

EU Briefing Paper

Recommendations for the proposed Due Diligence Regulation concerning the placing of timber and timber products on the EU market

INTRODUCTION: After six years of debate, civil society groups welcome the due diligence regulation concerning the placing of timber and timber products on the EU market introduced by the European Commission but are concerned that the current discussions in the Council might not lead to an effective solution. At the next Agriculture Council, Ministers have the opportunity to reaffirm their determination to combat deforestation and forest degradation globally by voting in favor of a strong due diligence regulation to ensure that wood and wood products sold to European consumers are **LEGAL**.

Strong legislation at EU level is needed to guarantee that only timber and timber-based products from legal sources are placed and traded on the EU market. This legislation should set a new precedent for reforming the international forestry sector and promoting environmentally and socially responsible forest management, while helping to reduce EU countries and corporate actors footprint on the world's forests.

With the meeting of the Agriculture Council and the Climate Conference in Copenhagen (4-18 December) coinciding, the EU has the opportunity to establish itself as a leader in the forest policy debate by showing vision and political determination. To lead this breakthrough effort, we call on you and your EU partners to make vital amendments to close loopholes in the Commission proposal, and transform the due diligence regulation into an effective and credible tool to fight forest destruction. In our view, a good Council political agreement should include, as a minimum, a clear commitment to:

- ❶ Set a minimum level of sanctions and penalties throughout the Community, mirroring provisions of the Illegal, Unreported and Unregulated. (IUU) Fishing Regulation,
- ❷ Support a comprehensive definition of legally-produced timber that encompasses all relevant environmental, social and economic laws related to forests, as well as human rights and labor laws, land-tenure, fiscal and commercial laws,
- ❸ Introduce a clear list of what constitutes an offence under the regulation and determine prohibited actions,
- ❹ Apply the Regulation to all wooden products without exemption and without a phased approach, and close loopholes for biomass and recycled wood products,
- ❺ Ensure the immediate application of all elements of the due diligence regulation,
- ❻ Provide enforcement agencies with powers to control operators and timber products, and make sure that shortcomings and infringements are systematically reported.
- ❼ Establish a robust set of criteria and a centralised accreditation procedure at EU level for monitoring organisations,
- ❽ Extend the duty of care to all operators throughout the supply chain, with differentiated obligations,
- ❾ Require operators who establish their own due diligence system to have it audited regularly by independent third party verifiers, and establish the basis of a reliable risk management procedure that will help identify and mitigate the risks associated with certain products and suppliers,

1. Set a minimum level of sanctions and penalties, mirroring provisions of the Illegal, Unreported and Unregulated. (IUU) Fishing Regulation,

The Council should support the Parliament proposal to establish a minimum level of sanctions and penalties at EU level to ensure a level playing field and dissuade operators from becoming involved in illegal timber transactions. There is no legal obstacle for specifications of penalties and sanctions in case of non-compliance with the due diligence regulation. As shown in the legal analysis conducted by the legal experts 'Client Earth', such provisions already exist in EU legislation in related fields¹. (e.g. EU regulation establishing a Community system to prevent, deter and eliminate illegal fishing).

Parliament proposal – Specification of penalties and sanctions

Article 13 Penalties

The Member States shall lay down the rules on penalties applicable to infringements of the provisions of this Regulation and shall take all measures necessary to ensure that they are implemented. The penalties provided for **may be criminal or administrative, must be effective, proportionate and dissuasive and shall include, where appropriate, inter alia:**

- (i) **Financial penalties reflecting :**
- **the degree of environmental damage;**
 - **the value of the timber products;**
 - **the tax losses and economic damage occasioned by the infringement;**
- (ii) **Seizure of timber and timber products;**
- (iii) **Temporary prohibition from marketing timber and timber products.**

Where legal proceedings are pending, operators shall suspend sourcing timber and timber products from those areas.

Financial penalties shall represent at least five times the value of the timber products obtained by committing a serious infringement. In case of a repeated serious infringement within a five-year period, the financial penalties shall gradually increase up to at least eight times the value of the timber products obtained by committing a serious infringement.

