

# Towards Deforestation-Free Public Procurement?

## Reflections on the Interplay between the Deforestation Regulation (EUDR) and Public Procurement in the EU

Chiara Falvo and Federica Muscaritoli\*

*Deforestation and forest degradation are significant environmental and socio-economic challenges, primarily driven by the global demand for certain agricultural commodities and products. To respond to increasing pressures from EU stakeholders and curb consumption-driven deforestation, the EU recently adopted Regulation 2023/1115, the EU Deforestation Regulation (EUDR). The EUDR applies to a list of goods strongly linked to deforestation and forest degradation and often part of global and complex supply chains. Under the EUDR, relevant commodities and products can be placed on or 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 as a minimum penalty for breaching its provisions. This article provides an overview of this new legal instrument and analyses the interplay between its rules and EU public procurement law. It also aims to characterise the new 'deforestation exclusion' in light of the regime on exclusion provided by Directive 2014/24/EU.*

*Keywords: Deforestation Regulation (EUDR); Due Diligence; Sustainable Public Procurement; Exclusion Grounds*

### I. Introduction

Over the past 30 years, deforestation has led to the loss of around 420 million ha of forests globally.<sup>1</sup> Deforestation and forest degradation increase global warming,<sup>2</sup> cause biodiversity loss,<sup>3</sup> and pose significant

risks to human health.<sup>4</sup> Additionally, they threaten the livelihoods of smallholder farmers, indigenous people and local communities.<sup>5</sup> 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.<sup>6</sup>

DOI: 10.21552/epppl/2024/2/4

\* Chiara Falvo, PhD candidate, University of Turin, Faculty of Law, Italy <chiara.falvo@unito.it>; Federica Muscaritoli, PhD candidate, University of Copenhagen, Faculty of Law, Denmark <federica.muscaritoli@jur.ku.dk>. The authors are Marie-Curie Fellows in the SAPIENS Network. 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.

1 FAO, *Global Forest Resources Assessment 2020: Main report* (FAO Rome 2020) 18.

2 Priyadarshi Shukla, Jim Skea, Eduardo Calvo Buendia, Valérie Masson-Delmotte, Hans-Otto Pörtner, Debra C Roberts, Panmao Zhai and others, 'Summary for Policymakers' in *Climate Change and Land: an IPCC special report on climate change, desertifica-*

*tion, land degradation, sustainable land management, food security, and greenhouse gas fluxes in terrestrial ecosystems* (IPCC 2019).

3 Eduardo Brondizio, Josef Settele and others, *Global assessment report on biodiversity and ecosystem services of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services* (eds) (IPBES Secretariat Bonn Germany 2019).

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

5 *ibid.*

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

Most deforestation and forest degradation globally are driven by the demand for a limited number of agricultural commodities, often traded in global supply chains involving a complex network of producers, traders and suppliers. While deforestation occurs upstream, downstream companies and suppliers, who drive the demand, have a crucial role in mitigating deforestation risks across their sourcing networks.<sup>7</sup>

Acknowledging the impact of its consumption on deforestation,<sup>8</sup> the EU recently adopted Regulation (EU) 2023/1115 (EUDR).<sup>9</sup> The EUDR covers specific goods and prohibits their import into and export from the EU market unless they are deforestation-free and legally produced. 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.<sup>10</sup>

The EU Green Deal (EGD),<sup>11</sup> under which the EUDR falls, has prompted a significant evolution in the EU legal landscape, with implications also for EU public procurement law. Indeed, some legislative initiatives include specific provisions related to sustainable public procurement, requiring, under dif-

ferent forms and degrees, sustainability considerations in public procurement.<sup>12</sup> The EUDR is a relevant example of this evolution, as it features a public procurement-specific provision establishing a penalty of temporary exclusion from public procurement processes in case of infringement of its provisions.<sup>13</sup>

This article first aims to contextualise the EUDR within emerging trends in EU public procurement law. Secondly, it analyses the implications of the new EUDR 'deforestation exclusion' in light of Directive 2014/24/EU (hereafter also called Public Sector Directive or PSD).<sup>14</sup>

The article is structured as follows: section II introduces the policy action of European institutions to combat deforestation and emphasises the strategic role of sustainable public procurement therein; section III provides an overview of the EUDR, its scope, obligations and key implementation mechanisms; section IV investigates the interplay between the EUDR and EU public procurement law, in particular Directive 2014/24; finally, the conclusions trace the main considerations of the work and elaborate some recommendations for the implementation of deforestation-free public procurement.

7 OECD/FAO, OECD-FAO Business Handbook on Deforestation and Due Diligence in Agricultural Supply Chains (OECD Publishing Paris 2023).

8 Commission, *The impact of EU consumption on deforestation: Comprehensive analysis of the impact of EU consumption on deforestation* (Technical Report, European Union 2013); IEEEP, *EU Consumption as a Driver of Global Deforestation* (Institute for European Environmental Policy 2019).

9 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 [2023] OJ L 150/206 (EUDR).

