

UK GOVERNMENT OPENS CONSULTATION ON "WORLD- LEADING" DUE DILIGENCE LAW

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Legal Briefings - By **Oliver Elgie and Zoe Morris**

The UK's new [Environment Act 2021](#) (the "Environment Act") introduces a prohibition on the use of "forest risk commodities" in UK commercial activities, unless those commodities have been produced in compliance with local laws. It also introduces due diligence and reporting obligations in relation to "forest risk commodities".

The UK government opened a [consultation](#) on 3 December 2021, in relation to this new regime. The consultation is open until 11 March 2022.

Whilst the scope and impact of this new regime will be subject to the outcome of the consultation, as reported [previously](#), it highlights the increasing importance of businesses undertaking robust and coordinated ESG due diligence in relation to their businesses and supply chains.

PROHIBITION ON THE USE OF CERTAIN "FOREST RISK COMMODITIES" AND CORPORATE REPORTING AND DUE DILIGENCE OBLIGATION

Schedule 17 of the Environment Act makes it illegal for certain businesses to use a "forest risk commodity" (or a product derived from a "forest risk commodity") in their UK commercial activities, unless those commodities have been produced in compliance with "local laws" (i.e. any law having effect in the country or territory where the forest commodity was grown, raised or cultivated).

The Environment Act also introduces a mandatory due diligence system and an annual reporting requirement on companies using "forest risk commodities" in their supply chains.

The definition of "forest risk commodities" will be set out in secondary legislation, but will be commodities that are associated with wide-scale deforestation.

There is an exemption from these requirements where the amount of the "forest risk commodity" does not exceed a certain threshold (to be prescribed in secondary legislation) and the relevant person makes a declaration for the reporting period that they are satisfied on reasonable grounds that this threshold will not be exceeded.

PURPOSE/SCOPE OF THE CONSULTATION

The Environment Act itself has left most of key issues to be the subject of secondary legislation, including:

- the definition of "forest risk commodities";
- the businesses that will be within scope of the new regime;
- the exemption threshold;
- the subject, scope and criteria of the new due diligence and reporting obligations; and
- the enforcement mechanisms for this new regime.

The consultation is seeking views on these points. We have set out the key aspects of the consultation in further detail below.

"FOREST RISK COMMODITIES"

A commodity may only come within the definition of "forest risk commodity" if the Secretary of State considers that forest is being or may be converted to agricultural use for the purposes of producing the commodity.

The current proposed "forest risk commodities" are cattle (beef and leather), cocoa, coffee, maize, palm oil, rubber and soy. Products covered by the UK Timber Regulations will not be in scope, meaning that timber, paper and pulp have been removed from the list since the legislation was first proposed. The consultation has requested evidence of any further commodities that drive deforestation.

The consultation has proposed that the new rules will not come into force in relation to all "forest risk commodities" at the same time. Instead, a phased approach is currently proposed. The consultation is also seeking views on how such a phased approach could be implemented.

BUSINESSES IN SCOPE

Under the Environment Act, a business will be in scope if (i) its turnover for the previous financial year exceeds a specified threshold (or it is a subsidiary of a company whose turnover meets such threshold); and (ii) it uses "forest risk commodities" in its UK commercial activities.

For the purposes of ascertaining whether a business is in scope, it is proposed that turnover should be calculated as follows:

- UK businesses: their total turnover
- Foreign businesses conducting business in the UK: either turnover related to UK activity or global activity

The government is seeking input as to the factors that should be considered when setting the turnover level, as well as on the actual turnover level for each commodity. The consultation envisages potentially different thresholds for each commodity, suggesting potential thresholds of £50 million, £100 million or £200 million as options for each commodity.

EXEMPTION

The Environment Act includes an exemption for businesses that trade volumes of each commodity under a certain threshold. The consultation is seeking evidence on the appropriate methodology to calculate this threshold, as well as the threshold itself, with options of 1, 10, 100 and 1,000 tonnes per commodity suggested.

DUE DILIGENCE SYSTEM

The government is also consulting on the details of the due diligence regime, suggesting that a business in scope should take steps to:

- identify, and obtain information about, "forest risk commodities";
- assess the risk that relevant local laws pertaining to land use and land ownership were not complied with in relation to those commodities; and
- mitigate that risk

The UK government is proposing that businesses should "*eliminate risk or reduce risk to as low as reasonably practicable*" that they are using "forest risk commodities" grown on land illegally used or occupied.

The consultation also seeks views on the scope of the guidance that the Government should introduce, including guidance as to whether/how a business may use existing certifications and standards to help meet the due diligence requirement.

Further, the consultation is seeking views on the scope of the reporting obligation.

ENFORCEMENT

The government is proposing that the maximum penalty for failure to comply should be £250,000 (in line with schemes such as the Ivory Act), but is seeking views on this.

COMMENT

This is a further example of the increasing due diligence requirements being placed on companies in relation to ESG issues.

Whilst the number of companies within scope of this new regime and the extent of the due diligence and reporting requirements are not yet clear, the prohibition on the use "forest risk commodities" makes it clear that due diligence will need to be undertaken as part of robust risk management for any business that forms any part of the value chain of a regulated entity, just as robust human rights due diligence is now a key element of a proper risk management framework in response to the increasing human-rights based sanctions regimes.

This new regime will sit alongside the UK Modern Slavery Act on the UK statute book. These two pieces of legislation will likely have different reporting thresholds (the UK Modern Slavery Act reporting threshold is a turnover of £36 million) and potentially different due diligence and reporting requirements. Businesses will need to consider how they can most efficiently and robustly respond both to deforestation and modern slavery risks whilst ensuring compliance with two different regulatory frameworks.

In contrast to the UK's piecemeal approach, the [proposed EU human rights due diligence law](#) would seek to combine environmental and human rights due diligence in a manner more consistent with the United Nations Guiding Principles on Business and Human Rights (being the standards towards which many leading companies have been working towards for a number of years already).

There is a risk therefore that the UK's approach could lead to a patchwork of rules that impose a greater compliance burden on businesses. This approach risks being less effective in terms of the underlying ESG goals than a more comprehensive and consistent approach contained within a single piece of legislation.

Finally, the new law only makes it illegal for businesses to use "forest risk commodities" that have been produced in contravention with relevant laws in the country where they were grown. The new law does *not* require businesses to comply with international standards. In circumstances where local law might be inadequate to protect the environment or human rights, this new regime risks failing to raise standards or achieving the aim of preventing deforestation.

NEXT STEPS FOR COMPANIES

Although the exact scope of this new regime remains unclear, businesses that use "forest risk commodities" (or products derived from them) should examine their current ESG due diligence and reporting processes in light of this new requirement.

Both the UK's piecemeal approach and the more comprehensive regime proposed by the EU militate towards companies centralising their ESG concerns, strategies and response, rather than risking environmental, human rights and other ESG issues being siloed with separate responsibility. A centralised approach can better ensure that consistent, robust and operationally efficient steps are taken in relation to due diligence across the E, the S and the G.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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