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The EU is poised to delay by one year the implementation deadlines of the Deforestation-Free Products Regulation (EUDR)

By Alya Mahira, Caitlynn Nadya and Paolo R. Vergano

On 2 October 2024, following months of pressure by certain EU industries, by some EU Member States, and by several trading partners, the European Commission (hereinafter, Commission) officially proposed to extend the implementation deadline of *Regulation (EU) 2023/1115 of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010* (hereinafter, Deforestation-Free Products Regulation, or EUDR) by one year.

The European Parliament and the Council of the EU aim to have the Commission's Proposal formally adopted and published in the EU Official Journal by the end of the year. The Commission also published a detailed guidance document and an updated document on frequently asked questions, which aim to clarify the EUDR requirements, as well as a *Strategic Framework for International Cooperation Engagement*. Stakeholders will have one more year to prepare for compliance, also allowing the EU to finalise the outstanding implementing acts.

Key requirements of the EUDR

The EUDR is the EU's controversial regulation aimed at reducing the EU's impact on global deforestation and forest degradation. The EUDR will initially apply to seven "*relevant commodities*", namely palm oil, cattle, wood, coffee, cocoa, rubber, and soy and, more specifically, to specific "*relevant products*" linked to these commodities and specified on the basis of the respective Customs codes in Annex I to the EUDR.

The EUDR requires operators and traders to ensure that "*relevant products*" placed or made available on the EU market, or exported from the EU, are "*legal*", namely that they have been produced in accordance with the relevant legislation of the country of production, and "*deforestation-free*", notably that they have been produced on land that has not been subject to deforestation or forest degradation after 31 December 2020. Otherwise, such products may

not be placed on the EU market. To demonstrate compliance with these requirements, operators and traders will need to exercise due diligence, which will include gathering relevant information, such as the geolocation of all plots of land where the relevant commodities were produced, conducting a risk assessment, and pursuing risk mitigation (see *Trade Perspectives*, Issue No. 13 of 3 July 2023).

The specific due diligence requirements will depend on the classification of the origin under the EUDR's '*benchmarking system*', which is intended to classify countries, or parts thereof, as presenting a low, standard, or high-risk of producing commodities or products that violate the EUDR.

Responding to demands: The EUDR's extended implementation deadlines

The EUDR entered into force on 29 June 2023 and the obligations were set to apply from 30 December 2024 for large companies and from 30 June 2025 for small and medium enterprises (hereinafter, SMEs), respectively. Due to the complexity of the requirements, many producing countries, affected EU industries, and certain EU Member States called on the EU to postpone the implementation of the EUDR. The Commission's Proposal foresees to delay the implementation deadline by one year, to 30 December 2025 for large companies and to 30 June 2026 for SMEs. The Council and the European Parliament are aiming to conclude the legislative procedure before the end of the year. The proposed extension would provide operators and traders additional time to ensure compliance with the EUDR.

The benchmarking system: Will the EU '*discriminate*'?

The EU's trading partners are particularly concerned about the potentially discriminatory nature of the EUDR's benchmarking system. Operators and traders sourcing relevant commodities from '*low-risk*' countries, or parts thereof, will only be subject to the information collection requirements; those sourcing from '*standard-risk*' origins will be subject to information collection, risk assessment, and risk mitigation requirements; while those sourcing from '*high-risk*' countries will additionally be subject to an increased frequency of checks. As of 29 June 2023, all countries have been assigned a '*standard risk*'. Under the EUDR, the list of countries (or parts thereof) that present a low or high risk was supposed to be published by 30 December 2024 at the latest. According to the Commission's Proposal, the list is now set to be published by 30 June 2025, only a few months prior to the EUDR's new application date.

Ahead of the publication of the implementing act, the Commission has published general principles on the benchmarking methodology that it intends to follow. According to these principles, the methodology to classify countries as '*low-risk*' involves an examination of deforestation both in absolute and relative terms, taking into account global gross deforestation averages. The extended deadlines and the publication of this implementing act appear as a positive development in view of the EU's WTO transparency obligations, which require WTO Members to, *inter alia*, publish trade measures in a manner that would enable other WTO Members "*to become acquainted with them*".