10 See section III.

11 Commission, 'The European Green Deal' COM (2019) 640 final.

12 These include, eg Regulation (EU) 2023/1542 of the European Parliament and of the Council of 12 July 2023 concerning batteries and waste batteries, amending Directive 2008/98/EC [2023] OJ L 191; Regulation (EU) 2019/1020 of the European Parliament and of the Council of 20 June 2019 on market surveillance and compliance of products and amending Directive 2004/42/EC and Regulations (EC) No 765/2008 and (EU) No 305/2011 [2019] OJ L 169; Regulation (EU) 2023/1542 of the European Parliament and of the Council of 12 July 2023 concerning batteries and waste batteries, amending Directive 2008/98/EC and Regulation (EU) 2019/1020 and repealing Directive 2006/66/EC [2023] OJ L 191; Directive (EU) 2023/1791 of the European Parliament and of the Council of 13 September 2023 on energy efficiency and

amending Regulation (EU) 2023/955 (recast) [2023] OJ L 231/1. In terms of legislation proposals: Commission, 'Proposal for a Regulation on Waste Shipments', COM (2021) 709 final; 'Proposal for a Regulation on Ecodesign for Sustainable Products', COM (2022) 142 final; 'Proposal for a Construction Products Regulation', COM (2022) 144 final; 'Proposal for a Critical Raw Materials Act', COM (2023) 160 final; 'Proposal for a Net Zero Industry Act', COM (2023) 161 final; 'Proposal for a Green Claims Directive', COM (2023) 166 final. For a comprehensive overview of these initiatives see Marta Andhov, Roberto Caranta, Willem Janssen, Olga Martin-Ortega, *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 2022); Willem Janssen, 'Shifting Towards Mandatory Sustainability Requirements in EU Public Procurement Law: Context, Relevance and a Typology' in Willem Janssen and Roberto Caranta (eds), *Mandatory Sustainability Requirements in EU Public Procurement Law. Reflections on a Paradigm Shift* (Bloomsbury Publishing, 2023) 3-20; other chapters in Willem Janssen and Roberto Caranta (eds) (Bloomsbury Publishing, 2023) are also relevant; see also Federica Muscaritoli, 'EU Net-zero Industries and Critical Raw Materials Acts: implications for Public Procurement' (*SAPIENS Network*, 5 January 2024) <<https://sapiensnetwork.eu/eu-net-zero-industries-and-critical-raw-materials-acts-implications-for-public-procurement/>> accessed 14 May 2024.

13 Art 25(2)(d), Reg (EU) 2023/1115 [2023] OJ L 150. See section IV.

14 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 [2014] OJ L 94/65 (Public Sector Directive or PSD).

## II. Sustainable Public Procurement: Recent Trends and the Link with Deforestation

EU institutions recognised 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 Plan<sup>15</sup> included a section on public procurement, regulated at that time by the 1993 EU Directives.<sup>16</sup> Member States 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.<sup>17</sup> In its 2019 Communication, the Commission stressed the need to facilitate the identification, promotion and acquisition of products from deforestation-free supply chains also for public authorities.<sup>18</sup> In its conclusions on the same Communication, the Council invited the Commission ‘to assess the feasibility of ... options such as ... application of due diligence, zero-deforestation standard [and] *deforestation-free public procurement procedures*’.<sup>19</sup> Lastly, the European Parliament, in its 2020 resolution, emphasised the role that public procurement can play to fight deforestation.<sup>20</sup> The Parliament proposed to include the issue of deforestation and compliance with the related legislative proposal on due

diligence<sup>21</sup> in the EU green public procurement criteria.<sup>22</sup> It also called for a revision of the Public Procurement Directive 2014/24 to integrate compliance with due diligence as a possible award criterion. 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 Plurilateral Agreement on Government Procurement (GPA) and Directive 2014/24/EU’.<sup>23</sup> Finally, it stated that Member States, in accordance with their national legislation and practice, should ensure the implementation of the obligations set out in the proposed law against deforestation, including through the sanction of exclusion from public procurement procedures.<sup>24</sup>

Under the EGD, the Biodiversity,<sup>25</sup> Farm to Fork<sup>26</sup> and New Forest<sup>27</sup> Strategies announced an upcoming legislative proposal on deforestation, stressing its importance for achieving their objectives. In 2020, a large online consultation showed significant public interest, further encouraging action.<sup>28</sup> The EU’s adoption of mandatory rules to address deforestation is a crucial advance for its leading role in the green transition and a further example of the paradigm shift detectable in EU public procurement law.

Indeed, the regulation of public procurement at the EU level was initially instrumental to the creation

15 Commission, ‘Forest Law Enforcement, Governance and Trade (FLEGT) - Proposal for an EU Action Plan’ COM (2003) 251 final.

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

17 Member States could, ie, integrate sustainable forest management requirements into the subject matter of contracts and in the technical specifications, and include the act of ‘deliberately handling illegally harvested timber’ in the scope of the discretionary exclusion ground for grave professional misconduct provided by Art 57 PSD. See COM (2003) 251 (n 15) 16.

18 Commission, ‘Stepping Up EU Action to Protect and Restore the World’s Forests’ COM (2019) 352 final, 7.

19 Council, ‘Conclusions on the Communication on Stepping Up EU Action to Protect and Restore the World’s Forests’ [2019] (15151/19) 7 (emphasis added).

20 Parliament, ‘Resolution of 22 October 2020 with recommendations to the Commission on an EU legal framework to halt and reverse EU-driven global deforestation’ [2020] (2020/2006(INL)).

