



**SAPIENS
NETWORK**

Sustainability and Procurement
in International, European, and
National Systems

SAPIENS Working Paper

January/2024

Towards Deforestation-free Procurement?

Reflections on the interplay between the new Deforestation Regulation
and Public Procurement in the EU

Chiara Falvo and Federica Muscaritoli

Work Package 3 - Sectorally applied SPP

Work Package 2 - Procurement to achieve the SDGs



This project has received funding from the European Union's Horizon 2020 research and innovation programme under the Marie Skłodowska-Curie grant agreement No 956696.

ABSTRACT

Deforestation and forest degradation are major environmental and socio-economic challenges threatening biodiversity and local communities' livelihoods and exacerbating climate change. The global demand for certain agricultural commodities and products is one of the main drivers of these phenomena. In an attempt to respond to increasing pressures from EU stakeholders and to curb consumption-driven deforestation, the EU recently adopted Regulation 2023/1115, the EU Deforestation Regulation (EUDR). The EUDR applies to a list of commodities and products that are strongly linked to deforestation and forest degradation and are often part of global and complex supply chains. Under the EUDR, relevant commodities and products can be placed on or be exported from the EU market only if they are deforestation-free and legally produced. To this end, the Regulation foresees targeted due diligence obligations for market actors to ensure the traceability of their supply chains, collect information, and assess and mitigate risks. The EUDR also includes a procurement-specific provision establishing the “temporary exclusion from public procurement processes for a maximum period of 12 months” as a minimum penalty for the breach of its provisions. This Working Paper provides an overview of this new legal instrument and analyses the interplay between its rules and EU public procurement law. In particular, it aims to characterise this new “deforestation exclusion” in light of the regime on exclusion provided by Directive 2014/24/EU.

Introduction

Over the past 30 years, deforestation has led to the loss of around 420 million ha of forests globally.¹ Deforestation and forest degradation increase global warming,² cause biodiversity loss,³ and pose significant risks to human health.⁴ Forest depletion also threatens the livelihoods of smallholder farmers, indigenous people and local communities.⁵ Approximately 90% of global deforestation results from agricultural expansion, a trend expected to intensify due to population growth and climate change impacts on food production.⁶ Most deforestation and forest degradation globally are driven by the demand for a limited number of agricultural commodities, showing a strong link between these phenomena and international trade.⁷

Many agricultural commodities are sourced and traded in global supply chains that involve a complex network of producers, farmers, traders, suppliers and other actors. While deforestation occurs upstream in the supply chain, downstream companies and suppliers, who drive the demand, play an important role in ensuring that deforestation risks are addressed throughout the commodity supply chains they source from.⁸ Coordinated and coherent actions are needed to develop deforestation-free supply chains. It has been advocated that, on one side, “producing countries need to enhance policy and strengthen forest governance, [and, on the other side,] consuming countries need to explore regulatory measures and procurement standards to reduce deforestation embedded in imported products”.⁹

Acknowledging its impact as a major consumer and importer of commodities contributing to deforestation,¹⁰ the EU recently adopted Regulation (EU) 2023/1115 on Deforestation and

¹ FAO, 2020. Global Forest Resources Assessment 2020: Main report. Rome, p.18.

² IPCC, 2019. Climate Change and Land: an IPCC special report on climate change, desertification, land degradation, sustainable land management, food security, and greenhouse gas fluxes in terrestrial ecosystems [P.R. Shukla, J. Skea, E. Calvo Buendia, V.Masson-Delmotte, H.-O. Pörtner, D. C. Roberts, P. Zhai, R. Slade, S. Connors, R. van Diemen, M. Ferrat, E. Haughey, S. Luz, S. Neogi, M. Pathak, J. Petzold, J. Portugal Pereira, P. Vyas, E. Huntley, K. Kissick, M. Belkacemi, J. Malley, (Eds.)].

³ IPBES, 2019. Global assessment report on biodiversity and ecosystem services of the Intergovernmental Science- Policy Platform on Biodiversity and Ecosystem Services. E. S. Brondizio, J. Settele, S. Díaz, and H. T. Ngo (editors). IPBES Secretariat, Bonn, Germany.

⁴ European Commission (EC), 2021. Impact assessment “Minimising the risk of deforestation and forest degradation associated with products placed on the EU market. SWD(2021) 326 final, Part 1, p. 15; FAO and UNEP, 2020. The State of the World's Forests 2020. Forests, biodiversity and people. Rome.

⁵ EC, 2021. Impact assessment. op. cit., p. 15.

⁶ FAO. 2022. The State of the World's Forests 2022. Forest pathways for green recovery and building inclusive, resilient and sustainable economies. Rome, p. XV.

⁷ EC, 2021. Impact assessment. op. cit., p. 16.

⁸ On deforestation and forest degradation in the context of global supply chains, see OECD/FAO, 2023. OECD-FAO Business Handbook on Deforestation and Due Diligence in Agricultural Supply Chains, OECD Publishing, Paris.

⁹ Taylor, R. and Streck, C. 2018. The Elusive Impact of the Deforestation-Free Supply Chain Movement. Working Paper. Washington, DC: World Resources Institute, p. 6.

¹⁰ On the impact of EU's consumption on global deforestation and forest degradation, see EC, 2013. The impact of EU consumption on deforestation: Comprehensive analysis of the impact of EU consumption on deforestation. Final report; IEEEP, 2019. EU Consumption as a Driver of Global Deforestation. Institute for European Environmental Policy.

Forest Degradation (hereafter EUDR).¹¹ The EUDR covers specific commodities and products with the highest EU-embodied deforestation, prohibiting their import into and export from the EU market unless they are deforestation-free and legally produced.¹² To do so, the Regulation foresees a mandatory due diligence system, which requires relevant market actors to ensure the traceability of their supply chains, collect information, and assess and mitigate risks.¹³

The EU Green Deal (EGD),¹⁴ under which the EUDR falls, has prompted a significant evolution in the EU legal landscape, drawing attention from scholars to its implications for EU public procurement law. In fact, some legislative initiatives foreseen under the EGD include specific provisions related to green public procurement (GPP), requiring, under different forms and degrees, the consideration of sustainability considerations in public procurement.¹⁵ The EUDR is a relevant example of this evolution, as it features a public procurement-specific provision. In particular, it establishes a penalty of temporary exclusion from public procurement processes in case of infringement of its provisions.¹⁶

The present Working Paper (WP) has two main objectives. Firstly, it aims to contextualize the EUDR within emerging trends in EU public procurement law. Secondly, it analyses the implications and potential frictions of the new EUDR deforestation exclusion with EU public procurement law, specifically with Directive 2014/24/EU (hereafter also called Public Sector Directive or PSD).¹⁷

To achieve the goals of this research, the working paper is structured as follows: it briefly introduces the EU policy action to tackle deforestation and emphasises the strategic role of sustainable public procurement therein (section 1); section 2 then provides an overview of the EUDR, in particular, its scope, obligations and key implementation mechanisms; section

¹¹ Regulation (EU) 2023/1115 of the European Parliament and of the Council 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, OJ L 150, 9.6.2023.

