

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 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 certain aspects of the EU Timber Regulation need clarification. It was agreed that a guidance document was necessary, in which issues related to the EU Timber Regulation and its non-legislative acts to be addressed. The guidance document was discussed and elaborated with the assistance of the FLEGT Committee.

The guidance document will not have a binding legal effect; its sole purpose is to provide explanations on certain aspects of the EU Timber Regulation and the two Commission non-legislative acts. It does not replace, add or amend anything to the provisions of the Regulation (EU) No 995/2010, the Commission Regulation (EU) No 363/2012, and the Commission Regulation (EU) No 607/2012, which constitute the legal basis to be applied. The issues addressed in the guidance document should not be considered in isolation; they must be used in conjunction with the legislation, and not as a “stand-alone” reference.

Our belief however is that the guidance document will be a useful reference material for everyone who will have to comply with the EU TR as it provides important elucidation on parts of the legislative text that are difficult to understand. The guidance document 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 two Commission non-legislative acts and after holding numerous bilateral meetings with stakeholders a number of issues were outlined and to be included in a guidance document. After gathering some experience in application of the EUTR and if need be the list of issues could be further expanded and the document supplemented accordingly.

¹ OJ L 295, 12.11.2010, p. 23.

² OJ L 115, 27.4.2012, p. 12.

³ OJ L 177, 7.7.12, p. 16.

1. The definition of "placing on the market"

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 '

[...]

This definition clearly states that the "supply" must be:

- **on the internal market** - so the timber must be physically present in the EU, either harvested here or imported and cleared by customs for free circulation as products do not acquire the status of "European Union goods" before they have entered the territory of the customs union. Goods under special customs procedures (e.g. temporary importation; inward processing; processing under customs control; customs warehouses; free zones) as well as transits and reexportation are not considered to be placed on the market.
- **for the first time** - timber products already placed on the EU market will not be covered nor will products derived from timber products already placed on the market. Making a product available for the first time further refers to each individual product placed on the market after the date of entry into application of the EU Timber Regulation (3rd March 2013), and not to the launch of a new product or product line. Moreover the concept of placing on the market refers to each individual product, not to a type of product, irrespective of whether it was manufactured as an individual unit or a series

- **in the course of a commercial activity** - so the Regulation does not impose requirements on non-commercial consumers

All the above elements must be present simultaneously. 'Placing on the market' should therefore, be understood as occurring when an operator first makes timber or timber products available on the EU market for distribution or for use in the course of his commercial activity.

The provisions of the Regulation concerning "operators" therefore apply to:

- companies or individuals which harvest timber within the EU, for the purpose of processing or for distribution to commercial or non-commercial consumers
- companies or individuals which bring timber or timber products into the EU, for the purpose of processing or for distribution to commercial or non-commercial consumers, and
- companies or individuals which harvest timber within the EU or bring timber or timber products into the EU exclusively for use in their own business.

Under this interpretation, a business which harvests timber within the EU or which brings into the EU timber or timber products for use in its own organisation needs to implement a due diligence system. This interpretation does not require the timber to be sold or physically transferred to a specific person: the timber is covered by the Regulation as soon as a supplier made it available for distribution or use in the EU⁴.

The position under the Regulation of 'agents' who act as middle men, sourcing products for others and not merely acting as shipping agents, will need to be determined by reference to the particular facts of each case and the applicable contractual arrangements. An 'agent' who purchases and brings stock into the EU to meet anticipated orders from buyers will be an "operator" in his own right, unlike a true agent who acts only on behalf of another party and at no point takes actual ownership of products himself.