Under WTO rules, measures that treat imported products differently based on their country of origin, as in the case of the EUDR's benchmarking system, are, *prima facie*, inconsistent with Article I:1 of the *GATT 1994*, which requires trade advantages granted by one WTO Member to another WTO Member to be extended to all WTO Members. However, Article XX of the General Agreement on Tariffs and Trade (*GATT) 1994* on "*General Exceptions*" allows WTO Members to maintain trade-restrictive measures for the purpose of achieving certain legitimate objectives, including measures that relate to the "*conservation of exhaustible natural resources, if such measures are made effective in conjunction with restrictions on domestic production or consumption*", as specified in Article XX(g) of the GATT. The EU can be expected to rely on this exception should the benchmarking system come under WTO scrutiny, but would need to show that the requirements under Article XX(g) of the GATT are met and that the measure does not lead to "*arbitrary discrimination or disguised trade restrictions*".

Finding trade-facilitative solutions and preparing for compliance

Given the complexity of the EUDR requirements, certification or other third-party verified schemes may be important elements of trade facilitation for economic operators, but, under the EUDR, they are only considered "*complementary information*" that may be used as part of the risk assessment. The various certification and third-party verification schemes have made important contributions to promote sustainable forestry practices, and some have already aligned their standards to the EUDR requirements. EU trading partners could advocate for the recognition of such certification schemes, allowing products certified in a third country to be considered as complying with the EUDR requirements. The certification schemes would have to deliver the necessary information required under the EUDR. This is certainly an issue that could be addressed in the context of the EU's *Strategic Framework for International Cooperation Engagement*.

The extension of the implementation deadlines would provide more time for operators and traders to prepare for compliance with the EUDR, for instance by mapping their supply chains. From November 2024, operators and traders will be able to register their profiles on a dedicated Information System, on which businesses must upload their due diligence statements. From December 2024, they will then be able to start submitting their due diligence statements, allowing a test phase prior to the application of the requirements. Operators and traders are advised to consult the additional documents published by the Commission, as they may clarify key aspects of the EUDR. Additionally, seeking expert legal advice should be considered with a view to timely and properly navigate the complex new rules.

For any additional information or legal advice on this matter, please contact Paolo R. Vergano

Products from Western Sahara must be labelled as such and EU Member States may not adopt unilateral import prohibitions, says the Court of Justice of the EU

By *Alejandro López Bo, Stella Nalwoga* and *Tobias Dolle*

On 4 October 2024, the Court of Justice of the European Union (hereinafter, CJEU) delivered a landmark ruling in Case C-399/22 concerning a request for a preliminary decision referred to the CJEU by France's Council of State (*i.e.*, *Conseil d'État*), the country's highest administrative court, regarding a dispute about the labelling of melons and tomatoes from Western Sahara. Western Sahara is a territorial entity annexed partially by the Kingdom of Morocco in 1975 and considered by consistent CJEU case law as a "*distinct and separate territory*" from Morocco. The other part of the territory is controlled by the *Polisario Front*, a political organisation considered by UN *General Assembly Resolution 34/37* as the "*representative of the people of Western Sahara*". In its decision, the CJEU confirms that products harvested in Western Sahara must be labelled as originating from that territory and affirms that EU law does not allow EU Member States to unilaterally adopt measures that prohibit the import of agricultural products from that territory.

This decision aligns with previous CJEU judgments addressing the origin labelling of goods from disputed territories, which refer to "*territories over which sovereignty is contested due to the control of an outside entity and which the international community does not recognise either as parts of these entities or as separate sovereigns*", and has significant implications for businesses importing products from the region.

Western Sahara origin labels and no unilateral import prohibitions by EU Member States

In 2020, the *Confédération paysanne*, a French farmers' union, challenged the French authorities' alleged failure to prohibit the import of melons and tomatoes from Western Sahara, which it claims are incorrectly labelled as originating in Morocco. Morocco has been financing the development of greenhouses in parts of its occupied area of Western Sahara, where mostly tomatoes and melons are cultivated. The *Confédération paysanne* argued that such labelling

violates EU law. Given the relevance of the interpretation of EU law, France's Council of State requested a preliminary ruling from the CJEU regarding the following questions: 1) What measures a Member State may take to address incorrect indications of origin?; and 2) What indication of origin should accompany fresh fruit and vegetables from Western Sahara?

