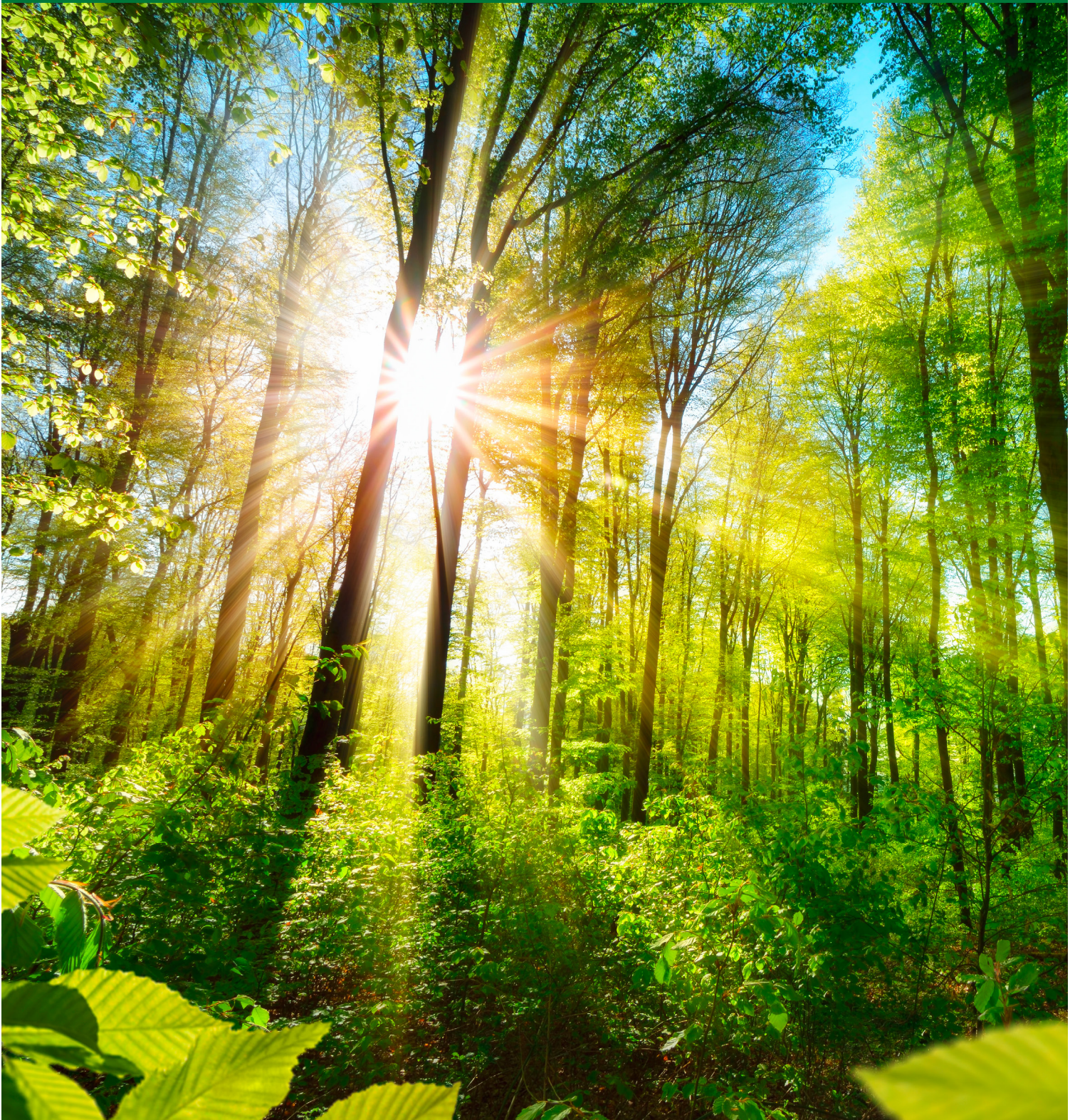


Overview of the new EU Deforestation Regulation (EUDR)

June 21, 2024



On 29 June 2023, Regulation (EU) 2023/1115 on deforestation-free supply chains (EUDR) came into force. Compared to the German Supply Chain Due Diligence Act and its European counterpart, the EUDR was negotiated and adopted quietly – but this does not diminish the impact that the EUDR will have on various industrial sectors. It creates a new system that imposes far-reaching obligations on operators and traders. Both will now have to ensure for example that products obtained from certain relevant commodities (so-called **relevant products**) are deforestation-free and have been produced in accordance with the national regulations of the respective country of production.