For timber harvested outside the EU:

- Where an EU based company buys timber or timber products in a third country and imports them into the EU, the EU based company becomes an operator when the timber or timber products enter the EU
- Where an EU based company buys timber or timber products in a third country and then has an agent import them into the EU, the EU based company becomes an operator when the timber or timber products enter the EU
- Where an EU based company orders timber or timber products in a third country from a non-EU based supplier who imports them into the EU, the EU company becomes an operator when the timber enters the EU (even if ownership does not formally transfer until the timber is delivered to the EU based company)
- Where a non-EU based company imports timber or timber products into the EU, obtains the

⁴ This interpretation broadly accords with the approach taken in the Guide to the Implementation of Directives based on the New Approach and the Global Approach ("the Blue Guide"), which could be seen on: http://ec.europa.eu/enterprise/policies/single-market-goods/files/blue-guide/guidepublic_en.pdf. However, the definition in the EU Timber Regulation differs from the one used in the single market directives.

release for free circulation and then seeks a buyer, the non-EU based company becomes an operator when the timber or timber products enter the EU (because the non-EU company has made the timber products available on the EU market)

- Where a non-EU based company sells timber or timber products from a third country directly to non-commercial end-users in the EU, the non-EU company becomes an operator when the timber or timber products enter the EU

All operators, whether EU or non-EU based, must comply with the prohibition on placing illegally harvested timber on the market and the obligation to exercise due diligence

Scenarios outlining how the interpretation of placing on the market would work in practice are given in Annex I.

The EU Timber Regulation does not have retroactive effect. This means that the prohibition will not apply to timber and timber products placed on the market before its entry into application on 3rd March 2013. However operators will need to show, when checked by the competent authorities, that they have established a due diligence system which is operational as of 3rd March 2013. Therefore it is important that operators are able to identify their supply before and after that date. The obligation for traceability for traders also applies from that date.

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.

Due diligence requires an operator to gather information about timber and timber products and their suppliers in order to conduct a full risk assessment. The information required to be assessed under Article 6 can be divided into two categories.

- Article 6(1)(a) - specific information related to the timber or timber product itself: a description, its country of harvest (and, where applicable the sub-national region and concession), the supplier and trader, and documentation indicating compliance with applicable legislation.
- Article 6(1)(b) general information providing the context for assessing the product- specific information, about the prevalence of illegal harvesting of specific tree species and prevalence of illegal harvesting practices in the place of harvest, and on the complexity of the supply chain,

While the general information provides operators with the context in which to evaluate the level of risk, the product specific information is necessary to determine the risk linked to the timber product itself. It means that if the general information points to potential risks, special attention needs to be given to the gathering of the product specific-information. If the product is derived from several timber sources it will be necessary to assess the risk for each component or species.

The level of risk can only be assessed on a case-by-case basis as it depends upon a number of factors. Although there is not a single accepted system for risk assessment, as a general rule however, the operator will have to address the following questions:

- **Where was the timber harvested?**

Is illegal logging prevalent in the country, or sub-region, or concession from where the timber originates? Is the specific tree species involved particularly at risk of illegal logging? Are there sanctions imposed by the UN Security Council or the Council of the European Union on timber imports and exports?

- **Is the level of governance of concern?**

The level of governance might undermine the reliability of some documents indicating compliance with applicable legislation. Thus the country's corruption level, business risk indices, or other governance indicators should be considered.

- **Are all documents indicating compliance with applicable legislation made available by the supplier, and are verifiable?**

If all possible documents are readily available, there is a stronger likelihood that the product's supply chain has been established. There should be well founded confidence that the documents are genuine and reliable.

- **Are there indications of involvement of any company in the supply chain in practices related to illegal logging?**

There is a greater risk that timber purchased from a company that has been involved in practices related to illegal logging will have been illegally harvested.

- **Is the supply chain complex?⁵**

The more complex the supply chain the harder it may be to trace the origins of the wood in a product back to the logging source. Failure to establish necessary information at any point in the supply chain may increase the possibility of illegally harvested timber entering the chain.

Negligible risk should be understood to apply to a supply when, following full assessment of both the product-specific and the general information no cause for concern can be discerned.

The list of risk assessment criteria is not exhaustive; operators may choose to add further criteria if they help determine the likelihood that timber in a product had been illegally harvested, or alternatively, demonstrate legal harvesting.

