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COVER NOTE

From:	Secretary-General of the European Commission, signed by Ms Martine DEPREZ, Director
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To:	Mr Jeppe TRANHOLM-MIKKELSEN, Secretary-General of the Council of the European Union
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Delegations will find attached document SWD(2021) 325 final.

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COMMISSION STAFF WORKING DOCUMENT

Subsidiarity Grid

Accompanying the document

Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on the making available on the Union market as well as export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010

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Subsidiarity Grid

1. Can the Union act? What is the legal basis and competence of the Unions' intended action?
1.1 Which article(s) of the Treaty are used to support the legislative proposal or policy initiative?
<p>EU competence to act in the area of deforestation and forest degradation stems from the articles of the Treaty on the Functioning of the European Union (TFEU) related to the protection of the environment (Articles 21 (2.f) and 191 (2) TFEU). Article 21(2.f) requires the Union “to help develop international measures to preserve and improve the quality of the environment and the sustainable management of global natural resources, in order to ensure sustainable development”. Article 191 (2) requires the Union policy on the environment to aim at a high level of protection.</p> <p>Article 192 (1) states that “the European Parliament and the Council, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee and the Committee of the Regions, shall decide what action is to be taken by the Union in order to achieve the objectives referred to in Article 191”.</p>
1.2 Is the Union competence represented by this Treaty article exclusive, shared or supporting in nature?
<p>In the case of environment, the Union's competence is shared.</p> <p><i>Subsidiarity does not apply for policy areas where the Union has exclusive competence as defined in Article 3 TFEU¹. It is the specific legal basis which determines whether the proposal falls under the subsidiarity control mechanism. Article 4 TFEU² sets out the areas where competence is shared between the Union and the Member States. Article 6 TFEU³ sets out the areas for which the Unions has competence only to support the actions of the Member States.</i></p>
2. Subsidiarity Principle: Why should the EU act?
2.1 Does the proposal fulfil the procedural requirements of Protocol No. 2⁴:
<ul style="list-style-type: none">- Has there been a wide consultation before proposing the act?- Is there a detailed statement with qualitative and, where possible, quantitative indicators allowing an appraisal of whether the action can best be achieved at Union level?
<p>The Open Public Consultation (OPC) carried out by the Commission in 2020 received nearly 1.2 million responses .A majority of stakeholders agreed on the need of an EU-level intervention to reduce the EU's contribution to global deforestation and forest degradation. Most stakeholders also agreed on setting out an EU deforestation-free definition as a requirement of the policy intervention.</p> <p>In terms of policy measures, the OPC showed strong, support for legally binding options (deforestation-free requirement, mandatory due diligence, mandatory public certification, etc.) while soft, voluntary measures like voluntary due diligence, voluntary labelling or voluntary private certification were considered to lack in effectiveness. The overwhelming majority of qualified</p>

¹ <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12008E003&from=EN>

² <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12008E004&from=EN>

³ <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008E006:EN:HTML>

⁴ <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12016E/PRO/02&from=EN>

stakeholders — businesses associations and NGOs — supported a mandatory due diligence regime, although the preferred details of this system vary from one respondent to another.

The detailed conclusions from the stakeholder consultations, including the Feedback on the inception impact assessment, the findings of the OPC and the outcome of targeted stakeholder consultation, are included in Annex 2 of the Impact Assessment.

2.2 Does the explanatory memorandum (and any impact assessment) accompanying the Commission’s proposal contain an adequate justification regarding the conformity with the principle of subsidiarity?

The main drivers of deforestation and forest degradation are linked to both the EU market and international trade. The supply chains for the products covered by the initiative are international and very often global. The experience the EU has acquired in dealing with complex supply-chain issues (e.g. stemming from the illegal logging related legislation for example) is instrumental to ensure a level playing field for operators at the EU level in terms of requirements to be met before placing products (commodities and derived products) on the EU market for the first time.

The explanatory memorandum and the impact assessment (chapter 3) contain a section on the principle of subsidiarity (see question 2.2 below.)

2.3 Based on the answers to the questions below, can the objectives of the proposed action be achieved sufficiently by the Member States acting alone (necessity for EU action)?

In the absence of a harmonised approach, measures restricting internal trade would be taken by several Member States, hence disrupting the functioning of the internal market. This would have a serious impact on the functioning of the EU market, jeopardize the ability of European Operators to source products/commodities in the scope of this Regulation as well as undermine the credibility of EU measures.

2.4 Based on the answer to the questions below, can the objectives of the proposed action be better achieved at Union level by reason of scale or effects of that action (EU added value)?

The absence of applicable rules at the European level put responsible business operators that are ready to clean up their supply chains at a competitive disadvantage and rewards unsustainable behaviour. Therefore, while environment is a competence shared between the EU and the Member States, EU-wide measures are necessary to ensure a common understanding of deforestation and forest degradation-free supply chains and to increase the transparency of such supply chains.

In so far as the present initiative also covers imported goods, action at Union level is more effective than action at national level as it prevents possible adverse impact on the functioning of the internal market and on trade aspects. EU action can therefore complement and strengthen national efforts of Member States. Were the EU not to act, the problem of deforestation and forest degradation related to EU consumption would persist and further deteriorate. This could negatively affect the EU's efforts in the field of global biodiversity protection and climate change.

Therefore, action at EU level is required to address EU consumption footprint and international trade issues in a coordinated and harmonised way while providing the legal certainty and clarity, necessary for the proper functioning of the EU market.

3. Proportionality: How the EU should act

3.1 Does the explanatory memorandum (and any impact assessment) accompanying the

Commission’s proposal contain an adequate justification regarding the proportionality of the proposal and a statement allowing appraisal of the compliance of the proposal with the principle of proportionality?

With this legislative initiative the EU steps up its action against deforestation and forest degradation by establishing a regulatory framework which aims to be ambitious and implementable, and which incentivises the transition to sustainable supply chains in all producing countries, within or beyond the EU. This would make the EU a credible global standard-setter. The minimum monetised benefits clearly offset the costs. The initiative is also in line with the gravity of the problem it aims to tackle, as well as with the priorities of the European Green Deal.

This legislative initiative aims at minimising EU contribution to deforestation and forest degradation. This objective will be achieved by establishing a tiered, mandatory due diligence system, relying on a deforestation free definition, combined with a benchmarking system and a list of contravening operators. As analysed in the Impact Assessment, it is expected that this measure will be the most effective curbing EU-driven deforestation and the most efficient among those screened in preparation of this initiative.

3.2 Based on the answers to the questions below and information available from any impact assessment, the explanatory memorandum or other sources, is the proposed action an appropriate way to achieve the intended objectives?

The proposed legislative initiative will cover a range of products/commodities associated with deforestation and forest degradation and will be based on a definition of deforestation-free product/commodity. Through an expanded product scope and by adding the requirement of “deforestation free” to the current system based on legality, the proposed measures will address the main driver of deforestation, i.e. agricultural expansion, thereby reducing the EU’s contribution to deforestation and forest degradation.

In terms of policy measure, the legislative proposal envisages a benchmarking system and a list of contravening operators combined with a tiered improved mandatory due diligence system, relying on a deforestation-free definition. This option would ensure that the EU puts in place a regulatory framework that is both very ambitious and implementable, while incentivising the sustainability transition in all countries, within or beyond the EU, making us a credible global standard-setter.