21 Reference is made 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 Parliament (n 20) Annex.

22 Reference is made to the Green Public Procurement Voluntary Criteria developed by the European Commission’s Joint Research Centre (JRC) <[https://green-business.ec.europa.eu/green-public-procurement/gpp-criteria-and-requirements\\_en](https://green-business.ec.europa.eu/green-public-procurement/gpp-criteria-and-requirements_en)> accessed 14 May 2024. Particularly relevant in this context is Commission, ‘EU green public procurement criteria for food, 2020/2006 catering services and vending machines’ SWD (2019) 366 final.

23 Parliament 2020/2006(INL) (n 20) 22.

24 *ibid* 31-32.

25 Commission, ‘EU Biodiversity Strategy for 2030: Bringing nature back into our lives’ COM (2020) 380 final.

26 Commission, ‘A Farm to Fork Strategy for a fair, healthy and environmentally-friendly food system’ COM (2020) 381 final.

27 Commission, ‘New EU Forest Strategy for 2030’ COM (2021) 572 final.

28 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. European Commission, <[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](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)> accessed 14 May 2024.

of the internal market through the removal of tariff and non-tariff barriers to trade.<sup>29</sup> This was mainly due to the tendency to favour national candidates in procurement procedures.<sup>30</sup> Traditionally intended and used as a mechanical and price-driven process,<sup>31</sup> public procurement has progressively gained traction in both theory and practice as a strategic tool, also given its considerable economic importance (14% EU GDP).<sup>32</sup> Sustainable, Green and Socially Responsible Public Procurement 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 case law<sup>33</sup> and later through its codification by the 2014 Public Procurement Directives.<sup>34</sup>

This led to a framework that currently provides several possibilities for including sustainable criteria in public tenders.<sup>35</sup> 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.<sup>36</sup> 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 at issue.<sup>37</sup>

More recently, the EGD has brought about a shift in the use of public procurement as a policy tool. The Commission affirmed that '[p]ublic authorities, including the EU institutions, should lead by example and ensure that their procurement is green'.<sup>38</sup> Moreover, recognising the limitations of voluntary approaches to green public procurement,<sup>39</sup> the Commission announced the introduction of minimum mandatory green public procurement criteria and targets in sectoral legislation, including product-specific legislation.<sup>40</sup> Thus, the legislative approach to sustainable public procurement is changing, and mandatory provisions are being introduced in several sectoral initiatives.<sup>41</sup> The result is an intricate legal landscape characterised by a set of public procurement provisions dispersed across legal instruments beyond the EU Public Procurement Directives. The new obligations also 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 it also prescribes what – and from whom – contracting authorities should (or should not) purchase.<sup>42</sup> 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 also entails that the reach of public pro-

29 Council (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* [1968] OJ 1962 P 2/36.

30 Sue Arrowsmith, 'EC Regime on Public Procurement' in Khi V Thai (ed), *International Handbook of Public Procurement* (Taylor and Francis Group 2009) 252; Sune Troels Poulsen, Peter Stig Jakobsen, Simon Evers Kalsmose-Hjelmborg, 'Purposes and Principles' in *EU public procurement law: the Public Sector Directive, the Utilities Directive* (2nd edn, DJØF Publishing 2012) 29-30.

31 Roberto Caranta, 'Public Procurement for the SDGs – Rethinking the Basic' in Lela Melon (ed) *Sustainability in Public Procurement, Corporate Law and Higher Education* (1st edn, Routledge 2023) 3-21.

32 European Commission, <[https://single-market-economy.ec.europa.eu/single-market/public-procurement\\_en#:~:text=Why%20public%20procurement%20is%20important,of%20services%20C%20works%20and%20supplies](https://single-market-economy.ec.europa.eu/single-market/public-procurement_en#:~:text=Why%20public%20procurement%20is%20important,of%20services%20C%20works%20and%20supplies)> accessed 14 May 2024.

33 See mainly C-31/87 *Beentjes* [1988] ECR 04635; C-225/98 *Commission v France* [2000] ECR I-7445; Case C-513/99 *Concordia Bus* [2002] ECR I-7213; C-448/01 *EVN and Wienstrom* [2003] ECR I-14527; Case C-368/10 *Commission v Netherlands* [2012] ECLI-284; C-395/18 *Tim* [2020] ECLI:EU:C:2020:58.

34 Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts [2014] 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 [2014] 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 [2014] OJ L94/243.

35 On the topic see Marta Andhov, Roberto Caranta and others, 'Sustainability through public procurement: the way forward – Reform Proposals' (2020) SMART Project Report; Beate Sjaifjell and Anja Wiesbrock (eds) *Sustainable Public Procurement Under EU Law* (Cambridge: Cambridge University Press 2015).

36 Arts 8, 10, 26, 28, 49, 56 TFEU [2012] OJ C 326 and Art 18 PSD. On mutual recognition, see C-120/78 *Cassis de Dijon* [1979] ECR 649.