⁵ For clarification of "complexity of supply chain" see section 3.

3. Clarification of "complexity of the supply chain"

Relevant legislation:

EU Timber Regulation

Article 6

Due diligence systems

[...]

(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.

Complexity of the supply chain is explicitly listed amongst the risk assessment criteria in Article 6 of the Regulation and therefore is relevant to the risk assessment and risk mitigation part of the due diligence exercise.

The rationale underpinning this criterion is that tracing timber back to its place of harvest (country of harvest and, where applicable, the sub-national region and the concession of harvest) may be more difficult if the supply chain is complex. Failure to establish necessary information at any point in the supply chain can increase the possibility of illegally harvested timber entering the chain. However it is not the length of the supply chain which should be regarded as the factor that elevates risk. What matters is the ability to trace the timber in a product back to its place of harvest. The level of risk will increase if the complexity of the supply chain makes it difficult to identify the information required by Article 6(1)(a) and (b) of the EU Timber Regulation. The existence of unidentified steps in the supply chain can lead to the conclusion that the risk is non-negligible.

The complexity of the supply chain increases with the number of processors and middlemen between the place of harvest and the operator. Complexity may also increase when more than one species or timber sources are used in the product.

In order to assess the complexity of the supply chain operators might use the following questions, which are neither obligatory nor exclusive:

- ✓ Are there several processors and steps in the supply chain before the placing of a particular timber product on the EU market?
- ✓ Have timber and timber products been traded in more than one country before placing on the EU market?
- ✓ Does the timber in the product to be placed on the market consist of more than one tree species?
- ✓ Does the timber in the product to be placed on the market come from different sources?

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

Relevant legislation:

EU Timber Regulation

Article 2

[...]

(f) 'legally harvested' means harvested in accordance with the applicable legislation in the country of harvest;

(g) 'illegally harvested' means harvested in contravention of the applicable legislation in the country of harvest;

(h) 'applicable legislation' means the legislation in force in the country of harvest covering the following matters:

- rights to harvest timber within legally gazetted boundaries,*
- payments for harvest rights and timber including duties related to timber harvesting,*
- timber harvesting, including environmental and forest legislation including forest management and biodiversity conservation, where directly related to timber harvesting,*
- third parties' legal rights concerning use and tenure that are affected by timber harvesting, and*
- trade and customs, in so far as the forest sector is concerned.*

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

The rationale behind this obligation is that in the absence of an internationally agreed definition of legally harvested timber the basis for defining what constitutes illegal logging should be the legislation of the country where the timber was harvested.

The EUTR provides in Art. 6(1)(a) last indent that documents or other information indicating compliance with applicable legislation in the country of harvest must be collected as part of the due diligence obligation. It should be stressed from the outset that collecting documentation must be done for the purposes of the risk assessment and should not be viewed as a self-standing requirement.

The EUTR takes a flexible approach by listing a number of legislative areas without specifying particular laws, which are different from country to country and may be subject to amendments. In order to obtain documents or other information indicating compliance with the applicable legislation in the country of harvest operators must in the first place be aware of what legislation exists in a particular country of harvest. In this effort they may be supported by the Member States' Competent Authorities in collaboration with the European Commission⁶. They may also make use of the services of monitoring organisations (MO). In cases where operators are not using services of a MO they may seek assistance from organisations with specialist knowledge of the forest sector in specific countries where timber and timber products are harvested.

The obligation to obtain documents or other information should be interpreted broadly as different regulatory regimes exist in different countries, and not all of them require issuing of specific documentation. Therefore it should be read as including official documents issued by competent authorities; documents demonstrating contractual obligations; documents showing company policies; codes of conducts; certificates issued by third party verified schemes, etc.