¹² The concept of embodied deforestation refers to the deforestation that occurs during the production of a good, commodity or service and is included as an externality in its production, trade and consumption. As little deforestation takes place within the EU, deforestation embodied in EU27 consumption is almost entirely related to imports. See EC, 2013, op. cit., p. IV.

¹³ See details in section 2.

¹⁴ EC, 2019. The European Green Deal, COM(2019) 640 final.

¹⁵ These include, for instance, the revised Batteries Regulation ((EU) 2023/1542) and Energy Efficiency Directive ((EU) 2023/1791), and the Proposals for a Regulation on Waste Shipments (COM(2021) 709 final); for a Regulation on Ecodesign for Sustainable Products (COM(2022) 142 final); for a Construction Products Regulation (COM(2022) 144 final); for a Critical Raw Materials Act (COM(2023) 160 final); for a Net Zero Industry Act (COM(2023) 161 final); and for a Green Claims Directive (COM(2023) 166 final). For a comprehensive overview of these initiatives see Andhov, M., Caranta, R., Janssen, W. A., and Martin-Ortega, O., 2022. Shaping Sustainable Public Procurement Laws in the European Union: - An analysis of the legislative development from 'how to buy' to 'what to buy' in current and future EU legislative initiatives. The Greens/ EFA in the European Parliament; Janssen, W. Shifting Towards Mandatory Sustainability Requirements in EU Public Procurement Law: Context, Relevance and a Typology. In Janssen, W. and Caranta, R. (Eds.), 2023. *Mandatory Sustainability Requirements in EU Public Procurement Law. Reflections on a Paradigm Shift*. Bloomsbury Publishing, pp. 3-20; and other chapters in Janssen, W. and Caranta, R. (Eds.), 2023, op. cit.; Muscaritoli, F., 2023. EU Net-zero Industries and Critical Raw Materials Acts: implications for Public Procurement. <https://sapiensnetwork.eu>.

¹⁶ Article 25(2)(d) EUDR. In depth analysis in section 3.

¹⁷ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJ L94/65.

3 investigates the interplay between the EUDR and EU public procurement law, in particular Directive 2014/24; finally, the conclusions provide a summary of the key findings and recommendations for more effective deforestation-free public procurement (section 4).

1. Sustainable public procurement: recent trends and the link with deforestation

The EU institutions were aware of the strategic importance of public procurement in addressing forest-related issues long before the adoption of the EGD. In 2003, the EU Forest Law Enforcement Governance and Trade (FLEGT) Action Plan¹⁸ included a section on public procurement, regulated at that time by the 1993 EU Directives.¹⁹ Member States (MS) were invited to address illegal logging with a set of recommendations on how to take into account environmental aspects of sustainable forest management in procurement procedures.²⁰ In its 2019 Communication, the Commission stressed the need “to make it easier for suppliers, manufacturers, retailers, consumers and *public authorities*, to identify, promote and purchase” products from deforestation-free supply chains.²¹ In its conclusions on the same Communication, the Council invited the Commission “to assess the feasibility of [...] relevant options such as [...] application of due diligence, zero-deforestation standard [and] *deforestation-free public procurement procedures*” (emphasis added).²² Lastly, the European Parliament, in its 2020 resolution on “An EU legal framework to halt and reverse EU-driven global deforestation”, emphasized the role that public procurement can play to contribute to these goals.²³ The Parliament called for the inclusion in the EU GPP criteria²⁴ of deforestation and compliance with the due diligence proposal²⁵, as well as a revision of Directive 2014/24 on public procurement to integrate compliance with due diligence in the award criteria. It also asked the Commission “to take initiatives to forbid the public purchase of imported products resulting in deforestation within the framework of the WTO

¹⁸ EC, 2003. Forest Law Enforcement, Governance and Trade (FLEGT) - Proposal for an EU Action Plan, COM(2003) 251 final.

¹⁹ Council Directive 93/36/EEC of 14 June 1993 coordinating procedures for the award of public supply contracts, OJ L 199, 9.8.1993; Council Directive 93/37/EEC of 14 June 1993 concerning the coordination of procedures for the award of public works contracts, OJ L 199, 9.8.1993; Council Directive 93/38/EEC of 14 June 1993 coordinating the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors, OJ L 199, 9.8.1993.

²⁰ In addition to the possibility of integrating sustainable forest management requirements into the definition of the subject matter of contracts and the technical specifications, MS were called to “make use of their competences in this field” by, for example, including in the scope of the discretionary exclusion ground for grave professional misconduct provided by the EU public procurement Directives the fact of “deliberately handling illegally harvested timber”. EC, 2003, op. cit., p. 16.

²¹ EC, 2019. Stepping Up EU Action to Protect and Restore the World’s Forests, COM(2019) 352 final, p. 7.

²² Council, 2019. Conclusions on the Communication on Stepping Up EU Action to Protect and Restore the World’s Forests. 15151/19, p. 7.

²³ European Parliament (EP), 2020. Resolution of 22 October 2020 with recommendations to the Commission on an EU legal framework to halt and reverse EU-driven global deforestation, (2020/2006(INL)).

²⁴ Reference is made to the Green Public Procurement Voluntary Criteria developed by the European Commission's Joint Research Centre (JRC), available at: https://green-business.ec.europa.eu/green-public-procurement/gpp-criteria-and-requirements_en. Particularly relevant in this context are the EU green public procurement criteria for food, catering services and vending machines, SWD(2019) 366 final.

²⁵ It referred to the proposal for a Regulation for an EU legal framework to halt and reverse EU-driven global deforestation requested by the Parliament to the Commission. See EP, 2020, op. cit., Annex.

