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EU Legal Framework on logging and trade in timber: the FLEGT Regulation and the Timber Regulation

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Overview

- Political & Policy Background
- EU Timber Regulation
- FLEGT Regulation
- Connection between FLEGT and Timber Regulations
- Related legislation internationally



EU Political Commitments

Communication from the Commission (COM(2008) 645/3)

- At least halve gross tropical deforestation by 2020
- Halt global forest cover loss by 2030

New York Declaration on Forests (2014)

- Halve natural forest loss by 2020
- End natural forest loss by 2030



EU commitments to address deforestation date to at least 2001. They have been repeated and slightly modified over time.

The most recent public commitment being the September 2014 New York Declaration on Forests.

Policy Background

- **Forest Law Enforcement Governance and Trade (FLEGT) Proposal for an EU Action Plan (2003)**
 - To address illegal logging and related trade
 - **Timber trade focus**
 - **Develop FLEGT Voluntary Partnership Agreements** - including licensed legal timber (FLEGT Regulation 2005)
 - **Review options for legislative options to control EU market access** → Timber Regulation (EUTR 2010)



In 2001 the OECD estimated that the global trade for illegal timber was worth in the region of EUR150billion.

Policy background followed from a recognition of the destructive impacts of illegal logging from social, environmental and economic perspectives. And the connection with corruption and organised crime.

2002 estimate of lost revenue to governments in forested countries in the region of EUR 10 – 15billion.

Illegal logging therefore recognised to undermine several essential elements of EC's development objectives.

Recognition that the problem of poor governance in forests countries was compounded by strong international demand for timber that does not effectively discriminate between legal and illegally harvested timber.

The FLEGT Action Plan also included a focus on public procurement mechanisms

Overview of EU Timber Regulation

- Regulation (EU) 995/2010
 - Commission Implementing Regulation (EU) 607/2012
 - Commission Delegated Regulation (EU) 363/2012
- Aim: prevent illegally harvested timber and derived products accessing the EU market
- Applies to timber and timber products when „first placed“ on the EU market



All references are to Regulation 995/2010 unless otherwise stated

Implementing Regulation 607/2012: developed details on the exercise of due diligence and checks on Monitoring Organisations

Delegated Regulation 363/2012: developed procedural rules on the recognition of Monitoring Organisations

Overview of EU Timber Regulation

- Timber with a valid CITES licence or FLEGT certificate is recognised as legal
- Implemented and enforced at Member State level



EUTR - key definitions

- **Operator:** any natural or legal person that places timber or timber products on the market (Article 2(c))
- **Placing on the market:** the supply, by any means, of timber or timber products, for the first time on the internal market, for distribution or use in a commercial activity, in return for payment or free of charge (Article 2(b))
- **Trader:** natural or legal person selling timber already on the internal market (Article 2(d))



EUTR - key definitions

- Legally harvested: harvested in accordance with national applicable legislation in the country of harvest (Article 2(f))
- Applicable legislation: legislation in force in the country of harvest within 5 categories (Article 2(h))
- Product scope: timber and timber products set out in Annex (defined by HS code) (Article 2(a))



EUTR

- Main obligations apply to **Operators**, which:
 - Are **prohibited** from placing illegally harvested timber or derived products on the EU market
 - Must exercise **due diligence**
 - Must maintain and regularly evaluate their due diligence system
 - Must maintain records of their due diligence for 5 years (Article 4, EUTR & Article 5(1) Regulation 607/2012)



The prohibition and due diligence obligation are separate, complimentary requirements.

An operator is required to meet both.

EUTR - Due Diligence

- Requires Operators to evaluate the **risk of illegality** of harvest
- 3 steps to due diligence (Art 6(1)):
 - **Access to information** concerning the timber supply
 - **Risk assessment** procedures to analyse and evaluate risk of illegality
 - Unless the risk is assessed to be negligible, **risk mitigation procedures**, adequate and proportionate to minimise the risk



NB – the term ,due diligence‘ appears to not be equally well understood in all languages/legal traditions.