The following table gives some concrete examples, which are for illustration purposes and cannot be considered compulsory or exhaustive:

1. Documentation for rights to harvest timber within legally gazetted boundaries	Generally available documents in paper or electronic form e.g. documentation of ownership/rights to land use or contract or concession agreements
2. Payments for harvest rights and timber including duties related to timber harvesting	Generally available documents in paper or electronically e.g. contracts, bank notes, VAT documentation, official receipts, etc.
3. Timber harvesting, including environmental and forest legislation including forest management and biodiversity conservation, where directly related to timber harvesting.	Official audit reports; environmental clearance certificates; approved harvest plans; coupe closure reports, ISO certificates; codes of conducts; publicly available information demonstrating rigorous legislative supervision and timber tracking and control procedures; official documents issued by competent authorities in a country of harvest etc.
4. Third parties' legal rights concerning use and tenure that are affected by timber harvesting	Environnemental impact assessments, environnemental management plans, environnemental audit reports, social

⁶ The EU has concluded a number of Voluntary Partnership Agreements (VPA) with third countries, which contain a detailed description of legislation applicable in those countries. They can guide operators regarding the applicable law in relation to products, which are not included in the Annex to a particular VPA as the case might be.

	responsibility agreements, specific reports on tenure and rights claims and conflicts.
5. Trade and customs, in so far as the forest sector is concerned	Generally available documents in paper or electronic format e.g. contracts, bank notes, trade notes, import licenses, export licenses, official receipts for export duties, export ban lists, export quota awards, etc.

5a. Clarification of the product scope - packaging materials

Relevant legislation:

EU Timber Regulation

Article 2

(a) "Timber and timber products means the timber and timber products as set out in the Annex, with the exception of timber and timber products or components of such products manufactured from timber and timber products that have completed their lifecycle and would otherwise be disposed of as waste as defined in Article 3(1) of Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste"

The Annex to the EU Timber Regulation

[...]

4415 Packing cases, boxes, crates, drums and similar packing, of wood; cable-drums of wood; pallets, box pallets and other load boards, of wood; pallet collars of wood

(Not packing material used exclusively as packing material to support, protect or carry another product placed on the market.) "

[...]

Pulp and paper of Chapters 47 and 48 of the Combined Nomenclature, with the exception of bamboo-based and recovered (waste and scrap) products

[...]

The Annex sets out the "Timber and timber products as classified in the Combined Nomenclature⁷ set out in Annex I to Council Regulation (EEC) No 2658/87, to which this Regulation applies"

HS Code 4819 covers : *"Cartons, boxes, cases, bags and other packing containers, of paper, paperboard, cellulose wadding or webs of cellulose fibres; box files, letter trays, and similar articles, of paper or paperboard, of a kind used in offices, shops or the like "*

- **When any of the above articles are placed on the market as products in their own right, rather than simply being used as packaging for another product, they *will* be covered by the Regulation and therefore due diligence must be applied.**
- **If packaging, as classified under HS code 4415 or 4819, is used to 'support, protect or carry' another product it will *not* be covered by the Regulation.**

This means that the above cited restriction in brackets to HS Code 4415 within the Annex of the EUTR is used by analogy also to HS Code 4819.

⁷ The current version of the Combined Nomenclature is available at: <http://eur-lex.europa.eu/Result.do?direct=yes&lang=en&where=EUROVOC:005751&whereihm=EUR OVOC:Combined%20Nomenclature>

Within these categories there is a further distinction between packaging that is considered to give a product its 'essential character' and packaging which is shaped and fitted to a specific product, but not an integral part of the product itself. General rule 5 for the interpretation of the Combined Nomenclature⁸ clarifies these differences and examples are contained below. However, these additional distinctions are only likely to be relevant to a small proportion of goods subject to the Regulation.

In summary,

Covered by the Regulation

- Packaging material of HS codes 4415 or 4819 placed on the market as a product in itself.
- Containers which fall within HS codes 4415 or 4819 which give a product its essential character: e.g. decorative gift boxes,

Exempt from the Regulation:

- Packing material presented with the goods therein and used exclusively to support, protect or carry another product (which may or may not be a wood-based product).