Plurilateral Agreement on Government Procurement (GPA) and Directive 2014/24/EU".²⁶ Finally, it stated that "Member States should ensure, in accordance with their national law and practice, the enforcement of the duties" set by the proposed Regulation, including by means of exclusion from public procurement processes.²⁷

Under the European Green Deal, the Biodiversity²⁸, Farm to Fork²⁹ and New Forest³⁰ Strategies announced an upcoming legislative proposal on deforestation in 2021, stressing its importance for achieving their objectives. In 2020, a large online consultation showed significant public interest, further encouraging action.³¹ The EU's adoption of mandatory rules to address deforestation is a crucial regulatory advance for its leading role in the green transition and a further example of the paradigm shift detectable in EU public procurement law.

The EU has not always had a policy-driven conception of public procurement. Initially, the regulation of public procurement at the EU level was instrumental to the creation of the internal market through the removal of tariff and non-tariff barriers to trade.³² This was mainly due to the tendency to reserve participation in procurement procedures or give preference in the awarding of contracts to national candidates.³³ Traditionally intended and used as a mechanical and price-driven process,³⁴ public procurement has progressively gained traction in both theory and practice as a strategic tool, also given its considerable economic importance (14% EU GDP).³⁵ Sustainable (SPP), Green (GPP) and Socially Responsible Public Procurement (SRPP) are instances of how public procurement can be used to achieve broader policy goals. Indeed, over the past thirty years, sustainable considerations have been progressively allowed under the EU's legislative framework, initially under the impulse of the Court of Justice (ECJ) case law³⁶ and later through its

²⁶ EP, 2020, op. cit., p. 22.

²⁷ *Ibid.*, p. 31-32.

²⁸ EC, 2020. EU Biodiversity Strategy for 2030: Bringing nature back into our lives, COM(2020) 380. final.

²⁹ EC, 2020. A Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system, COM(2020) 381 final.

³⁰ EC, 2021. New EU Forest Strategy for 2030, COM(2021) 572 final.

³¹ With almost 1,2 million participants, the Commission's online public consultation on deforestation was the second most popular in the EU's history. Deforestation and forest degradation – reducing the impact of products placed on the EU market. Available at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12137-Deforestation-and-forest-degradation-reducing-the-impact-of-products-placed-on-the-EU-market/public_consultation_en.

³² Council of the EEC, *General Programme for the abolition of restrictions on freedom to provide services*, 18 December 1961, OJ 1962 P 2/32; Council of the EEC, *General Programme for the abolition of restrictions on freedom of establishment*, 18 December 1961, OJ 1962 P 2/36.

³³ Arrowsmith, S., EC Regime on Public Procurement. In Khi V Thai (Ed.), 2009. *International Handbook of Public Procurement*, Taylor & Francis Group, p. 252; Fabricius, J. Purposes and Principles. In Poulsen, S. T., Jakobsen, P. S. and Kalsmose-Hjelmberg, S.E. (Eds.), 2012. *EU public procurement law: the Public Sector Directive, the Utilities Directive*, 2nd edition, DJØF Publishing, pp. 29-30.

³⁴ Caranta, R., Public Procurement for the SDGs – Rethinking the Basic. In Melon, L. (Ed.), 2023. *Sustainability in Public Procurement, Corporate Law and Higher Education*. 1st edn, Routledge, pp. 3-21.

³⁵ https://single-market-economy.ec.europa.eu/single-market/public-procurement_en#:~:text=Why%20public%20procurement%20is%20important,of%20services%2C%20works%20and%20supplies.

³⁶ See mainly C-31/87, Beentjes, EU:C:1988:422; C-225/98, Commission v. France, EU:C:2000:494; C-513/99, Concordia Bus Finland, ECLI:EU:C:2002:495; C-448/01, EVN and Wienstrom ECLI:EU:C:2003:651; C-368/10, Commission v Netherlands, ECLI:EU:C:2012:284; C-395/18, Tim, ECLI: EU:C:2020:58.

codification by the 2014 Public Procurement Directives.³⁷ This led to a framework that currently provides several possibilities to include sustainable criteria in public tenders.³⁸

To be allowed, such criteria need to comply with the fundamental principles stemming from EU Treaties and EU Public Procurement Directives – such as non-discrimination, transparency and proportionality.³⁹ Moreover, any sustainable considerations included by contracting authorities in selection criteria, award criteria, technical specifications, contract performance clauses or in the labels required as means of proof must be linked to the subject matter of the contract.⁴⁰

More recently, the European Green Deal has brought about a significant shift in the use of public procurement as a policy tool. The Commission affirms that “[p]ublic authorities, including the EU institutions, should lead by example and ensure that their procurement is green.⁴¹ Moreover, recognising the limitations of voluntary approaches to green public procurement (GPP),⁴² the Commission announced the introduction of minimum mandatory GPP criteria and targets in sectoral legislation, including product-specific legislation.⁴³ Thus, the legislative approach to SPP is changing, and mandatory provisions are being introduced in several sectoral initiatives.⁴⁴ The result is an intricate legal landscape characterized by a set of public procurement-related provisions in legal acts other than the current EU Public Procurement Directives. These new obligations reflect a significant change in the scope of EU public procurement law: while in the past, it mostly regulated how the procedure was to be carried out, now EU law also prescribes what – and from whom – contracting authorities should (or should not) purchase.⁴⁵ The lines between public procurement and other EU law branches are becoming increasingly blurred in this scenario, as, for instance, many requirements for public procurement entities are now contained in environmental laws.

The shift towards mandatory sustainability requirements entails that the reach of public procurement law extends beyond the internal market to the global market. This may occur not only when non-EU bidders take part in public procurement procedures, but also when the procurement involves processes and production methods (PPMs) that took place outside the EU, or when a violation of environmental law outside the EU influences a public

³⁷ Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, OJ L 94/1; Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJ L94/65; Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, OJ L94/243.

³⁸ On the legal possibilities and limits of SPP see, among others, Andhov, M., Caranta, R., *et al.*, 2020. Sustainability through public procurement: the way forward – Reform Proposals. SMART Project Report; Sjaafjell, B. and Wiesbrock, A. (Eds.), 2015. Sustainable Public Procurement Under EU Law. Cambridge: Cambridge University Press.

³⁹ Articles 8, 10, 26, 28, 49, 56 TFEU and Article 18 Directive 2014/24. On mutual recognition, see case C-120/78 Rewe-Zentral AG (Cassis de Dijon), ECLI:EU:C:1979:42.

⁴⁰ Recitals 75, 97, 104 and Articles 42, 43, 67 and 70.

⁴¹ EC, 2019. The European Green Deal, *op. cit.*, p. 8.

⁴² EC, 2020. A New Circular Economy Action Plan: for a cleaner and more competitive Europe, COM(2020) 98 final, p. 3.

⁴³ EC, 2020. European Green Deal Investment Plan, COM(2020) 21 final, p. 12.