Without prejudice to other provisions laid down in Community law, pertaining to public funds, Member States shall not grant any public aid under national aid regimes or under Community funds to operators convicted of a serious infringement of this Regulation, until corrective measures have been taken and effective, proportionate and dissuasive penalties have been applied.

2. Support a comprehensive definition of legally produced timber

We urge the Council to support the definition of legally produced timber proposed by the European Parliament in Article 2 in its first reading (April 2009). It is for the moment the best and most comprehensive definition to properly address the threat of illegal logging and, in the process, protect the rights of indigenous and local people, our endangered forests and biodiversity, ecosystems, and climate therein.

Definition of legally produced timber proposed by the European Parliament

'Applicable legislation' means the legislation whether national, regional or international, in particular that concerning the conservation of biological diversity, forest management, resources use rights and the *minimization* of adverse environmental impacts. It should also take into account property tenure, rights of indigenous peoples, labor and community welfare legislation, taxes, import and export duties, royalties or fees related to harvesting, transportation and marketing

As a minimum, EU member states should support a definition of legally produced timber that is fully consistent with the definition contained in the FLEGT VPAs². We are concerned that any definition of legally produced timber below these requirements could create a disincentive for developing countries to engage in the negotiation of FLEGT voluntary partnership agreement (VPAs) and place at disadvantage those countries who have already signed a VPA.

¹ **Legal Analysis: Specification of penalties for non-compliance with the illegal timber regulation**
http://www.clientearth.org/images/stories/CE_pdfs/ClientEarth%20Briefing%20Due%20Diligence%2021%20Sept%2009.pdf

² **FLEGT Briefing Note – What is legal timber ?**
http://ec.europa.eu/development/center/repository/B2_Flegt_BR2_2007final_en.pdf

Definition of legally produced timber used for FLEGT voluntary partnership agreements

Definitions of legally produced timber should incorporate laws that address the three pillars of sustainability – i.e. those aimed at economic, environmental and social objectives. These are likely to include:

- Granting of and compliance with rights to harvest timber within legally-gazetted boundaries;
- Compliance with requirements regarding forest management, including compliance with relevant environmental, labor and community welfare legislation;
- Compliance with requirements concerning taxes, import and export duties, royalties and fees directly related to timber harvesting and timber trade;
- Respect for tenure or use rights to land and resources that may be affected by timber harvest rights, where such rights exist;
- Compliance with requirements for trade and export procedures.

3. Introduce a clear list of what constitute an offence under the regulation, and determine prohibited actions,

EU Member States should introduce a list of what constitute an offence under the due diligence regulation, and determine what prohibited actions on the EU market are. The benefit of such a list will be to provide clarity on permissible and impermissible behavior for first and subsequent operators. This can be achieved in Article 13, or under a new article. Here is the list that we suggest:

- *the failure by an operator to establish a due diligence system;*
- *the failure by an operator to establish and/or operate a due diligence system which meets all the requirements of this Regulation and in particular of Article 4,*
- *the placing on the market of any timber and timber products that has been harvested, taken, sold, traded or possessed in contravention with the applicable legislation, if attempted or committed with intent, recklessly or by serious negligence.*

Creating these offences and the application of a due diligence system are complementary regulatory tools. As demonstrated in the legal analysis from the law firm (Client Earth), there is no legal obstacle to the co-existence of these two approaches, which if implemented would provide powerful disincentives to engage in the illegal-timber trade³.

4. Apply the Regulation to all wooden products without exemption and without a phased approach, and close loopholes for biomass and recycled wood

ALL wood products, including wood products used for energy production, should fall under the scope of this Regulation. There should not be any exemption or phase-in implementation allowed in this Regulation (Article 2, Annex). There are no good technical or economical reasons to delay the use of due diligence systems in the wood processing, energy production or pulp and paper industry. While the EU actively supports the reduction of greenhouse gases emissions from deforestation and forest degradation in the context of the climate negotiations, it would be unacceptable to allow a large portion of the forest-based industries to continue trading in illegal timber and fuelling forest degradation worldwide until well into the next decade.