37 Recitals 75, 97, 104 and Arts 42, 43, 67 and 70 Dir 2014/24 [2014] OJ L 94.

38 Commission, 'The European Green Deal' COM(2019) 640 final, 8.

39 Commission, 'A New Circular Economy Action Plan: for a cleaner and more competitive Europe COM (2020) 98 final, 3.

40 Commission, 'European Green Deal Investment Plan' COM (2020) 21 final, 12.

41 See (n 12).

42 On the shift from 'how to buy' to 'what to buy', see Andhov, Caranta, Janssen, Martin-Ortega 2022 (n 12).

curement 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 that took place outside the EU or when a violation of environmental law outside the EU influences a public procurement procedure in the EU through the exclusion of an economic operator or rejection of an abnormally low bid.<sup>43</sup>

### III. Regulation (EU) 2023/1115 on Deforestation (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),<sup>44</sup> as measures to fight deforestation contribute to the achievement of the Union's environmental policy objectives established therein.<sup>45</sup>

The general objectives of the Regulation are to minimise 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.<sup>46</sup>

To achieve its goals, the Regulation lays down rules on market access for a number of *relevant products and commodities*.<sup>47</sup> The scope *ratione materiae* was identified based on the highest embodied deforestation<sup>48</sup> 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.<sup>49</sup> The Regulation's scope is progressive, as the EU intends to review the coverage list regularly.<sup>50</sup>

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-free<sup>51</sup> or harvested from forests without inducing forest degradation<sup>52</sup> after 31 December 2020,<sup>53</sup> and second, they must have been produced in compliance with the relevant legislation of the country of production.<sup>54</sup> The third is a formal requirement, as the relevant products must always be accompanied by a due diligence statement (hereinafter DDS).<sup>55</sup>

The obligations set out in the Regulation are directed to operators, traders, Member States and their competent authorities.<sup>56</sup> 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 distribu-

43 Ezgi Uysal, Willem Janssen, 'The European Green Deal and Public Procurement Law: Its Extraterritorial Reach beyond the EU's border' in Eritja Mar Campins and Xavier Fernandez-Pons (eds), *Deploying the European Green Deal: Protecting the Environment Beyond the EU Borders* (1st edn, Routledge 2024) 177-194.

44 Treaty on the Functioning of the European Union (TFEU) [2012] OJ C 326.

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

46 Art 1 and recital 18 EUDR.

47 *ibid* art 1.

48 'Embodied deforestation' refers to the deforestation occurring during the production of a good, commodity or service and is included as an externality in its production, trade and consumption. Deforestation embodied in EU27 consumption is almost entirely related to imports. See Commission, 2013 (n 8) IV.

49 See Annex I EUDR.

50 SWD (2021) 326 final (n 4) 34.

51 ie produced on land that has not been subject to deforestation.

52 Under the EUDR, 'Deforestation' and 'Forest Degradation' are defined, respectively 'the conversion of forest to agricultural use, whether human-induced or not' (Art 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 (Art 2(7)).

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

54 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 (Art 2(40)).

55 See details below.

56 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.

tion to commercial or non-commercial consumers, or for use in the business of the operator or trader itself.<sup>57</sup>

Before placing relevant products on the market or exporting them, operators must exercise due diligence, which includes three elements.<sup>58</sup> These are the collection of information, data and documents to demonstrate the products' compliance with the requirements of Article 3, risk assessment measures and risk mitigation measures.<sup>59</sup> Operators' due diligence obligations also include the establishment and maintenance of due diligence systems, consisting of a framework of procedures and measures to ensure product compliance. Reporting and record-keeping requirements are also set out.<sup>60</sup>

Additionally, 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, where they declare that, after exercising due diligence, no or only a negligible risk of non-compliance was found.<sup>61</sup> The risk is *negligible* where, after a full assessment of product-specific and general information and the adoption of any potential mitigation measures, the products or commodities 'show no cause for concern'<sup>62</sup> in relation to the requirements of freedom from deforestation or legality of production.<sup>63</sup> The DDS are electronically available and transmittable and must contain the information provided in Annex II. Once the DDS is submitted through the information system, the operator is responsible for the compliance of the relevant products.

Both operators and traders are subject to different obligations depending on their size. SMEs operators can rely on the due diligence already exercised by other operators and on existing DDS.<sup>64</sup> Similarly, non-SME traders are subject to the same obligations as non-SME operators, while SME traders are allowed to make relevant products available on the market only if they are in possession of specific information that they must collect and keep for at least five years.<sup>65</sup>

By 30 December 2023, Member States were required to designate one or more competent authorities responsible for ensuring compliance with the Regulation.<sup>66</sup> 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.<sup>67</sup> Competent authorities 'are responsible for the over-

all enforcement of the Regulation with regard to a relevant product entering or leaving the market'.<sup>68</sup> They must conduct compliance checks to meet certain quantitative and qualitative requirements.<sup>69</sup> They must also cooperate and exchange information with other entities, such as customs authorities of their own country and other Member States, the Commission and, if necessary, the administrative authorities of third countries.<sup>70</sup> Additionally, they can adopt immediate *interim* measures in case of potential non-compliance, and when non-compliance is detected, they can require corrective action.<sup>71</sup>

Member States are 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 publicly available an annual Union-wide report on the application of the Regulation.<sup>72</sup>

57 Concerning the definitions of the duty holders and the activities regulated, 'to the extent possible, they are based on concepts already existing in EU law in relevant internal market and customs legislation', see Commission, '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, 11. See also, ie, Arts 3(6) and (7) of Directive 2019/904 of the European Parliament and of the Council of 5 June 2019 on the reduction of the impact of certain plastic products on the environment [2019] OJ L 155/1, defines the regulated activities similarly.