⁴⁴ See footnote 15.

⁴⁵ For a thorough analysis of the shift from ‘how to buy’ to ‘what to buy’, see Andhov, M., Caranta, R., Janssen, W. A., and Martin-Ortega, O., 2022, *op. cit.*

procurement procedure in the EU through the exclusion of an economic operator or rejection of an abnormally low bid.⁴⁶

2. Understanding the EU Deforestation Regulation (EUDR)

The adoption of the EUDR stems from Articles 191(1) and 192(1) of the Treaty on the Functioning of the European Union (TFEU), as measures to fight deforestation contribute to the achievement of the Union's environmental policy objectives established therein.⁴⁷

The general objectives of the Regulation are to minimize global deforestation and forest degradation driven by EU consumption and consequently reduce GHG emissions and biodiversity loss, as well as to promote sustainable production and consumption patterns in the Union and globally.⁴⁸ Additionally, it aims to increase EU demand for and trade in legal and deforestation-free commodities and products.⁴⁹

To achieve its goals, the Regulation lays down rules on the placing and making available on the Union market as well as the export from the Union of *relevant products and commodities*.⁵⁰ The scope *rationae materiae* was identified based on the highest embodied deforestation⁵¹ and includes a list of seven commodities - cattle, cocoa, coffee, oil palm, rubber, soya and wood - and products that contain, have been fed with or have been made using the relevant commodities - such as beef, furniture, or chocolate.⁵² The Regulation's scope is progressive, as the EU intends to regularly review the list of covered commodities and products.⁵³

Under Article 3, the Regulation prohibits the placing, making available or exporting relevant products and commodities on or from the EU market unless they respect three cumulative conditions. The first two are substantive requirements: first, the products must be deforestation-free⁵⁴ or harvested from forests without inducing forest degradation⁵⁵ *after 31 December 2020*,⁵⁶ and second, they must have been produced in compliance with the relevant

⁴⁶ Uysal, E. and Janssen, W. The European Green Deal and Public Procurement Law: Its Extraterritorial Reach beyond the EU's border. In Mar Campins Eritja and Xavier Fernandez-Pons (Eds.), *Deploying the European Green Deal: Protecting the Environment Beyond the EU Borders*, 2024, Routledge (forthcoming), pp. 177-194.

⁴⁷ These objectives are "preserving, protecting, and improving the quality of the environment, protecting human health, prudent and rational utilization of natural resources, promoting measures to deal with regional or worldwide environmental problems, and in particular combating climate change", Article 191(1) TFEU.

⁴⁸ Article 1 and Recital 18 EUDR.

⁴⁹ EC, Impact assessment, op. cit., Part 1/2.

⁵⁰ Article 1 EUDR.

⁵¹ See footnote 12.

⁵² See Annex I EUDR.

⁵³ EC, Impact assessment, op. cit., p. 34.

⁵⁴ This means that they were produced on land that has not been subject to deforestation.

⁵⁵ Deforestation and Forest Degradation are defined, respectively, as "the conversion of forest to agricultural use, whether human-induced or not" (Article 2(3)), and structural changes to forest cover, through conversion of primary or naturally regenerating forests into plantation forests or other wooded land or primary forests into planted forests (Article 2(7)).

⁵⁶ This is the cut-off date for the definition of deforestation.

legislation of the country of production.⁵⁷ The third is a formal requirement, as the relevant products must be always accompanied by a due diligence statement (DDS).⁵⁸

The main recipients of the obligations set out in the Regulation are operators, traders, as well as Member States and their designated competent authorities.⁵⁹

Under the definitions provided for by Article 2, an *operator* is any natural or legal person who, in the course of a commercial activity, places relevant products on the EU market or exports them from the EU. Products are *placed on the market* when made available for the first time in the Union market, including through import. A *trader* is any person in the supply chain other than the operator who, in the course of a commercial activity, *makes relevant products available on the market*, meaning that they are supplied for distribution, consumption or use on the Union market in the course of a commercial activity, whether in return for payment or free of charge. Such commercial activity could be for the purpose of processing, for distribution to commercial or non-commercial consumers, or for use in the business of the operator or trader itself.⁶⁰

Operators are subject to due diligence obligations to be exercised for all relevant products.⁶¹ They must establish and implement a due diligence system, which consists of a framework of procedures and measures involving three elements, namely information requirements to demonstrate the products' compliance with the requirements of Article 3, risk assessment and risk mitigation measures.⁶² The requirements for establishing and maintaining due diligence systems, reporting, and record keeping are set out in Article 12 EUDR.

Operators are prevented from placing on the market or exporting the products if they have not first submitted a DDS to the national competent authorities. Once the DDS is submitted through the information system, the operator is responsible for the compliance of the relevant products. The DDS are electronically available and transmittable and must contain specific information provided in Annex II. They also contain the operator's declaration that, after exercising due diligence, no or only a negligible risk of non-compliance was found.⁶³ The risk is *negligible* where, on the basis of a full assessment of product-specific and general information and after adopting any potential mitigation measures, the products or commodities "show no cause for concern"⁶⁴ in relation to the requirements of freedom from

⁵⁷ This includes, among others, laws regarding land use rights, environmental protection, human rights, labour rights, as well as tax, anti-corruption, trade and customs regulations (Article 2(40)).

⁵⁸ More details on this document are provided below.

⁵⁹ The obligations laid down in the Regulation will apply to operators and traders from 30 December 2024 and to micro and small enterprises from 30 June 2025, as they enjoy a longer adaptation period.

⁶⁰ Concerning the definitions of the duty holders and the activities regulated, the Commission's Proposal of the Regulation clarified that "to the extent possible, they are based on concepts already existing in EU law in relevant internal market and customs legislation" (COM(2021) 706 final, p.11). See, for example, Article 3(6) and (7) of Directive 2019/904 on the reduction of the impact of certain plastic products on the environment, OJ L 155, 12.6.2019.

⁶¹ Articles 4 and 8 EUDR.

⁶² See articles 9, 10 and 11 EUDR.

⁶³ Articles 4(2)(3) and Annex II EUDR. The information to be included in the DDS is, for example, details of the operator and on the quality and quantity of products, as well as geolocation data on places of production.

⁶⁴ Article 2(26) EUDR.

deforestation or production in accordance with the relevant legislation of the country of production.⁶⁵

With regards to traders, these are subject to different obligations depending on their size.⁶⁶ Non-SME traders are subject to these same obligations as operators, while SME traders can make available relevant products on the market only if they are in possession of specific information that they must collect and keep for at least 5 years.