Operators must maintain records of these steps for at least 5 years (Reg 607/2012 Art 5)

EUTR - Due Diligence (Article 6)

Information

- Species
- Country / region of harvest
- Quantity
- Supplier
- Buyer
- Documents/information indicating compliance with laws

Risk Assessment

- Assurance of compliance with legislation
- Prevalence of illegal harvest of species
- Prevalence of illegal harvest in country
- Sanctions by UN/EU on timber
- Complexity of supply chain

Risk Mitigation

- IF risk is greater than 'negligible', take steps to reduce risk e.g.
- Require additional information
- Third party verification



EUTR - exercising due diligence

- If using third party verification (e.g. FSC/PEFC) for risk assessment or mitigation, Operators must:
 - ensure the system meets the established criteria
 - maintain records of how they have determined the system meets the relevant criteria

(Article 4, Regulation 607/2012)

- There is no *de minimis* - due diligence must be done on all timber



EUTR - Monitoring Organisations

- Monitoring Organisations:
 - Organisations officially recognised by the Commission as providing appropriate due diligence systems
 - Make due diligence systems available to Operators to use
 - Must verify that Operators use the due diligence system appropriately

(Article 8)

- Non-compliance by Monitoring Organisations is the responsibility of the Commission



EUTR

- Traders

- Must be able to identify:
 - The operator/trader from which they obtained timber/ & timber products
 - The trader to which they supplied timber & timber products
- And must maintain these records for 5 years

(Article 5)



Key questions for compliance/enforcement

- Who is the operator?
 - When is timber first placed on the market?
 - (i) On the internal market; (ii) for the first time; (iii) in the course of a commercial activity
- What information is needed:
 - For compliance with applicable legislation
 - To show that the risk of illegality is 'negligible'
- Complex products - multiple tree sources
- CITES certificates/FLEGT licences



The Commission Guidance document deals with each of these issues – as well as others.

Placing on the market

a) For timber harvested within the EU, the entity that distributes or uses the timber when it has been harvested, is the operator.

(b)(i) For timber harvested outside the EU, the entity acting as the importer when the timber is cleared by EU customs authorities for free circulation is the operator. In the majority of cases, the importer can be identified as the named or numbered “Consignee” in Box 8 of the customs declaration document (Single Administrative Document).

(b)(ii) For timber or timber products imported to the EU, the definition of operator is independent of the ownership of the product, or other contractual arrangements.

(Commission Guidance document – Section 1)

EUTR - Enforcement

- Member States enforce the EUTR at national level
- Each Member State has one (or more) Competent Authority, responsible for checks and enforcement
- Member States penalties must be „effective, proportionate and dissuasive“ (Art 19)
- Third parties may submit „substantiated concerns“ (Art 10(1))



Differences in Member State penalty regimes exist, including in terms of the level of potential sanctions; and the degree to which the severity of the breach must be established.

Breaches within Member State competence

Operators

- Placing illegal timber on the market:
 - Establishing the timber was illegal
 - Evidence from other jurisdictions

- Failure to maintain a due diligence system

- Failure to exercise due diligence:
 - Did the Operator access the relevant information
 - Were risk mitigation steps (if any) sufficient
 - Were appropriate records maintained



Member State penalty regime highlights

France

- **Administrative sanctions:**
 - Breach of prohibition or DD obligation
 - If a formal notice is not complied with
 - Fine - up to EUR 15,000 with EUR 1,500/day

- **Criminal sanctions:**
 - Breach of prohibition
 - Failure to comply with a formal notice
 - Up to EUR100,000 +/-or detention (up to 2 years)
 - Timber confiscation



Member State penalty regime highlights

Netherlands

- **Administrative sanctions:**
 - Breach of prohibition or DD obligation (no intention)
 - Fine: up to EUR20,250 +/- or detention (up to 6 months)
 - Timber seized +/- or trade suspended

- **Criminal sanctions:**
 - Breach of prohibition or due diligence (with intention)
 - Failure to comply with a formal notice for remedial action
 - Fine: up to EUR20,250 +/- or detention (up to 2 years)
 - Timber seized +/- or trade suspended



Enforcement to date

- Netherlands:

- Timber from Cameroon supplier known to log illegally
- Dutch CA had warned the company (Fibois) that it was non-compliant with DD - no mitigation measures
- Fibois took no corrective action
- Dutch CA issued a non-compliance penalty per m³ for wood previously placed on market
- Fibois has appealed

- 25% of Dutch companies checked have not had adequate DD. Have 6 months to improve.