58 Arts 4 and 8 EUDR.

59 *ibid* arts 9, 10 and 11.

60 *ibid* art 12.

61 *ibid* arts 4(2)(3) and Annex II. The DDS must include, for example, the operator's details, details on the quality and quantity of products, geolocation data on places of production.

62 *ibid* art 2(26).

63 *ibid* art 3(a) and (b).

64 *ibid* art 4(8).

65 *ibid* art 5.

66 *ibid* art 14.

67 The list of competent authorities appointed so far is available at: <<https://circabc.europa.eu/ui/group/34861680-e799-4d7c-bbda83c45da458/library/b52a6d25-e365-4301-a90a-59cf7ce2e8d3/details?download=true>> accessed 14 May 2024.

68 Art 26 EUDR.

69 *ibid* arts 16, 18 and 19.

70 *ibid* art 21.

71 *ibid* arts 23 and 24.

72 *ibid* art 22.

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.

#### IV. Exclusion as a Penalty: Leveraging Public Procurement to Enforce the EUDR

Under Article 25, Member States are required to lay down rules on penalties applicable to infringements of the Regulation by operators and traders, as well as to 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 must include certain measures listed thereafter. These include:

- (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.<sup>73</sup> Both amendments were introduced by the European Parliament, contributing to both delineating and extending the scope of the exclusion.<sup>74</sup>

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 judgments

become final, taking into account the relevant data protection rules.

On its part, the Commission shall publish on its website the list of such judgments, including the name of the legal person, the date of the final judgment, a summary of the activities that led to the infringement of the Regulation, as well as the nature of the sanction imposed, and its amount if it is a financial penalty.

Article 25 EUDR thus requires Member States to adopt effective, proportionate and dissuasive penalties and, at the same time, lists certain mandatory minimum penalties to be introduced in their national legal systems, including temporary exclusion from public procurement procedures. We therefore consider that the European legislator has deemed the latter to meet the requirements of effectiveness, proportionality and dissuasiveness demanded for all sanctions against violations of the EUDR. Nevertheless, it should be noted that the effectiveness, proportionality, and dissuasiveness of the exclusion penalty will also depend on the duration of the exclusion imposed on the economic operators. The maximum exclusion period is 12 months, which should be proportional to the seriousness of the infringement. Given this relatively short timeframe, it could be considered that the duration of the exclusion may not fully capture the different degrees of seriousness of EUDR violations. Indeed, as noted by Schoenmaekers, ‘if the debarment period is not sufficiently long, it might not be deterrent at all’, and, in any case:<sup>75</sup>

- ... the certainty of being debarred is far more likely to have a deterrent effect than the length of the actual debarment, at least if the length is not negligible.

On the other hand, Majtan stressed that using debarment for a shorter period, or not at all in case of non-serious offences, could result in a more flexible sanctions framework, which would not reduce competition significantly.<sup>76</sup>

Exploring the legal rationale of procurement exclusions as forms of punishment, Schoenmaekers points out that such measures may have a preventative effect, achieved by deterrence, insofar as they aim ‘to restrain economic operators from re-offending’, but also a retributive one, as they address the fact that:

73 COM (2021) 706 (n 58).

74 Parliament, Position on 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).

75 Sarah Schoenmaekers, ‘The EU Debarment Rules: Legal and Economic Rationale’ (2016) PPLR 91, 100.

76 Roman Majtan, ‘The Self-Cleaning Dilemma: Reconciling Competing Objectives of Procurement Processes’, 245, *The Geo Wash Int’L Rev* 2013, 58. On the trade-off between competition and debarment, Schoenmaekers argues that “the reduction of competition [caused by debarment] is justified to protect contracting authorities from untrustworthy operators and hence to protect public budgets” and other public interests. In this sense, the exclusion of tenderers is meant to result in less but better competition (n 76) 99, 104.

... those who did not respect the rules or behaved dishonestly pose unfair competition and have taken unfair advantage of their victims and the community in general...

Furthermore, she qualifies exclusion grounds 'as a form of incapacitation', precluding those who have committed certain negative conducts from participating in procurement procedures.<sup>77</sup>

As a regulation, the EUDR is binding in its entirety and directly applicable in all Member States, producing its effects without the need for implementing measures. Nonetheless, with regard to penalties, Article 25 requires Member States to adopt national implementing rules. In this respect, it is important to note that the general wording of Article 25, together with the absence of precise references to EU public procurement legislation, in particular Directive 2014/24, leaves the Member States with a wide margin of discretion in determining the sanctions and could result in an inconsistent interpretation and application of the Regulation.

## 1. The EUDR in Light of Broader Trends in EU Public Procurement Law

The EUDR reflects broader trends occurring in EU public procurement law. First, it constitutes an example of the shift towards mandatory sustainability requirements in public procurement. In light of the typology proposed by Janssen,<sup>78</sup> the EUDR seems to be set up as both a product-specific legislation, which impacts public procurement by regulating the process and production methods of specific products and producers from a deforestation-free perspective, and as a sectoral procedural mandatory requirement, which requires that procurement procedures be set up in an EUDR-compliant manner, in particular through the use of exclusion grounds.