By 30 December 2023, Member States were required to designate one or more competent authorities responsible for ensuring compliance with the Regulation.⁶⁷ To this date, only some Member States have appointed their competent authorities, mostly consisting of national authorities for food safety or ministries for agriculture and the environment.⁶⁸ Competent authorities “are responsible for the overall enforcement of the Regulation with regard to a relevant product entering or leaving the market”.⁶⁹ They have to investigate cases of non-compliance by carrying out checks, which are subject to several quantitative and qualitative requirements.⁷⁰ They must cooperate and exchange information with other entities, such as customs authorities of their own country and other MS, the Commission and, if necessary, the administrative authorities of third countries.⁷¹ Additionally, they can adopt immediate *interim* measures in case of potential non-compliance, and when non-compliance is detected, they can require corrective action.⁷²

Member States are also subjected to reporting obligations. They must make available to the public and to the Commission, annually, information on the application of the Regulation, including the checks performed on operators and traders and the types of non-compliance identified, the corrective action taken and the penalties imposed. Based on this data, the Commission will make a Union-wide report available.⁷³

It is precisely with reference to penalties, established in Article 25, that the EUDR creates an explicit link with public procurement. The latter will be analysed in detail in the following sections.

3. Exclusion as a penalty: public procurement to enforce the EUDR

Under Article 25, Member States are required to “lay down rules on penalties applicable to infringements of this Regulation by operators and traders and shall take all measures necessary to ensure that they are implemented”. Paragraph 2 of the same article provides that the penalties must be “effective, proportionate and dissuasive” and they shall include,

⁶⁵ Article 3(a) and (b) EUDR.

⁶⁶ Article 5 EUDR.

⁶⁷ Article 14 EUDR.

⁶⁸ The list of competent authorities appointed so far is available at: <https://circabc.europa.eu/ui/group/34861680-e799-4d7c-bbad-da83c45da458/library/15b78f75-8f4e-4b3e-ab84-15f162311749/details?download=true>

⁶⁹ Article 26 EUDR.

⁷⁰ Articles 16, 18 and 19 EUDR.

⁷¹ Article 21 EUDR.

⁷² Articles 23 and 24 EUDR.

⁷³ Article 22 EUDR.

among others: “(d) *temporary exclusion for a maximum period of 12 months from public procurement processes and from access to public funding, including tendering procedures, grants and concessions*”.

The original Commission’s Proposal did not indicate the maximum duration of the exclusion from procurement procedures nor the additional exclusion from public funding.⁷⁴ These amendments were introduced by the European Parliament, contributing to both delineating and expanding the scope of the penalty.⁷⁵

Additionally, under paragraph 3, Member States are required to “notify the Commission of final judgments against legal persons for infringements of the Regulation and the penalties imposed on them, within 30 days from the date on which the judgements become final, taking into account the relevant data protection rules”. On its part, the Commission is required to publish a list of judgments on its website, including the name of the legal person, the date, a summary of the activities that led to the infringement of the Regulation, and the nature of the penalty imposed, including the amount if it is financial.

Article 25 EUDR thus requires Member States to adopt effective, proportionate and dissuasive penalties and, at the same time, it provides a list of minimum mandatory penalties to be introduced by the Member States into their legal systems.

Being the EUDR a regulation, it is binding in its entirety and directly applicable in all Member States, producing its effects without the need for implementing measures. Nonetheless, Article 25 on penalties showcases that national implementation rules are actually required. In this respect, the general wording of Article 25 leaves Member States with a certain degree of discretion and could lead to inconsistent interpretations and applications of the provision itself.

3.1 The EUDR in light of broader trends in EU public procurement law

The EUDR reflects three broader trends occurring in EU public procurement law. First, the EUDR constitutes an example of the shift towards mandatory sustainability requirements in public procurement. In light of the typology proposed by Prof. Janssen,⁷⁶ the EUDR seems to be set up as both a product-specific legislation affecting public procurement by regulating specific products and producers from a deforestation-free perspective - i.e. the process and production methods (PPMs), as well as a sectoral procedural mandatory requirement, requiring the setting up of a procurement procedure in an EUDR-compliant manner.

⁷⁴ 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, COM(2021) 706.

⁷⁵ Position of the European Parliament adopted at first reading on 19 April 2023 with a view to the adoption of Regulation (EU) 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, EP-PE_TC1-COD(2021)0366.

⁷⁶ Janssen, W. Shifting Towards Mandatory Sustainability Requirements in EU Public Procurement Law: Context, Relevance and a Typology. In Janssen, W. and Caranta, R. (Eds.), 2023, op. cit., pp 16-19.

Second, the EUDR is resorting to public procurement as an instrument for enforcing its obligations. The increasing use of exclusion grounds to enforce obligations established outside the EU Public Procurement Directives also emerges from other sectoral legislative initiatives and national experiences.⁷⁷ These are the Corporate Sustainability Due Diligence Directive (CSDD) Proposal⁷⁸ and the Proposal for a Green Claims Directive.^{79,80} In this regard, the doctrine emphasises that the adoption of sector-specific grounds for exclusion is intended to remedy the non-mandatory nature of the ground for exclusion for breaches of obligations under Article 18(2) of Directive 24/2014.⁸¹ Similarly, in France, the Climate and Resilience Law of 24 August 2021 has created a form of public enforcement of the “duty of vigilance” by introducing a discretionary ground for exclusion for non-compliance with the obligation to draw up a vigilance plan in public procurement law.⁸²

Third, together with the amended Proposal for a CSDD Directive⁸³, the EUDR illustrates the significant place that corporate due diligence is gaining in the context of public procurement. Differently from the EUDR, which is a product-specific legal instrument containing a limited due diligence duty, the CSDD Directive aims to introduce general mandatory obligations for large EU and non-EU companies to identify, prevent, mitigate and account for their adverse impacts on human rights and the environment (HREDD) in their own operations and their value chains.⁸⁴ The EUDR and the CSDD are EU’s hard law instruments that address the link between HREDD and public procurement, previously recognised in soft law instruments.⁸⁵ While an in-depth analysis of such linkage is beyond the scope of this contribution, there is no doubt that HREDD will receive increasing attention within sustainable public procurement studies, as it becomes essential to ensure that governments address the adverse impacts caused by businesses who are part of their value chains.⁸⁶

⁷⁷ In France, the Law on Green Industry, *LOI n° 2023-973 du 23 octobre 2023 relative à l'industrie verte (1)*, introduces two new discretionary exclusion grounds from public procurement: the first is addressed to companies failing to comply with their obligation to draw up a report on their greenhouse gas emissions (BEGES) (Article 29), the second is for companies failing to comply with their commitments to publish information on sustainability (Article 25).