⁸ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1999:278:0011:0012:EN:PDF>

5b. Clarification of the product scope - "waste*"/"recovered" products

Relevant legislation:

EU Timber Regulation

Recital (11)

Bearing in mind that the use of recycled timber and timber products should be encouraged, and that including such products in the scope of this Regulation would place a disproportionate burden on operators, used timber and timber products that have completed their life cycle, and would otherwise be disposed of as waste, should be excluded from the scope of this Regulation.

Article 2

(a) 'timber and timber products ' means timber and timber products set out in the Annex, with the exception of timber products or components of such products manufactured from timber or timber products that have completed their lifecycle and would otherwise be disposed of as waste, as defined in Article 3(1) of Directive 2008/98/EC of the European Parliament and of the Council of 19 November on waste⁹.'

Directive 2008/98/EC Article 3(1)

'waste ' means any substance or object which the holder discards or intends or is required to discard'

This exemption applies to:

timber products of a kind covered by the Annex, which are produced from material that has completed its lifecycle and would otherwise have been discarded as waste (e.g. timber retrieved from dismantled buildings, or products made from waste wood),

This exemption **does not** apply to:

- by-products from a manufacturing process involving material which had not completed its lifecycle and would otherwise have been discarded as waste.

Scenarios

Will wood chips and sawdust produced as a by-product of sawmilling be subject to the Regulation?

Yes.

However, wood chips or other timber products produced from material which has previously been placed on the internal market will not be subject to the requirements of the Regulation which relate to 'placing on the market' (Article 2(b) EUTR, final sentence).

Will furniture made from timber recovered from demolition of houses be subject to the Regulation?

No, the material in these products has completed its lifecycle and would otherwise have been discarded as waste.

⁹ OJ L 312, 22.11.2008, p. 3.

6. The role of third parties verified schemes in the process of risk assessment and risk mitigation¹⁰

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 system

[...]

"[...] 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:

"[...] risk mitigation procedures [...] may include requiring additional information or documents and/or third party verification".

Commission implementing Regulation (EU) No 607/2012

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:

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;

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;

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;

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.

¹⁰ Note that certification is not granted the same status as FLEGT licences and CITES permits (section 10 below).

A. Background information

Voluntary forest certification and timber legality verification schemes are often used to meet specific customer requirements for timber products. Typically these include a standard that describes management practices that must be implemented within a forest management unit, comprising broad principles, criteria and indicators; requirements for checking compliance with the standard and awarding certificates; and separate "chain of custody" certification to provide assurance that a product only contains timber, or a specified percentage of timber, from certified forests.

When an organisation that is not the forest manager, manufacturer or trader, nor the customer requiring certification, carries out an assessment and awards a certificate, this is known as third-party certification. Certification schemes generally require such third-party organisations to be able to demonstrate their qualifications to perform assessments through a process of accreditation that sets standards for the skills of auditors and the systems that the certification organisations must adhere to. The International Organisation for Standardisation (ISO) has published standards covering both requirements for certification bodies and assessment practices. Proprietary timber legality verification schemes, though often provided by organisations that offer accredited certification services, generally themselves do not require accreditation.

A requirement for compliance with legislation governing management of the forest management unit is generally part of forest management certification standards. Systems management standards, such as those for environmental management or quality management, generally don't include such a requirement, or it may not be rigorously checked in assessment.

B. Guidance

In considering whether to make use of certification scheme or legality verification as assurance that the timber in a product had been legally harvested, an operator must determine whether the scheme incorporates a standard that includes all the applicable legislation. This requires some knowledge of the scheme the operator is using and how it is applied in the country where the timber was harvested. Certified products generally carry a label with the name of the certification organisation that has set the criteria for the certificate and has set the requirements for the auditing process. Such organisations will normally be able to provide information on coverage of the certification and how it was applied in the country where the timber was harvested, including such details as the nature and frequency of field audits.