Placing on the market

a) For timber harvested within the EU, the entity that distributes or uses the timber when it has been harvested, is the operator.

(b)(i) For timber harvested outside the EU, the entity acting as the importer when the timber is cleared by EU customs authorities for free circulation is the operator. In the majority of cases, the importer can be identified as the named or numbered “Consignee” in Box 8 of the customs declaration document (Single Administrative Document).

(b)(ii) For timber or timber products imported to the EU, the definition of operator is independent of the ownership of the product, or other contractual arrangements.

(Commission Guidance document – Section 1)

Enforcement to date

- Sweden:
 - Teak flooring from Thailand with timber from Myanmar
 - Key risk = high incidence of forest sector corruption in Myanmar
 - Swedish CA issued an injunction for failure to do due diligence.
 - Company prevented from placing flooring on the market until risk is mitigated
 - 3 months to improve DDS
 - Swedish CA has issued at least 30 similar injunctions since 2014



Placing on the market

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(Commission Guidance document – Section 1)

FLEGT Regulation

- Council Regulation (EC) 2173/2005
- Commission Regulation (EC) 1024/2008
- Legal basis for Voluntary Partnership Agreements (VPAs)
 - Voluntary to enter in to
 - Legally binding once agreed
- VPAs → bilateral basis for the development of a FLEGT licensing scheme for FLEGT licenced timber to the EU market



Overview of FLEGT Regulation

- FLEGT licensed timber = legal in accordance with national legislation
- A national Timber Legality Verification System (TLAS) certifies legality
- Implemented and enforced in Partner country and at Member State level
- No FLEGT licences yet issued (April 2016)



FLEGT Regulation - key obligation

- Imports to the Community of timber products from partner countries are prohibited unless the shipment has a valid FLEGT licences (Article 4, Reg. 2173/2005)
- Prohibition applies once FLEGT licences commence
- Product scope:
 - Annex 1 Regulation 2173/2005
 - VPA agreement Annex (as relevant)



FLEGT Regulation - in practice

- FLEGT licence to be available to Member State competent authority with the customs declaration (Article 5, Reg. 2173/2005)
- Competent authorities to keep a paper or electronic record of FLEGT licences (Article 5(1), Reg. 2173/2005)
- FLEGT licences will be time limited



FLEGT licences to be made available in the Member State in which the shipment is declared for release for free circulation (Article 6, Regulation 1024/2008)

FLEGT Regulation - in practice

- Where the validity of the FLEGT licence is in doubt, competent authorities may seek additional information from the licensing authority in the VPA country (Article 5(5), Reg. 2173/2005)
- The weight/volume of a shipment may not differ by more than 10% indicated in the licence (Article 10(2), Reg. 1024/2008)



FLEGT licences to be made available in the Member State in which the shipment is declared for release for free circulation (Article 6, Regulation 1024/2008)

FLEGT Regulation - enforcement

- Member State to establish penalties („effective, proportionate and dissuasive“) (Article 5(8), Reg 2173/2005)
- An EU-electronic system to recognise licences is being developed (due March 2016)



Connection between EUTR and FLEGT

- **FLEGT Regulation:**
 - Bi-lateral agreements between the EU and forested countries (Voluntary Partnership Agreements)
 - To strengthen forest governance in timber producing countries
 - One element: FLEGT licences to certify the legality of timber

- **EUTR:**
 - Requires that timber & timber products are legal to have access the internal market
 - Timber with FLEGT licences is recognised as legal



EU commitments to address deforestation date to at least 2001. They have been repeated and slightly modified over time.

The most recent public commitment being the September 2014 New York Declaration on Forests.

Related legislation internationally

- US Lacey Act, Amended 2008
- Australian Illegal Logging Prohibition Act 2012
- Draft Japanese Law on the Trade of Illegal Timber



Looking ahead

- Further enforcement of the EUTR
- FLEGT licences anticipated 2nd half of 2016



Thank you / Questions