The CJEU first analysed whether EU law would allow an EU Member State to unilaterally prohibit the importation of fresh fruit and vegetables from Western Sahara, due to an alleged labelling error related to the country of origin. In its reasoning, the CJEU bases itself on Article 207 of the Treaty on the Functioning of the EU (hereinafter, TFEU) and relevant EU secondary law allowing the introduction of safeguard measures, such as import prohibitions. The CJEU considered that the power to prohibit imports and exports is primarily a competence of the EU on the basis of the EU's Common Commercial Policy. Firstly, individual EU Member States do not have the authority to impose import prohibitions of products from outside of the EU, where their importation is "*permitted and regulated by a trade agreement concluded by the Union",* "*unless they are expressly authorised to do so by Union law".* Secondly, the CJEU ruled that the EU is competent in the field of safeguard measures and that, therefore, individual EU Member States may not adopt such measures unilaterally. Thirdly, the Court recalled that the European Commission (hereinafter, Commission), and not any EU Member State, would be competent to intervene "*within the framework set by the cooperation mechanisms provided for in the Association Agreement*" in case of a "*generalised violation*" of EU rules relative to the origin of fruit and vegetables.

The CJEU then assessed whether products from Western Sahara, subject to an obligation to display their country of origin, must mention only that territory, and not Morocco, as their '*country of origin*'. On the basis of *Regulation (EU) No 1308/2013 of the European Parliament and of the Council of 17 December 2013 establishing a common organisation of the markets in agricultural products* and related delegated acts, the CJEU argued that, "*at the stages of import and consumer sales*", the labelling of melons and tomatoes *"harvested in Western Sahara must indicate only Western Sahara as their country of origin*". In this regard, the CJEU first acknowledged that Article 76 of *Regulation 1308/2013* requires that fresh fruit and vegetables indicate the country of origin "*at all stages of marketing"*.

Secondly, the Court recalled that its case law defines the notion of '*country of origin'* under *Regulation 1308/2013* "*by reference to the Union Customs Code"*, meaning that the country of origin of a product is the "*country or territory*" where the goods have been "*entirely obtained*" or "*have undergone their last substantial processing*". In the case of melons and tomatoes, this means their place of harvesting. The CJEU then addressed the distinction between "*countries*" and "*territories*", defining the latter as "*entities other than "countries""*, which include, "*in particular, geographical areas which, while under the international jurisdiction or responsibility of a State, nevertheless have a status under international law distinct from that of that State*". On the basis of this definition, the Court argued that the obligation to state the country of origin also applies to products originating in a '*territory*'. It further argued that Western Sahara qualifies as a "*customs territory*" in the sense of EU Customs law, distinct from the territory of Morocco. Therefore, the Court held that the country of origin to be displayed is Western Sahara. The Court further pointed out that, considering previous jurisprudence, "*Any other indication would be misleading"* for consumers as to the *"true origin of the products in question",* which would counter EU consumer protection standards.

More transparent labelling, but unintended consequences?

The CJEU's ruling sends a strong message in support of the EU's Common Commercial Policy and reaffirms EU case law on disputed territories. This decision does, however, appear to depart from previous case law regarding the level of detail of origin labelling. In an earlier case, the CJEU had ruled that foodstuffs coming from territories occupied by Israel and produced in the so-called "*Israeli colonies*" needed to indicate both the name of the territory and the colony. This ruling was based on various factors, including '*ethical considerations*' related to the ongoing conflict and the potential impact on consumers, who may have ethical or political preferences regarding products from occupied territories. The CJEU's decision aimed at

providing consumers with transparent information to make informed choices about the origin and production of products they purchase (see *Trade Perspectives*, Issue No. 13 of 28 June 2019). In the decision on Western Sahara, however, the Court only requires fresh fruit and vegetables to indicate "*Western Sahara*" as their origin, not distinguishing between the parts occupied by Morocco and those under the control of the *Polisario Front*.

While this decision provides greater legal certainty for importers, it also carries political risks with a potential impact on importers. Given the sensitivity relating to the control over the Western Sahara and opposition within certain EU Member States to Morocco's annexation, there is a risk of campaigns or market-based actions targeting products labelled as originating in the Western Sahara, knowing that most exports originate in the areas annexed by Morocco. This could turn such label into an indirect barrier to trade, particularly in countries with historical ties or a significant Saharawi diaspora, like Spain and France.