As we understand, the Council is debating, whether to exclude recycled wood products. This exemption should be removed. The purpose of the due diligence regulation is to minimize the risk of illegal timber entering into the supply chain of wood products. This risk exists for recycled wood products as much as for non-recycled wood products. Illegal timber could be mixed with recycled wood products in order to reduce the price of production. Products, that are labeled as recycled but are manufactured with real timber from illegal sources could also be placed on the market. To minimize these risks, recycled wood products should be covered by the Regulation. A clear definition of what constitutes recycled wood products and a specific set of requirements and obligations should be established in order to take into account the specific nature of recycled wood products.

³ **Legal Analysis: Due Diligence in the Illegal-Timber Regulation**

http://www.clientearth.org/images/stories/CE_pdfs/ClientEarth%20Briefing%20Due%20Diligence%2021%20Sept%2009.pdf

5. Ensure the immediate application of the due diligence regulation

The Regulation should be applicable immediately after its entry into force. Policies and instruments to combat illegal timber and that, in addition, enhance sustainable forest management are being discussed at EU level since 2001 (first consultation before publication of the EU FLEGT action plan), with the active involvement and participation of the industry. Due diligence systems exist and are already available on the market. There is no good reason for further lengthy delays before the application of the Regulation.

6. Provide enforcement agencies with powers to control operators and timber products, and make sure that shortcomings and infringements are systematically reported.

The due diligence regulation (Articles 5.1c and Article 7.3) should require monitoring organizations and national competent authorities to systematically report back all shortcomings and infringements identified during audit and control inspection of companies.

We understand that the current draft Council agreement does not provide for this, which threatens to create uncertainty and confusion for the monitoring organizations (in article 5.1c, how to differentiate a serious from a non-serious failure?) and for the national competent authorities (in article 7.3 - in what circumstances should they report back shortcomings and issue a notice of remedial actions?).

To discourage illegal behavior and facilitate implementation, the Council should give a clear mandate to enforcement agencies throughout the Community to perform various controls on both monitoring systems and on individual operators where necessary. These controls should include regular checks, field audits, investigations, unannounced controls, raids and sting operations. Where serious infringements are suspected of having taken place, competent national authorities should be provided with powers to start full investigation and apply immediate enforcement measures. (I.e. Immobilizing transport vehicle, seizing and confiscating timber or timber products etc).

7. Establish a robust set of criteria and a centralized accreditation procedure at EU level for monitoring organizations

With regard to Article 5, a centralised procedure of accreditation at EU level is the less expensive, less burdensome and most effective of all options, and should therefore be supported by the Council. As demonstrated in a legal analysis conducted by the legal experts 'Client Earth' ⁴, there are at least four other good reasons why the accreditation procedure should be centralised:

- The accreditation procedure requires subjective determinations as to whether any given monitoring organization complies with regulatory requirements, which could create different standards across Member States under a fully, or partially decentralized accreditation procedure.
- A centralized accreditation procedure would prevent inconsistent standards, inconsistent recognition, forum-shopping, and undue burdens, any of which would diminish the effectiveness of the regulation and harm enforcement and compliance efforts.
- A centralized accreditation procedure would lead to a more efficient distribution of resources, allowing competent authorities to allocate scarce time and resources toward activities that simply cannot be performed at the Commission level.
- The principle of 'subsidiarity' invoked by certain EU member states is outweighed by the need for harmonized standards in the accreditation procedure and the establishment of common rules.

Regarding the eligibility criteria on which the accreditation process will be based, the list proposed by the European Commission is incomplete and critically insufficient to ensure that monitoring organizations are equipped to perform the tasks and provide the services specified in the Regulation.