⁷⁸ Proposal for a Directive on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, (COM(2022) 71 final), as amended by the European Parliament on 1 June 2023. See, in particular, Article 20 – paragraph 3a. (COM(2022)0071 – C9-0050/2022–2022/0051(COD)).

⁷⁹ Article 17(3) of the Proposal for a Directive of the European Parliament and of the Council on substantiation and communication of explicit environmental claims (Green Claims Directive) COM(2023) 166, final.

⁸⁰ See Andhov, M. and Kania, M., 2023. Ever-growing restrictions on whom public buyers can contract with – contemporary developments in the EU public procurement. <https://bestek-procurement.com>.

⁸¹ Uysal, E. and Janssen, W. 2024, op. cit., (forthcoming).

⁸² For a French perspective on the topic, also discussing the notion of “public enforcement”, see Lichère, F. 2023. *La commande publique dans le projet de loi pour une industrie verte. Réflexions sur l'enforcement à la française*. AJDA.

⁸³ With regard to procurement-specific provisions, see the amendments proposed by the European Parliament in Recital 54 b, Article 20 – paragraph 3a and Article 24 – paragraph 1. Amendments adopted by the European Parliament on 1 June 2023 on the Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937 (COM(2022)0071 – C9-0050/2022–2022/0051(COD)).

⁸⁴ (COM(2022) 71 final), Explanatory Memorandum.

⁸⁵ United Nations, 2011. UN Guiding Principles on Business and Human Rights, UN Doc. HR/PUB/11/04.

⁸⁶ For an in-depth analysis of the topic, see Treviño-Lozano, L. and Uysal, E. 2023. Bridging the gap between corporate sustainability due diligence and EU public procurement. *Maastricht Journal of*

3.2 Anything new on the public procurement exclusion front?

Article 25(2)(d) foresees a temporary exclusion for a maximum period of 12 months from public procurement procedures as a penalty for infringements of the Regulation by operators and traders. Much is to be investigated to characterise this new 'deforestation exclusion', including its scope, application, and potential to effectively contribute to implementing the EUDR.

First, since the EUDR requires Member States to adopt “effective, proportionate and dissuasive” penalties and already specifies *exclusion for public procurement* along with other penalties, we consider that these serve as the baseline for what the EU legislator considers effective, proportionate and dissuasive penalties. When introducing further penalties, Member States consider this minimum standard.

Moreover, the effectiveness, proportionality, and dissuasiveness of the exclusion penalty will also depend on the duration imposed on economic operators, which may not exceed 12 months and must be proportional to the gravity of the infringement committed. Given that 12 months may be considered a relatively short period, there is a concern that the nuances of the infringement’s severity may not be adequately reflected in the duration of the exclusion.

As a requirement for applying the penalty of exclusion, Article 25 refers generically to infringements of the Regulation by operators and traders. Therefore, it seems that both the breach of substantive processes and production methods (PPMs) obligations (i.e. the requirements for products to be deforestation-free and legally produced ex. Article 3 EUDR) and the violation of formal due diligence obligations (i.e. the setting up of a due diligence system and submission of a DDS, containing the minimum information required) may call for the application of a penalty of exclusion to an economic operator.⁸⁷ These breaches may occur in the country of production of the relevant commodity/product, in that of the tenderer, the contracting authority, or even in other EU or non-EU countries involved in the supply chain.⁸⁸ Moreover, Article 25(3) refers to final judgements as the type of measures that establish violations of the EUDR and impose penalties.

A crucial aspect to be defined concerns the nature of the temporary exclusion at issue. To do so, a distinction must be introduced between debarment, or disqualification, and exclusion. While the first constitutes an exclusion from an entire procurement system, the second is the exclusion of an economic operator from a specific and ongoing procurement procedure.⁸⁹ Exclusion generally has a less far-reaching scope because, arising in the course of the procedure, it tends to exclude from current and future procedures with the same contracting authority. Debarment, or disqualification, on the other hand, has a broader scope because it

European and Comparative Law, pp. 1–19; Methven O’Brien, C. and Caranta, R. 2024. Due Diligence in EU Institutions' Own-Account Procurement: Rules and Practices. Policy Department for Budgetary Affairs, European Parliament.

⁸⁷ See section 2. In this sense, also Uysal, E. and Janssen, W. 2024, op. cit., (forthcoming).

⁸⁸ On the potential extraterritorial effects of the ‘deforestation exclusion’ see also Uysal, E. and Janssen, W. 2024, op. cit. (forthcoming).

⁸⁹ On the topic of exclusion and debarment, see Yukins, C. & Kania, M. 2019. Suspension and Debarment in the U.S. Government: Comparative Lessons for the EU’s Next Steps in Procurement, 19-2 UrT 47, GWU Law School Public Law Research Paper No. 2019-39, pp. 47-73 and, in particular, pp. 47, 53.

“prohibits tenderers from participating in an indefinite number of future procurement procedures for a specific amount of time”.⁹⁰ Currently, EU law does not provide for an EU-wide debarment system for nationally financed contracts, but Member States may still recur to it in their national systems.⁹¹

The EUDR foresees the exclusion from public procurement as a penalty to be introduced in national legal systems for the breach of its obligations and to be imposed in judicial proceedings, i.e. outside a specific procurement procedure. In this respect, the Regulation seems to introduce a mandatory ground for debarment based on its violation.

Moreover, under Article 25(3) EUDR, Member States must notify the Commission of final judgments for infringements of the Regulation, within 30 days from the date on which the judgments become final, and the penalties imposed. The Commission then makes the list of such judgments publicly available on its website. This list will, therefore, contain a centralised collection of data on legal persons that have been sanctioned with exclusion in all Member States. Such mechanisms seem to amount to a centralised debarment/disqualification system, which might operate upstream and independently of the actual application of an exclusion criterion in a specific procurement procedure. This is innovative not only because it would be the first procurement debarment system at the EU level, but also because it concerns compliance with HREDD obligations.