When does the EUDR apply?

The EUDR came into force on 29 June 2023 however there will be a **transitional period** of 18 months before the requirements must be implemented by all member states. As it is a regulation, the EUDR will be **directly applicable in all EU member states at the same time**, without the need for a separate transposition act. Nonetheless, while the first companies will have to comply with EUDR provisions from 30 December 2024, the EUDR provides for a gradual expansion of its scope depending on the size of the company.

Who is affected and when?

- **From 30 December 2024**, the provisions of the EUDR will apply to large and medium-sized companies.
- **From 30 June 2025**, the provisions of the EUDR will also apply to small and micro-enterprises.

Note: Whether your own company will be classified as a „micro or small“, „medium-sized“ or „large“ company depends on the **thresholds** defined in the Accounting Directive (Directive 2013/34/EU). A „medium-sized enterprise“ is a company that exceeds at least two of the following three size criteria on the balance sheet date:

- **Balance sheet total > EUR 5,000,000**
- **Net sales > EUR 10,000,000**
- **Average number of employees > 50**

To which products does the EUDR apply?

The EUDR is product-related in that it is based on so-called „**relevant commodities**“ and „**relevant products**“.

The „relevant commodities“ are the following seven raw materials: **cattle, cocoa, coffee, oil palm, rubber, soy and wood**.

The „**relevant products**“ are then those resulting from the relevant commodities, i.e. if they contain, are fed by or manufactured using them. „Relevant products“ are therefore listed directly in **Annex I of the EUDR** on the basis of their specific customs tariff numbers.

Practical tip: Compare the products listed in Annex I with your own products. Even if you are unable to assign your own product exactly to a customs tariff number, this **can already give you a steer** on whether your product could fall within the scope of application, although a **specific check using the customs tariff number is always required** for a final and binding check.

Note: Even if your own product matches one of the listed customs tariff numbers and is therefore generally considered a „relevant product“, **there may be exceptions and the product may still not fall within the scope of the EUDR**. This should be checked on a case-by-case basis. **Caution** is also **required** as it is possible a product is relevant even if the customs tariff number is not explicitly listed in Annex 1. This is because the EUDR also refers to the so-called „**Combined Nomenclature**“ (Annex I of Regulation (EEC) No. 2658/87), which can contain other custom tariff headings not explicitly listed in Annex I of the EUDR.

Note: The EUDR also provides for an extension of the relevant commodities and products, to be published by 30 June 2025 at the latest.

What does the regulation cover?

The EUDR **primarily provides for a ban on the market or export of** relevant commodities and relevant products (**Article 3 EUDR**). Companies may **only place or make such commodities or products available** if they are:

- (1) **deforestation-free**,
- (2) **produced in accordance with the relevant legislation of the country of production** and
- (3) accompanied by a **due diligence statement**, which must be submitted for the relevant product.

If any one of these requirements is not met, the relevant product may not be traded by the company on, or exported from, the EU market. The **obligation to comply is absolute**.

Note: By submitting the **due diligence statement** to the competent authority, the company assumes **responsibility** for ensuring that the relevant products comply with the requirements of EUDR.

What measures need to be taken?

The EUDR distinguishes between **operators** and **traders**, although they are subject to the same obligations.

An „operator“ is anyone who makes a relevant product **available on the EU market for the first time** or **exports it from the EU**. A „trader“ is anyone who **makes a relevant product available on the EU market repeatedly**. As a result, **traders are downstream of operators in the value chain**. Due to the product-based approach, the same company can be an operator and a trader (with regard to different products).

Note: The EUDR distinguishes between „SMEs“ and „non-SME“ operators and traders. If a company is **considered an SME** – based on the respective thresholds of the Accounting Directive (2013/34/EU) – **a different standard of obligation may apply, depending on the individual case**. SME traders, for example, need only collect very manageable information in relation to the upstream and downstream supply chain.

Practical tip: If you identify products within the scope of the EUDR, **determine the role of your own company**. In other words, you should check whether and in which situations your company is to be regarded as an operator and/or trader. You should also check whether there may be a reduced scope of obligations, as your company qualifies as an SME.