The operator should be satisfied that the third party organisation that issued a certificate was sufficiently qualified and is in good standing with the certification scheme and the relevant accreditation body.. Information about how schemes are regulated can normally be obtained from the certification scheme.

Some schemes allow certification when a specified percentage of the timber in a product has met the full certification standard. This percentage is normally stated on the label. In such cases it is important that the operator seeks information about whether checks have been made on the non-certified portion and whether those checks provide adequate evidence of compliance with the applicable legislation.

Chain of custody certification may be used to as evidence that no unknown or non-permitted timber enters a supply chain. These are generally based on ensuring only permitted timber is allowed to enter the supply chain at "critical control points", and a product can be traced to its previous custodian (who must also hold chain of custody certification) rather than back to the forest where it was harvested. A product with chain of custody certification may contain a mix of certified and other permitted material from a variety of sources. When using chain of custody certification as evidence of legality, an operator should ensure that permitted material complies with applicable legislation and that controls are sufficient to exclude other material.

It should be noted that an organisation may hold chain of custody certification as long as it has systems in place to segregate certified and the allowed percentage of permitted material, and non-permitted material, but at a given point in time may not be producing any certified product. If relying on certification as assurance and purchasing from a supplier holding chain of custody certification, operators must therefore check that the specific product they purchase actually has the required certificate.

In the process of assessment the credibility of a third party verified scheme operators may use the following questions, which are not exhaustive:

- ✓ Are all the requirements in Article 4 of the Commission implementing Regulation (EU) No 607/2012 fulfilled?
- ✓ Is the certification or other third party verified schemes compliant with international or European standards (e.g. the relevant ISO-guides, ISEAL Codes)?
- ✓ Are there substantiated reports about possible shortcomings or problems of the third party verified schemes in the specific countries from which the timber or timber products are imported?
- ✓ Are the third parties that are making the checks and verifications referred to in Article 4 (b)(c) and (d) of the Commission implementing Regulation (EU) No 607/2012 independent accredited organisations?

7. 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.

[...]

A "due diligence system" can be described as a documented, tested, step-by-step method, including controls, aimed at producing a consistent desired outcome in a business process. It is important that an operator using its own due diligence system should evaluate that system at regular intervals to ensure that those responsible are following the procedures that apply to them and the desired outcome is being achieved. Good practice suggests this should be conducted annually.

An evaluation can be carried out by someone within the organisation (ideally independent from those carrying out the procedures), or by an external body. The evaluation should identify any weaknesses and failures and the organisation's management should set deadlines for addressing them.

In the case of a timber due diligence system, the evaluation should for example check whether there are documented procedures for collecting and recording key information about supplies of timber product to be placed on the market, for assessing the risk that any component of that product contained illegally harvested timber, and describing actions to take with different levels of risk. It should also check whether those who are responsible for carrying out each step in the procedures both understand and are implementing them, and that there are adequate controls to ensure that the procedures are effective in practice (i.e. that they identify and result in exclusion of risky timber supplies).

8. Composite products

Relevant legislation:

The EU Timber Regulation

Article 6(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:

description, including the trade name and type of product as well as the common name of tree species and, where applicable, its full scientific name,

country of harvest, and where applicable

sub-national region where the timber was harvested; and

concession of harvest,

[...]

When fulfilling this 'access to information' obligation for composite products or products with a composite wood-based component, the operator needs to get information on all virgin material in the mix, including the species, the location where each component was harvested, and the legality of origin of those components.