3.3 Article 25 EUDR in light of Article 57 PSD: a mandatory deforestation exclusion ground?

As discussed, by requiring Member States to report non-compliant operators and traders - and the sanctions applied to them - and the Commission to create an EU-wide public list of the latter - including those excluded from public procurement - the EUDR seems to introduce a debarment/disqualification system based on a publicly available list of final decisions at both National and European levels.⁹² This represents a novelty in the context of EU procurement law. Indeed, the EU public procurement Directives do not provide for the creation of a blacklist of excluded tenderers at the EU level.⁹³

It is unclear, however, how the debarment mechanism will operate in practice. It can operate automatically - i.e. at a higher and general level - without the need for contracting authorities to further verify the existence of the ground for exclusion. However, this may not be the case and contracting officials may be called to enforce the new deforestation exclusion ground in the context of a particular procurement procedure. This would occur if an economic operator, despite having previously been sanctioned with exclusion by a final judgment for an infringement of the EUDR, still participates in a procurement procedure.

⁹⁰ See Friton, P., & Zöll, J. 2021. Article 57. In Caranta, R. and Sanchez Graells, R. (Eds.), *European Public Procurement: Commentary on Directive 2014/24/EU*. Edward Elgar Publishing, p. 592.

⁹¹ A blacklist of excluded operators from EU financed contracts though exists. EDES Database - European Commission, https://commission.europa.eu/strategy-and-policy/eu-budget/how-it-works/annual-lifecycle/implementation/anti-fraud-measures/edes/edes-database_en.

⁹² Article 22(1)(d), (2) and Article 25(3) EUDR.

⁹³ Lemke, M. and others, 2018. Implementing the EU Directives on the Selection of Economic Operators in Public Procurement Procedures, OECD, p. 100 and ff. On procurement blacklisting, see Sanchez-Graells, A., 2016. Competition Infringements and Procurement Blacklisting. *Competition Law Journal*.

To characterise the new deforestation exclusion, we can draw on the discipline of exclusion provided by Article 57 PSD. The article is placed in the section ‘Criteria for qualitative selection’, containing provisions aimed at skimming among tenderers for their qualities or deficiencies to help contracting authorities identify reliable candidates.⁹⁴ Under the PSD, exclusion grounds are divided into mandatory and discretionary. Member States must transpose the mandatory exclusion grounds, and contracting authorities generally have no discretion when they apply such grounds.⁹⁵ In the case of mandatory exclusion grounds, exclusion is due in all and every procurement.

Article 57 PSD “calls for the exclusion decision to be made by individual contracting authorities and entities on a contract-by-contract basis.”⁹⁶ In any case, Member States are left with freedom as to whether to appoint a higher official “to oversee exclusion and debarment”.⁹⁷ According to Recital 102 PSD, in fact, Member States should be free to “allow individual contracting authorities to carry out the relevant evaluations or to entrust this task to other authorities at central or decentralized level”.

With regard to the legal nature of the deforestation mandatory ground foreseen in Article 25(2)(d) EUDR, we argue that a similarity exist with the mandatory grounds for exclusion under Article 57(1) PSD, which requires contracting authorities to exclude economic operators in the case of a conviction by final judgment on a number of reasons, which are provided, in an exhaustive manner, by the article itself. In fact, as Article 25(3) EUDR refers to *final judgments*, it seems that the exclusion is to be imposed as an accessory penalty by courts. A judgment is final when no further legal remedies are available. The wording of the provision also seems to exclude administrative decisions from its scope. As in the case of the Article 57(1) PSD, however, it must be noted that “there may be cases in which administrative decisions could lead to mandatory exclusion in a way that complies with EU law [...]”.⁹⁸

We therefore consider that if the contracting authority verifies that an economic operator has been sanctioned with the temporary exclusion from public procurement procedures ex. Article 25(2)(d) EUDR by a final judicial decision, it does not have discretion and must exclude such an economic operator from the procurement procedure.

Yet, another possible scenario exists if the judicial decision is not final. In this case, contracting authorities may still decide to exclude the tenderers based on certain discretionary grounds. Relevant here is Article 57(4)(a) PSD, which provides that an economic operator can be excluded when a contracting authority can demonstrate that he does not comply with applicable obligations in the field of environmental, social and labour law obligations set out in Article 18(2). “Applicable obligations” refer to national, EU and international laws, including those listed in Annex X. Moreover, pursuant to Article 57(4)(c)

⁹⁴ Recital 101 and C-41/18, *Meca*, ECLI:EU:C:2019:507, paragraph 30; C-395/18, *Tim*, ECLI:EU:C:2020:58, paragraph 49. On the wider purposes of exclusion grounds see Friton, P. & Zoll, J. 2021, op. cit..

⁹⁵ Friton, P., & Zöll, J. 2021. op. cit., p. 594, 595.

⁹⁶ Yukins, C. R., & Kania, M. 2019. op. cit. p. 68.

⁹⁷ *Ibid.* p. 69

⁹⁸ Friton, P., & Zöll, J. 2021. op. cit., p. 595.

PSD, contracting authorities can exclude a tenderer when they can show “grave professional misconduct, which renders its integrity questionable. In both cases, contracting authorities have to decide whether to exclude tenderers, by relying on “all appropriate means” to prove the non-compliance or the grave professional misconduct.⁹⁹

Concerning the duration of the exclusion, Article 57(7) PSD provides that Member States must “determine the maximum period of exclusion if no measures [...] are taken by the economic operator to demonstrate its reliability”. The duration of the exclusion varies depending on the nature of the exclusion ground. In cases of mandatory exclusion, the exclusion period is a maximum of 5 years from the date of the conviction by final judgment, while for discretionary exclusion, the exclusion period is a maximum of 3 years from the relevant event.¹⁰⁰ However, Article 25(2)(d) EUDR imposes a maximum duration of 12 months on all Member States. We consider that when the duration of the debarment/disqualification is specified in the final judicial decision, the contracting authority must comply with it. If the duration is not specified in the judgment, by analogy with what is provided by Article 57(2)(1), contracting authorities have to consider the 12 months after the judicial decision becomes final and binding.¹⁰¹ This paper does not investigate further the implications of Article 25 EUDR, interpreted in conjunction with Article 57(4), on the potential application by contracting authorities of deforestation-related discretionary exclusion on the grounds of either grave professional misconduct¹⁰² or violation of obligations in Article 18(2). However, the issue needs to be analysed, including with regard to the duration of the exclusion based on discretionary grounds.