Second, the EUDR resorts to public procurement as an instrument to enforce 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.<sup>79</sup> These are the Corporate Sustainability Due Diligence Directive (CSDD) Proposal<sup>80</sup> and the Proposal for a Green Claims Directive.<sup>81</sup> 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.<sup>82</sup> At the national level, particularly relevant is the French Climate and Resilience Law of 24 August 2021, which has created a form of public enforcement of the *duty of vigilance* by introducing a discretionary ground for exclusion from public procurement procedures for non-compliance with the obligation to draw up a vigilance plan.<sup>83</sup>

Third, together with the amended Proposal for a CSDD Directive, the EUDR illustrates the significant place that corporate human rights and environmental due diligence (HREDD) is gaining in the context of EU public procurement law.<sup>84</sup> Although an in-depth analysis of this linkage is beyond the scope of this contribution, it certainly deserves special attention within sustainable public procurement studies, as it becomes crucial to ensure that governments address and mitigate the potential adverse impacts caused by businesses involved in their value chains.<sup>85</sup>

77 Schoenmakers (n 75) 99.

78 Janssen (n 13) 16-19.

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

80 Commission, 'Proposal for a Directive on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937' COM (2022) 71 final (CSDD). See, in particular, the Amendments adopted by the European Parliament on 1 June 2023 on CSDD Proposal (COM(2022)71 – C9-0050/2022–2022/0051(COD)) and the final compromise text of 15 March 2024 (6145/24) of the Council.

81 Art 17(3) Commission, '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. See also Marta Andhov, Michal Kania, 'Ever-growing restrictions on whom public buyers can contract with – contemporary developments in the EU public procurement' (*Bestek*, 15 June 2023) <<https://bestek-procurement.com>> accessed 14 May 2024.

82 Ezgi Uysal and Willem Janssen (n 43).

83 For a French perspective on the concept of public enforcement, see François Lichère, 'La commande publique dans le projet de loi pour une industrie verte. Réflexions sur l'enforcement à la française' (2023) AJDA.

84 COM (2022) 71 final (n 80).

85 For an in-depth analysis of the topic, see Laura Treviño-Lozano and Ezgi Uysal, 'Bridging the gap between corporate sustainability due diligence and EU public procurement' (2023) Maastricht Journal of European and Comparative Law, 1–19; Claire Methven O'Brien and Roberto Caranta, *Due Diligence in EU Institutions' Own-Account Procurement: Rules and Practices* (Policy Department for Budgetary Affairs, European Parliament January 2024).



## 2. Anything New on the Public Procurement Exclusion Front?

Under Article 25(2)(d), a temporary exclusion for a maximum period of 12 months from public procurement procedures is stipulated 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 and modalities of application, and its potential to effectively contribute to implementing the EUDR.

With regard to the scope of Article 25(2)(d), it should be noted that the omission of a normative reference to Directive 2014/24/EU leaves open a question of fundamental importance, namely whether the exclusion for deforestation applies only to procurement procedures of European relevance, ie with an estimated value equal to or above the thresholds set out in Article 4 of the Directive.

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 obligations (ie the requirements for products to be deforestation-free and legally produced ex. Article 3 EUDR) and the violation of formal due diligence obligations (ie setting up a due diligence system and submitting a DDS containing the minimum information required) may call for the application of a penalty of exclusion to an economic operator. These breaches may occur in the country of production of the relevant commodity or product, in that of the tenderer, the contracting authority, or even in other EU or non-EU countries involved in the supply chain.<sup>86</sup>

A preliminary 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.<sup>87</sup> 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 'prohibits tenderers from participating in an indefinite number of future procurement procedures for a specific amount of time'.<sup>88</sup> 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.<sup>89</sup>

As already mentioned, 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. 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 who have been sanctioned with disqualification in all Member States.

Through mechanisms of notification by Member States, and information centralisation and publication by the Commission, the EUDR seems to create an EU-wide debarment/disqualification system. Such a system would operate upstream, before and regardless of the application of an exclusion criterion in a specific procurement procedure. This would be innovative not only because it would be the first EU debarment/disqualification system for contracts financed with national resources, but also because it would cover compliance HREDD.

## 3. Article 25 EUDR in Light of Article 57 PSD: A Mandatory Deforestation Exclusion Ground?

By requiring Member States to report non-compliant operators and traders - and the sanctions applied to

<sup>86</sup> On the potential extraterritorial effects of the 'deforestation exclusion' see (n 43).

<sup>87</sup> Chris Yukins and Michal Kania, 'Suspension and Debarment in the U.S. Government: Comparative Lessons for the EU's Next Steps in Procurement' 19-2 UrT 47 (2019) GWU Law School Public Law Research Paper No. 2019-39, 47-73.

<sup>88</sup> Pascal Friton and Janis Zöll, 'Article 57' in Roberto Caranta and Albert Sanchez-Graells (eds), *European Public Procurement: Commentary on Directive 2014/24/EU* (Edward Elgar Publishing 2021) 592.

<sup>89</sup> 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](https://commission.europa.eu/strategy-and-policy/eu-budget/how-it-works/annual-lifecycle/implementation/anti-fraud-measures/edes/edes-database_en)> accessed 14 May 2024.