Final ruling by France's Council of State

It will now be up to France's Council of State to give its final ruling in the case lodged by the *Confédération paysanne*, taking the CJEU's clarifications into account. This decision marks a further contribution by the CJEU to clarifying origin labelling for products from disputed territories.

For any additional information or legal advice on this matter, please contact Tobias Dolle

The EU clarifies the conditions under which EU Member States may request pre-arrival notifications of food and feed products originating from non-EU countries

By *Ignacio Carreño García* and *Tobias Dolle*

On 25 September 2024, the European Commission (hereinafter, Commission) published the *Commission Delegated Regulation (EU) 2024/2104 of 27 June 2024 supplementing Regulation (EU) 2017/625 of the European Parliament and of the Council as regards the cases where and the conditions under which competent authorities may request operators to notify the arrival of certain goods entering the Union*. *Regulation (EU) 2024/2104* supplements *Regulation (EU) 2017/625 on official controls and other official activities performed to ensure the application of food and feed law, rules on animal health and welfare, plant health and plant protection products* (hereinafter, Official Controls Regulation) by specifying cases where and conditions under which competent authorities in the EU Member States may request operators to notify the arrival of consignments of certain goods from third countries. This article discusses *Regulation (EU) 2017/625* and the rules applicable to official controls and to the pre-notification of arrivals, underlining the additional administrative burden that this entails for importers.

Official controls and pre-notification of arrival for certain products

The EU's *Official Controls Regulation* establishes the framework for official controls and other official activities to verify compliance with the EU's agri-food chain legislation. This framework includes the official controls performed on animals and goods entering the EU. Article 47(1) of the *Official Controls Regulation* requires the competent authorities of EU Member States to perform official controls at designated border control posts on each consignment of the following categories of animals and goods:

1) Animals;
2) Products of animal origin, germinal products and animal by-products;
3) Plants, plant products, and other objects for which, under *Regulation (EU) 2016/2031 on protective measures against pests of plants,* a phytosanitary certificate is required for their introduction into the EU;
4) Goods from certain third countries for which the Commission has decided that a temporary increase of official controls at their entry into the EU is necessary, due

to a known or emerging risk. or because there is evidence that widespread serious non-compliance with EU rules might be taking place;
5) Animals and goods that are subject to an emergency measure; and
6) Animals and goods for which conditions or measures have been established for their entry into the EU.

Each arrival of consignments of those categories of animals and goods is to be pre-notified and checked at border control posts using the *Common Health Entry Document* (hereinafter, CHED) according to Article 56(3) of the *Official Controls Regulation*. The CHED is to be submitted via the *Information Management System for Official Controls* (IMSOC), set up and managed by the Commission in accordance with Article 131(1) of the *Official Controls Regulation*. In Belgium, for example, this notification must be made at least one day in advance of the consignment's estimated time of arrival on the EU territory. The controls then include documentary checks and may also include identity and physical checks, depending on an assessment of the risk to health and the environment.

For other products, for which such controls are not mandatory under Article 47 of the *Official Controls Regulation*, according to Article 44 of the *Official Controls Regulation*, EU Member States are to perform official controls at the border control post on a risk basis and with the appropriate frequency. Where performed, such official controls must always include a documentary check and are to include identity checks and physical checks depending on the risk to human, animal or plant health, animal welfare or, as regards genetically modified organisms (GMOs) and plant protection products, also to the environment.

Article 45(4) of the *Official Controls Regulation* allows the Commission, in addition to the goods for which the notification is required under Article 47, to adopt additional rules permitting competent authorities to request that operators provide notification of the arrival of certain goods entering the EU. Article 2 of *Regulation (EU) 2024/2104* specifies the cases where and the conditions under which the competent authorities of the EU Member States may request operators to notify the arrival of consignments of certain goods from third countries. A request for advance notification may be made when a risk is identified with respect to: 1) Human health; 2) Animal health; 3) Plant health; 4) Animal welfare; or 5) The environment (in the case of pesticides or genetically modified organisms, GMOs). The history of compliance with the EU's agri-food chain legislation of these goods must be taken into account. Additional goods, for which a pre-notification may be required, include food and feed of non-animal origin, food contact materials, food and feed additives, and plant protection products.