⁴ **Legal Analysis: Accreditation Procedure in the Illegal-Timber Regulation**

http://www.clientearth.org/images/stories/CE_pdfs/Climate%20and%20forests%20ClientEarth%20Accreditation.30.Oct.09.pdf

We recommend the Council to add three more criteria to the list set out in Article 5 of the EC proposal:

- *it is independent from the operators it certifies,*
- *it has appropriate expertise,*
- *it has no conflict of interest with competent authorities and with the operators it certifies;*

8. Extend the duty of care to all operators throughout the supply chain, with differentiated obligations depending on their position in the chain,

We strongly advise the Council to support the Parliament proposal in Article 2 to extend the duty of care to all operators throughout the supply chain, with differentiated obligations depending on their position in the chain. The Parliament proposal establishes two tiers of operators with differing responsibilities. Similar to the Commission proposal, first operators must still put in place a full due diligence system. The second tier of subsequent operators shares responsibility for trading legal timber. But the requirements on subsequent operators are less burdensome.

Article 2
(aa) 'making available on the market' means any supply of timber and timber products on the Community market for distribution or use in the course of a commercial activity whether in return for payment or free of charge; Article 2b
(b) 'placing on the market' means the first making available of timber and timber products on the Community market ; subsequent processing and distribution of timber does not constitute 'placing on the market';
Article 2c
(c) 'operator' means any natural or legal person that places or makes available on the market timber or timber products;
Article 3
1. Operators shall ensure that they place or make available on the market only legally harvested timber and timber products.
2. Operators who place timber and timber products on the market shall establish a due diligence system containing the elements referred to in Article 4 or make use of a due diligence system of a recognized monitoring organization referred to in Article 5(1). Existing national legislative supervision and any voluntary chain of custody mechanism, which fulfil the requirements under this Regulation may be used as a basis for the due diligence system.
2a. Operators who make timber and timber products available on the market shall, throughout the supply chain, be able to:
(i) Identify the operator who has supplied the timber and timber products, and the operator to whom the timber and timber products have been supplied;
(ii) Provide upon request information on the name of the species, the country/countries of harvest and where feasible the concession of origin;
(iii) Check, where necessary, that the operator who has placed the timber and timber products on the market has fulfilled his obligations under this Regulation.

- The first requirement is often called one-up-and-one-down traceability, and is mandated for food products under food-safety regulations. It is an essential component for establishing chain of custody and ensuring traceability,
- The second requirement ensures that minimal information regarding the timber or timber product is retained, requiring operators to furnish it upon request.
- The third requirement mirrors the element of due diligence, and requires downstream operators to ensure that any timber or timber product was not placed on the market unlawfully. It is a self-policing mechanism for the industry, designed to limit laundering and abuse. This effect could be made even stronger if operators were required to report to competent authorities suspicion about the legality of a product provided by their suppliers. And, importantly, it incentivizes first operators to comply with their legal obligations, lest subsequent operators effectively close the EU market to their products.

Together, these requirements “avoid imposing any unnecessary administrative burden” and have the effect of guaranteeing adequate documentation and peer-oversight throughout the supply chain. The practical impact of the Parliament proposal is that legality will be confirmed on an ongoing basis with each transaction, not a singular point in time.

9. Require operators who establish their own due diligence system to have it audited regularly by independent third party verifiers, and establish the basis of a reliable risk assessment procedure

We urge the Council to introduce an amendment in article 3 that requires operators who establish their own due diligence system to have it audited regularly by an independent third party. This is absolutely necessary to ensure that all due diligence systems are functioning as requested by the Regulation.

The Council should also take steps to ensure that risk management procedures are implemented in an independent, objective and transparent manner. The regulation should set out clear criteria at EU level for operators for using risk management tools to decide which are the risk products or suppliers for monitoring and control efforts. This will avoid weaknesses and differing standards of risk management and reduce legal uncertainties. Amendments should therefore be inserted to describe:

- what a risk management procedure consists of,
- how this is to be implemented,
- how the Commission and Member States will help determine the level of risk, and what operators should do when faced with a risk of illegal logging and trade situation.

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