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.<sup>90</sup> 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.<sup>91</sup>

It is unclear, however, how the debarment mechanism will operate in practice. It could work automatically without contracting authorities having to verify the existence of the ground for exclusion every time. If this solution were not feasible, contracting authorities would be called upon to apply the new exclusion ground for deforestation in the context of a specific procurement procedure. This could happen if an economic operator who has been debarred from public procurement by a final judgment for a violation of the EUDR decides to take part in a procurement procedure. In this regard, it remains to be defined whether contracting authorities have the discretion or the obligation to apply this ground for exclusion.

In order to interpret the procurement-related provisions of the EUDR, we can recall the discipline of exclusion provided by Article 57 PSD. The article is placed in the section 'Choice of participants and award of contracts', subsection 'Criteria for qualitative selection', containing provisions aimed at skimming among tenderers for their qualities or deficiencies to help contracting authorities identify reliable candidates.<sup>92</sup> 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.<sup>93</sup> In the case of mandatory exclusion grounds, the 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'.<sup>94</sup> In any case, Member States are left with freedom as to whether to appoint a higher official 'to oversee exclusion and debarment'.<sup>95</sup> 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 decentralised level'.

As we said, the inclusion of the temporary exclusion penalty of Article 25(2)(d) EUDR in Member States' national law is mandatory. However, the EUDR does not clarify whether Member States should include it as a mandatory or discretionary ground for exclusion. In this regard, we argue that the new exclusion ground created by the EUDR must be given a mandatory nature. As such, if the contracting authority verifies that an economic operator has been sanctioned with temporary exclusion from public procurement procedures by a final judicial decision, it will have no discretion and will have to exclude that economic operator from the procurement procedure.

As Article 25(3) EUDR only refers to *final judgments* - to be considered final, no further legal remedies are available - it seems that the exclusion is to be imposed by courts as an accessory penalty for breaches of the law, excluding administrative decisions from the scope of the provision. In this regard, one could see a similarity 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 a final judgment on a number of reasons, which are provided, in an exhaustive manner, by the article. In any case, as for Article 57(1), it must be observed that 'there may be cases in which administrative decisions could lead to mandatory exclusion in a way that complies with EU law...'.<sup>96</sup>

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 is Article 57(4)(a) PSD, which provides that an economic operator can be excluded when a contracting authority can demonstrate that it does not comply with applic-

90 Arts 22(1)(d), (2) and 25(3) EUDR.

91 Marian Lemke and others, 'Implementing the EU Directives on the Selection of Economic Operators in Public Procurement Procedures' (2018) OECD, 100 and ff. On the topic of procurement blacklisting, Albert Sanchez-Graells, 'Competition Infringements and Procurement Blacklisting' (2016) Competition Law Journal.

92 Recital 101 EUDR and C-41/18, *Meca* [2018] ECLI:EU:C:2019:507, para 30; C-395/18 *Tim* [2020] ECLI:EU:C:2020:58, para 49. On the wider purposes of exclusion grounds, Friton and Zöll (n 88).

93 Friton and Zöll (n 88) 594-595.

94 Yukins and Kania (n 87) 68.

95 *ibid* 69.

96 Friton and Zöll (n 88) 595.

able obligations in the field of environmental, social and labour law obligations set out in Article 18(2). With the wording ‘applicable obligations’, Article 18(2) refers to national, EU and international laws, including those listed in Annex X. Moreover, pursuant to Article 57(4)(c) 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.<sup>97</sup>

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.<sup>98</sup> However, Article 25(2)(d) EUDR imposes a maximum duration of 12 months on all Member States. In this respect, we argue that when the duration of the debarment/disqualification is specified in the final judicial decision, the contracting authority must comply with it. Otherwise, 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.<sup>99</sup>

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 mea-

asures that are necessary to prevent future misconduct.

Self-cleaning is, for Arrowsmith, a right in the hands of economic operators, founded on the well-established Treaty’s four freedoms.<sup>100</sup> According to Article 57(6)(4), an economic operator whom a final judgment has excluded 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 argue that self-cleaning would not be available in any EU Member States during the deforestation exclusion period established by the final judgment.

This paper does not investigate the implications of Article 25(2)(d) 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 misconduct or violation of obligations in Article 18(2). However, an in-depth analysis of this issue is necessary and should also cover the duration of these exclusions and the application of self-cleaning measures.

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.<sup>101</sup> It should be recalled that, when submitting requests to participate or 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.<sup>102</sup> 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.<sup>103</sup> As the doctrine points out:<sup>104</sup>

Where 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.

97 Friton and Zöll (n 88) 606 ff.

98 Art 57(7) PSD.

99 Friton and Zöll (n 90) 632.

100 Sue Arrowsmith, Hans-Joachim Priess and Pascal Friton, ‘Self-Cleaning - An Emerging Concept in EC Public Procurement Law’ in Sue Arrowsmith, Hans-Joachim Priess and Pascal Friton (eds) *Self-Cleaning in Public Procurement Law* (Heymanns 2009) 3, 11.

101 *ibid* art 56(1), Friton and Zöll (n 88) 603.

102 *ibid* art 59.

103 *ibid* art 60.