Rationale for the new rules on pre-notification

Receiving advance information about certain consignments enables competent authorities of EU Member States to efficiently organise checks. *Regulation (EU) 2024/2104* clarifies the conditions under which EU Member State authorities may request non-EU operators to submit an advance notification of the arrival at EU border control posts of products other than those covered by Article 47(1) of the *Official Controls Regulation*. *Regulation (EU) 2024/2104* describes the information that operators must include in the notification, which must be done for each consignment via the EU's *Trade Control and Expert System* (TRACES). The competent authority will be able to request operators to notify the arrival of goods entering the EU where it considers that a notification is necessary in order to organise official controls on those goods in view of the risks to human, animal or plant health, animal welfare or, as regards genetically modified organisms and plant protection products, or to the environment, which are associated with those goods, or the history of compliance with the EU's agri-food chain legislation applicable to those goods.

According to Article 5 of *Regulation (EU) 2024/*2104, the possibility to request advance notifications for further imported products will apply from 3 March 2025. On 26 September 2024, the EU notified *Regulation (EU) 2024/2104, as regards the cases where and the conditions under which competent authorities may request operators to notify the arrival of*

certain goods entering the Union, to the WTO Committee on Sanitary and Phytosanitary Measures.

Major implications for exporting countries?

The new rules may affect exports to the EU of feed and food of non-animal origin that are not subject to the notification requirement under Article 47 of the Official Controls Regulation, including, for instance, food and feed additives, food and feed of non-animal origin, or materials intended to enter into contact with food. Pre-notification requirements may benefit the official controls, but imply an additional administrative burden for EU importers.

For any additional information or legal advice on this matter, please contact Ignacio Carreño Garcia

Recently adopted EU legislation

Trade Law

- *Council Decision (EU) 2024/2703 of 10 October 2024 on the position to be taken on behalf of the European Union within the International Sugar Council as regards the extension of the International Sugar Agreement, 1992*

- *Commission Implementing Regulation (EU) 2024/2661 of 14 October 2024 imposing a definitive anti-dumping duty on imports of aluminium radiators originating in the People's Republic of China following an expiry review pursuant to Article 11(2) of Regulation (EU) 2016/1036 of the European Parliament and of the Council*

Customs Law

- *Commission Implementing Regulation (EU) 2024/2598 of 4 October 2024 laying down the list of third countries or regions thereof authorised for the entry into the Union of certain animals and products of animal origin intended for human consumption in accordance with Regulation (EU) 2017/625 of the European Parliament and of the Council as regards the application of the prohibition on the use of certain antimicrobial medicinal products*

- *Commission Implementing Regulation (EU) 2024/2652 of 10 October 2024 amending Implementing Regulation (EU) 2020/761 with regard to the management of certain tariff quotas in the rice sector, the adjustment of cheese export tariff quotas for the United States and an update of the technical specifications for the IMA1 certificates for the import of dairy products from New Zealand*

Food Law

- *Regulation (EU) 2024/2594 of the European Parliament and of the Council of 18 September 2024 laying down conservation, management and control measures applicable in the area covered by the Convention on future multilateral cooperation in the North-East Atlantic fisheries, amending Regulation (EU) 2019/1241 of the European Parliament and of the Council and Council Regulation (EC) No 1224/2009, and repealing Regulation (EU) No 1236/2010 of the European Parliament and of the Council and Council Regulations (EEC) No 1899/85 and (EEC) No 1638/87*

- *Commission Regulation (EU) 2024/2597 of 4 October 2024 amending Annex II to Regulation (EC) No 1333/2008 of the European Parliament and of the Council as regards the use of sorbic acid (E 200) and potassium sorbate (E 202) and the Annex to Commission Regulation (EU) No 231/2012 as regards the specifications for sorbic acid (E 200), potassium sorbate (E 202) and propyl gallate (E 310)*

- *Commission Delegated Regulation (EU) 2024/2684 of 2 February 2024 amending Delegated Regulation (EU) 2016/127 as regards the protein-related requirements for infant and follow-on formula manufactured from protein hydrolysates*

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