

**ISSUES RELATING
TO THE EU TIMBER REGULATION LEGAL FRAMEWORK
FOR WHICH GUIDANCE SHOULD BE DEVELOPED**

INTRODUCTION

Regulation (EU) No 995/2010 laying down the obligations of operators who place timber and timber products on the market¹ (the EU Timber Regulation; EUTR) provides for adoption of non-legislative measures by the Commission aiming at a uniform implementation. The Commission adopted a delegated Regulation laying down detailed requirements and a procedure for recognition and withdrawal of recognition to monitoring organisations² and an implementing Regulation laying down detailed rules regarding the due diligence system and the frequency and nature of the checks to be carried out by Member States` competent authorities on monitoring organisations³.

Following consultations with stakeholders, experts from Member States and members of the FLEGT Committee a common view emerged that not all issues regarding the EU Timber Regulation could be addressed in the secondary legislation for a number of reasons: limits in the scope of the Commission's implementing powers; a risk to restrict operators unnecessarily by setting up a rigid due diligence system; a risk to obviate their responsibility to adequately exercise due diligence, etc. Therefore, the Commission undertook to issue guidance in 2012, in which outstanding issues related to the EUTR and its non-legislative acts would be addressed. The guidance will be discussed and elaborated with the assistance of the FLEGT Committee.

The guidance will not be legally binding; however, they will be a useful reference document for everyone who will have to comply with the EUTR and its secondary legislation as they will provide an important elucidation of parts of the legislative text that are difficult to understand. They will serve also to guide national competent authorities and enforcement bodies in the process of implementation and enforcement of this legislative package.

During the consultation process for elaborating the secondary legislation and after holding numerous bilateral meetings with stakeholders the Commission outlined a number of issues, which need to be addressed in guidelines. The list should not be regarded as exhaustive and further issues could be added at any stage of the drafting process.

¹ OJ L 295, 12.11.2010, p. 23.

² OJ L 115, 27.4.2012, p. 12.

³ In final stage of adoption.

ISSUES

1. The definition of "placing on the market"

It is important to determine when a market player qualifies as ‘operator’ to whom the prohibition and the obligation for "due diligence" apply.

Relevant legislation: EU Timber Regulation

Article 2

Definitions

[...]

(b) ‘placing on the market’ means the supply by any means, irrespective of the selling technique used, of timber or timber products for the first time on the internal market for distribution or use in the course of a commercial activity, whether in return for payment or free of charge. It also includes the supply by means of distance communication as defined in Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts (3). The supply on the internal market of timber products derived from timber or timber products already placed on the internal market shall not constitute ‘placing on the market’

[...]

2. Definition of negligible risk

Relevant legislation: EU Timber Regulation

Article 6

Due diligence systems

[...]

(c) except where the risk identified in course of the risk assessment procedures referred to in point (b) is negligible, risk mitigation procedures which consist of a set of measures and procedures that are adequate and proportionate to minimise effectively that risk and which may include requiring additional information or documents and/or requiring third party verification.

3. Clarification of "complexity of the supply chain"

Relevant legislation: EU Timber Regulation

Article 6

Due diligence systems

(1)[...]

(b) risk assessment procedures enabling the operator to analyse and evaluate the risk of illegally harvested timber or timber products derived from such timber being placed on the market.

Such procedures shall take into account the information set out in point (a) as well as relevant risk assessment criteria, including:

[...]

— complexity of the supply chain of timber and timber products.

4. Clarification of the requirement for documents indicating compliance of timber with applicable legislation

Relevant legislation: EU Timber Regulation

Article 6

Due diligence systems

(1)[...]

(a) *measures and procedures providing access to the following information concerning the operator's supply of timber or timber products placed on the market:*

[...]

— *documents or other information indicating compliance of those timber and timber products with the applicable legislation*

5. Clarification of the product scope

Relevant legislation: the Annex to the EU Timber Regulation

The EUTR applies to a large scope of timber and timber products but not to all. The Commission receives many questions about whether a specific product is covered; therefore a list of products that are not covered proves useful.

6. The role of third parties verified schemes in the process of risk assessment and risk mitigation.

Relevant legislation: the EU Timber Regulation

Recital (19)

In order to recognize good practice in the forestry sectors, certification or other third party verified schemes that include verification of compliance with applicable legislation may be used in the risk assessment procedure.

Article 6

Due diligence systems

[...]

(b) “[...] Risk assessment procedures shall take into account [...] relevant risk assessment criteria including: Assurance of compliance with applicable legislation, which may include certification or third-party-verified schemes which cover compliance with applicable legislation [...]”

and under risk mitigation:

(c) “[...] risk mitigation procedures [...] may include requiring additional information or documents and/or third party verification”.

Relevant legislation: The implementing Regulation on the due diligence system

Art. 4

Risk assessment and mitigation

Certification or other third party verified schemes referred to in the first indent of the second paragraph of Article 6(1)(b) and in Article 6(1)(c) may be taken into account in the risk assessment and risk mitigation procedures where they meet the following criteria:

- (a) they have established and made available for third party use a publicly available system of requirements, which system shall at the least include all relevant requirements of the applicable legislation;
- (b) they specify that appropriate checks, including field-visits, are made by a third party at regular intervals no longer than 12 months to verify that the applicable legislation is complied with;
- (c) they include means, verified by a third party, to trace timber harvested in accordance with applicable legislation, and timber products derived from such timber, at any point in the supply chain before such timber or timber products are placed on the market;
- (d) they include controls, verified by a third party, to ensure that timber or timber products of unknown origin, or timber or timber products which have not been harvested in accordance with applicable legislation, do not enter the supply chain.

7. The interaction of the prohibition and the "due diligence" obligation

The EU Timber Regulation lays down the obligations for operators but is silent on the interaction between them, i.e. what are the consequences for an operator who has complied with the due diligence obligation but nevertheless has unwillingly and unknowingly placed illegally harvested timber on the market.

Relevant legislation: the EU Timber Regulation

Article 4

Obligations of operators

1. The placing on the market of illegally harvested timber or timber products derived from such timber shall be prohibited.
2. Operators shall exercise due diligence when placing timber or timber products on the market. To that end, they shall use a framework of procedures and measures, hereinafter referred to as a 'due diligence system', as set out in Article 6.
[...]

8. Regular evaluation of a due diligence system

Relevant legislation: the EU Timber Regulation

Article 4

Obligations of operators

[...]

3. Each operator shall maintain and regularly evaluate the due diligence system which it uses, except where the operator makes use of a due diligence system established by a monitoring organisation referred to in Article 8.[...]

9. Composite products

Some argue that importers of "composite" products may find themselves in a disadvantageous position as compared to other operators as due to the complexity of their supply chains the products they trade in would always be considered of non-negligible risk and therefore mitigation measures would be deemed necessary.

This issues is intertwined with the possible hardships importers of "composite" products could experience in meeting the information requirement of the due diligence obligation.