104 Friton and Zöll (n 88) 599.

Moreover, as pointed out by Schoenmaekers, '[s]ince it is not mandatory to ask for such proof, contracting authorities are not always aware of the existence of a valid reason for debarment'.<sup>105</sup>

Finally, it is important to bear in mind that the mandatory exclusion of an economic operator for breach of obligations under the EUDR does not have to be linked to the subject matter of the contract. So, irrespective of the risks associated with the specific purchase at issue, any procurement procedure could be used to ensure compliance with the obligations of the EUDR regarding combating deforestation.

## V. Conclusions - Public Procurement to Enforce Deforestation-Related Obligations: Lessons Learnt and Potential Improvements

The adoption of the EUDR could be a crucial step in the EU's trajectory towards the promotion of global sustainable development, highlighting its commitment to combating deforestation through binding rules.

This paper explored the complex interplay between the new obligations to combat deforestation and the role of public procurement as a tool for their implementation. As seen, the EUDR constitutes an example of the shift towards mandatory sustainability requirements in public procurement. Secondly, it reflects the increasing use of public procurement - particularly exclusion grounds - to enforce rules established in other areas of law.<sup>106</sup> In particular, under the EUDR, public procurement becomes a field to ensure compliance with corporate due diligence obligations.

It was also pointed out that the vague wording of the procurement provision of the EUDR (Art. 25) leaves room for inconsistent interpretation by Member States and that the exact modalities of the new 'exclusion for deforestation' are unclear. However, the mechanisms proposed under the EUDR, which involve Member States reporting non-compliant economic operators and the Commission publicly disclosing this information, are innovative in nature. In fact, they suggest the creation of a system of disqualification from public procurement procedures at European level.

Debarring an economic operator from public procurement throughout the EU for a certain period of

time may result in significant economic and reputational harm, especially when this information is made available to the public, as foreseen under the EUDR.<sup>107</sup> 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'.<sup>108</sup>

The new mandatory exclusion for deforestation has both a preventative nature, in that it prevents companies from adopting certain behaviours and brings about cultural change, and a punitive nature, in that it affects the reputation of companies and leads to economic loss resulting from the termination of further business relations with public authorities. However, the threat of this new ground for exclusion will only act as a deterrent to non-compliance of the EUDR if an operator plans to partake in public tenders in the future.<sup>109</sup> Additionally, as mentioned, 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 EUDR should also reveal the impact of penalties. It requires the publication of an annual report by the Commission providing a Union-wide overview of the application of the Regulation. The report will be based on the data submitted by Member States, including their monitoring activity, checks, corrective actions and penalties. Additionally, it would be desirable that the impact of penalties is also assessed in the five-yearly reviews provided for in the Regulation.<sup>110</sup>

Centralising and facilitating the collection of data on non-compliant economic operators and sharing

105 Schoenmaekers (n 75) 95.

106 Lichère (n 83) 2.

107 Arts 22, 25(3), 33(5) and recital 62 EUDR.

108 *ibid* Recital 75.

109 Schoenmakers (n 75) 100-102.

110 Art 34 Reg (EU) 2023/1115 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.

them broadly and openly, particularly between competent authorities and contracting authorities of the Member States, is crucial for an effective implementation of the EUDR. Some 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 collect in a single system information on companies found in breach of relevant obligations.<sup>111</sup> Schoenmaekers also raises the problem of the lack of expertise on the part of contracting authorities to take exclusion decisions, in particular those not related to technical and financial aspects, and underlines the

need to create registers containing an overview of the exclusion and self-cleaning decisions taken by all contracting authorities.<sup>112</sup>

We believe that unlocking the potential of public procurement against deforestation requires a careful assessment of deforestation-related risks at every stage of any procurement process, regardless of their economic value. This includes the planning phase of tenders, decisions on what to buy and the definition of relevant requirements, as well as contract performance, extending beyond the mere application of exclusion grounds. To achieve this objective, it is advisable to include clear deforestation criteria and provisions both in future EU public procurement directives and in sectoral legislative initiatives.<sup>113</sup> 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 HREDD on EU and global market players, leading to more sustainable and responsible production and consumption. The EUDR can have a significant impact on the possibility of companies to participate in 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 these mechanisms to ensure compliance with other objectives (and obligations) related to the transition towards sustainable development.

111 Jean-François Kerléo, François Lichère, Elise Untermaier-Kerléo and Cédric Bernard, 'Pour une Loi Sapin 3' (2023) Chaire de droit des contrats publics and Observatoire de l'éthique publique; Baptiste Vassor, 'La multiplication des motifs d'exclusion à l'appréciation de l'acheteur public' (*Actualité fonction publique*, 2 November 2023) <<https://www.weka.fr>> accessed 14 May 2024.

112 Sarah Schoenmaekers, 'Self-cleaning and leniency: comparable objectives but different levels of success?' (2018) 13(1) EPPPL 3, 17.

113 This would be the case, for instance, of the Legislative Framework for Sustainable Food Systems (FSFS), whose adoption was planned as part of the Farm to Fork Strategy. This legislative initiative foresees the adoption of EU minimum mandatory criteria for public food procurement. The FSFS has not yet been delivered and its future adoption is uncertain. See <[https://food.ec.europa.eu/horizontal-topics/farm-fork-strategy/legislative-framework\\_en](https://food.ec.europa.eu/horizontal-topics/farm-fork-strategy/legislative-framework_en)> accessed 14 May 2024.