Operators and traders that are not SMEs are subject to a **comprehensive program of obligations**. They **must fulfill due diligence obligations** proving that the relevant products are deforestation-free and have been produced in accordance with the relevant legislation of the country of production.

These obligations are guaranteed **by submitting a due diligence statement**, which includes:

- (1) **collecting information**,
- (2) carrying out a risk assessment, and
- (3) if necessary, **taking measures to reduce the risk**.

Collecting information is the first step in fulfilling the due diligence obligations. Companies must collect information, data and documents that show that the relevant products comply with the regulation.

An important component of this information is the **geo-data** of all land where the relevant raw materials contained in the relevant product were produced. This geo-data must be included in the due diligence statement. By means of a before-and-after comparison, the geo-data can **determine whether deforestation or forest degradation has taken place after the „deadline „ of 31 December 2020**.

Note: If deforestation or forest degradation is identified by means of geodata, the product is no longer **„deforestation-free“**, meaning that there is a **violation of Article 3 EUDR**, and the trade ban applies.

Evidence must also be collected that the relevant legal provisions of the country of production have been observed in the production of the relevant commodities.

Note: In order to obtain this evidence, **intensive cooperation with your upstream supply chain** is required (since presumably only they have the necessary information). If the information cannot be obtained, the product must not be traded. **The EUDR does not provide for an exception in this regard**.

Practical tip: Make sure that you can obtain the necessary information from your suppliers **before purchasing the products**. This is because the due diligence statement must be submitted before the products are placed on or made available to the market, or exported. If it turns out afterwards that the products cannot be traded due to a lack of available information, this could result in **a loss of sales**.

In the **second step**, companies must carry out a **risk assessment** based on the information gathered. The risk assessment must determine whether there is a risk that the relevant products to be traded are **non-compliant** within the meaning of the EUDR. The EUDR specifies a large number of criteria to be used for the risk assessment. For example, the extent to which there is an abstract risk of deforestation in the country of production must be taken into account, as well as the reliability of the sources from which the collected information originates.

Note: The risk assessment checks the plausibility of the findings already collected in the first step, whereby abstract factors (such as the general deforestation risk in the producing country) and more concrete factors (such as the reliability of the information) must be taken into account.

If the risk assessment reveals there is **no or only a negligible risk**, the due diligence statement can be submitted and the relevant product can then be traded.

If the risk assessment shows that the risk is not negligible, the company must take **measures to reduce the risk in the third step**. Risk mitigation measures may include, for example, requesting additional details and conducting independent surveys or audits to ensure that the product is actually compliant. Measures to support suppliers are also conceivable.

Note: If it's not possible to conclude that there is at least a negligible risk, even taking into account risk mitigation measures, **the due diligence statement cannot be submitted**. This is because it expressly requires a declaration that no risk or only a negligible risk has been identified.

What control and sanction mechanisms does the EUDR have?

To ensure that the requirements of the EUDR are met, the competent authorities have various **control and monitoring powers**. Control options include scientific and technical analysis to determine the place of origin and the absence of deforestation when it comes to the relevant commodities and the relevant product.

Where there is a high risk, the competent authorities may take **interim measures to suspend the placing or making available on the EU market**. To end an infringement as quickly as possible, companies may be

required to take immediate **corrective action**. The authority may impose **distribution and export bans** on the relevant products and order their **withdrawal or recall**.

The competent authority may also order a **donation** of the relevant product for charitable or public interest purposes.

With regards enforcement, EU member states must adopt „effective, proportionate and dissuasive“ rules on **penalties**. According to the EUDR, this includes the following measures:

- Fines or penalties
- Recovery of the relevant products
- Collection of revenue from the relevant products
- Exclusion from award procedures
- Prohibition on placing or making available on the EU market and for export
- Prohibition of the application of simplified due diligence

Of course, there are also **reputational risks**. The EU Commission will publish EUDR violations committed by companies and established by a court on the Internet. In particular, the EU Commission will publish the name of the company and the conduct that caused the infringement.

What is the advice?

In view of the prohibitive nature of this regulation, there is a latent risk that companies will no longer be able to trade their own products in the future if they do not meet the requirements of the EUDR.

Companies should therefore obtain a focused overview of their operations as quickly as possible, to establish: (i) whether their products fall within the scope of the EUDR, (ii) what role they have under the EUDR, and (iii) how to ensure that the information required to submit due diligence declarations is available. We would be happy to support you in implementing the EUDR.

If you have any questions, please feel free to contact us



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