With respect to the verification of the mandatory exclusion ground, when it is not specified otherwise, the contracting authority must verify non-compliance following Articles 59 to 61 PSD.¹⁰³ “At the time of submission of requests to participate or of tenders”, tenderers may submit the ESPD (European Single Procurement Document), a self-declaration that serves as preliminary evidence of compliance with selection criteria and the absence of reasons for exclusion.¹⁰⁴ Besides this possibility, “contracting authorities may require the certificates, statements, and other means of proof [...] as evidence for the absence of grounds for exclusion as referred to in Article 57 [...]”. Means of proof related to exclusion grounds can include an extract from the relevant register, such as a judicial record or an equivalent document issued by a competent judicial or administrative authority.¹⁰⁵

It has to be pointed out that “[w]here no debarment or exclusion registers exist, it may be difficult for contracting authorities to challenge the content of a self-declaration, or to obtain relevant information in case self-declarations are not used”.¹⁰⁶

Paragraph 6 of Article 57 PSD concerns self-cleaning, defined as “the opportunity for a tenderer, which would otherwise be excluded, to be admitted to the procurement procedure because it has adopted all measures that are necessary to prevent future misconduct”.

⁹⁹ See Friton, P., & Zöll, J. 2021, op. cit., p. 606 ss.

¹⁰⁰ Article 57(7) PSD.

¹⁰¹ Friton, P., & Zöll, J. 2021. op. cit., p. 632.

¹⁰² Article 57(4)(c) PSD.

¹⁰³ Article 56(1) PSD. Friton, P., & Zöll, J. 2021. op. cit., p. 603.

¹⁰⁴ Article 59 PSD.

¹⁰⁵ Article 60 PSD.

¹⁰⁶ Friton, P., & Zöll, J. 2021. op. cit., p. 599.

According to Article 57(6)(4), an economic operator which has been excluded by a final judgment from participating in procurement procedures cannot benefit from the self-cleaning during the period of exclusion resulting from that judgment in the Member States where the judgment is effective. Therefore, we may argue that self-cleaning would not be available in any of the EU Member States during the period of the deforestation exclusion established by the final judgment.

Finally, it is also important to stress that the mandatory exclusion of an economic operator for breach of the obligations set out by the EUDR does not have to be linked to the subject matter of the contract. So, regardless of the actual risks associated with the specific purchase at issue, public procurement can be used to ensure compliance with deforestation-related obligations.

4. Conclusions. Public procurement to enforce deforestation-related obligations: lessons learnt and potential improvements

The adoption of the EUDR may constitute a crucial step in the EU's trajectory towards global sustainable development, representing its effort to address deforestation through binding measures.

This working paper explored the complex interplay between deforestation obligations and the role of public procurement as a tool for their enforcement. The EUDR establishes due diligence obligations and mandates exclusion from public procurement procedures for non-compliance. In this respect, the EUDR constitutes an example of the shift towards mandatory sustainability requirements in public procurement and reflects the increasing use of public procurement - particularly, exclusion grounds - to enforce rules established in other areas of law.¹⁰⁷ More specifically, the Regulation illustrates that public procurement can be utilised to ensure compliance with corporate due diligence obligations, as it is already happening in some national experiences. Although the practical implementation of this exclusion is not yet clear, the mechanisms proposed under the EUDR involve Member States reporting non-compliant economic operators and the Commission publicly disclosing this information. This suggests the establishment of a new deforestation EU-wide debarment system from public procurement procedures.

Debarring an economic operator from public procurement in the EU may result in a significant economic and reputational harm, especially when this information is made public, as foreseen under the EUDR.¹⁰⁸ The Regulation states, indeed, that the list of final judgments, to be published by the Commission, could "increase the awareness of consumers and civil society as regards operators and traders who infringe this Regulation".¹⁰⁹

The new deforestation exclusion may, therefore, act as a deterrent to non-compliance, even if the duration of 12 months may be considered rather short. The effectiveness, proportionality, and dissuasiveness of such a penalty will become evident over time. In fact, the reporting framework established in Article 22 should reveal the impact of these

¹⁰⁷ Lichère, F. 2023, op. cit., p. 2.

¹⁰⁸ Articles 22, 25(3), 33(5) and Recital 62 EUDR.

¹⁰⁹ Recital 75 EUDR.

measures. It requires the publication of an annual report that provides an “Union-wide overview of the application of this Regulation”. The report is based on data submitted by Member States, including on their monitoring activity, checks, corrective actions and penalties. Additionally, it is hoped that the impacts of the penalties will also be assessed in the five-yearly reviews of the Regulation.¹¹⁰

Centralizing the collection of data on non-compliant economic operators and exchanging this information broadly and openly, particularly between competent authorities and contracting authorities among Member States, is crucial for effectively enforcing the Regulation. Experiences at the national level underline the importance of facilitating the evaluation of procurement exclusion grounds by contracting authorities. The latter should be equipped with specific public platforms, passports or registers, which centralize information on companies that were excluded due to non-compliance with relevant obligations.¹¹¹

We believe that unlocking the potential of public procurement against deforestation requires a careful assessment of deforestation-related risks at every stage of the procurement process. This includes the definition of needs, contract performance, and extends beyond the mere application of exclusion grounds. To achieve this objective, it is advisable to include clear deforestation criteria and provisions in both future EU public procurement Directives and sectoral legislative initiatives.¹¹² Additionally, it is essential to provide target training to procurement practitioners and market operators.

Ultimately, we hope the EUDR will be the first of a series of laws that impose due diligence on EU and global market players, leading to more sustainable and responsible production and consumption. As previously mentioned, the EUDR has the potential to significantly impact public procurement in Europe. By establishing an EU-wide debarment/disqualification system and a new mandatory exclusion ground, the European legislator is paving the way for extending the same system to other types of violations, possibly in the areas of environmental law and human rights.

¹¹⁰ Article 34 EUDR stipulates that the Commission shall present the first impact assessment of the Regulation by 30 June 2024 and the second by 30 June 2025, accompanied, if appropriate, by legislative proposals to extend its scope to other wooded land, other natural ecosystems and further commodities and products, as well as to assess the need to set out specific obligations for financial institutions. Moreover, by 30 June 2028 and at least every five years, the Commission must carry out a general review of the Regulation and present a report to the EP and the Council.

¹¹¹ Kerl o, J-F., Lich ere, F., Untermaier-Kerl o, E. and Bernard, C., 2023. *Pour une Loi Sapin 3*, Chaire de droit des contrats publics and Observatoire de l' ethique publique; Vassor, B., 2023. *La multiplication des motifs d'exclusion   l'appr eciation de l'acheteur public*. <https://www.weka.fr>.

¹¹² This would be the case, for instance, of the Legislative Framework for Sustainable Food Systems (FSFS), which foresees the adoption of EU minimum mandatory criteria for public food procurement. Although planned within the current mandate, the FSFS was not delivered and its future adoption is uncertain. See https://food.ec.europa.eu/horizontal-topics/farm-fork-strategy/legislative-framework_en.