It is often difficult to identify the precise origin of all components of composite timber products. This is especially true for reconstituted products such as paper, fibre-board and particle board, where identifying species may also be difficult. If the species of wood used to produce the product varies, the operator will have to provide a list of each species of wood that may have been used to produce the wood product. The species should be listed in accordance with internationally accepted timber nomenclatures (e.g. DIN EN 13556 "Nomenclature of timbers used in Europe"; Nomenclature Générale des Bois Tropicaux, ATIBT (1979))

Where it can be established that a component in a composite product has already been placed on the market prior to its incorporation in the product, or it is made from material which has completed its lifecycle and would otherwise have been discarded as waste (see 5 b), risk assessment is not required for that component. For example, where an operator manufactures and sells a product that contains a mix of wood chips part of which originates from timber products already placed on the market in the EU and part from virgin timber he has imported into the EU, risk assessment is only required for the imported portion.

Examples descriptions of Operator's Supplies are in Annex II.

9. "Forest sector"

Relevant legislation:

The EU Timber Regulation

Article 2

[...]

(h) "applicable legislation means the legislation in force in the country of harvest covering the following matters: [...]

- trade and customs, in so far as the forest sector is concerned.

This refers exclusively to compliance with the laws and regulations in countries where timber has been harvested covering the export of timber and timber products. The requirement relates to export from the country of harvest and not the country of export to the EU. For example if timber was exported from country X to country Y and then to the European Union the requirement would apply to the export from X and not from Y to the EU.

The applicable legislation includes, but may not be restricted to:

- Bans, quotas and other restrictions on the export of timber products, for example bans on the export of unprocessed logs or rough-sawn lumber
- Requirements for export licences for timber and timber products
- Official authorisation that entities exporting timber and timber products may require
- Payment of taxes and duties applying to timber product exports

10. Treatment of CITES and FLEGT-Licensed Timber

Relevant legislation

EU Timber Regulation

Article 3

Status of timber and timber products covered by FLEGT and CITES

Timber embedded in timber products listed in Annexes II and III to Regulation (EC) No 2173/2005 which originate in partner countries listed in Annex I to that Regulation and which comply with that Regulation and its implementing provisions shall be considered to have been legally harvested for the purposes of this Regulation.

Timber of species listed in Annex A, B or C to Regulation (EC) No 338/97 and which complies with that Regulation and its implementing provisions shall be considered to have been legally harvested for the purposes of this Regulation.

[...]

The Regulation considers that timber and timber products covered by FLEGT licences or CITES certificates fully meet its requirements. This means:

- a) That operators who place products on the market covered by such documentation do not need to conduct due diligence on those products, apart from being able to demonstrate coverage by valid relevant documentation; and
- b) That any such product will be considered by Competent Authorities to have been legally harvested and will not carry any risk of breaching provisions of the Regulation, prohibiting placing illegal timber on the market.

This is because legality verification controls - and hence due diligence - will have been carried out in the exporting country in accordance with the Voluntary Partnership Agreements between those countries and the European Union, and the resulting timber can be considered risk-free by operators.

Annex I

How would the interpretation of "placing on the market" apply in practice?

The following scenarios outline situations in which a company/individual would be considered an operator under the EU Timber Regulation.

Scenario 1

Manufacturer C buys paper in a third country outside the EU and imports it into the EU (any country), where he uses the paper to make exercise books. He then sells the exercise books to retailer D in any EU Member State. Exercise books are a product covered by the Annex to the EU Timber Regulation:

- manufacturer C becomes an operator when he imports the paper for use in his own business.

Scenario 2

Retailer G purchases till rolls in a third country outside the EU and imports them into the EU, where he uses them in his stores:

- retailer G becomes an operator when he imports the till rolls into the EU for use in his own business.

Scenario 3

An EU based manufacturer C imports coated craft paper directly from a third country producer) and uses it to pack products that are subsequently sold on the EU market:

- manufacturer C becomes an operator when he imports the craft paper into the EU for use in his business. (Take note that in this case it is of no regard that the craft paper is only used as packaging as it is imported as a product in its own right)

[Scenarios 4, 5 and 6 deal with the purchase of timber and timber products by EU entities from non-EU entities, in slightly varying circumstances, which are explained at the end of each scenario]

Scenario 4

A EU based timber merchant H buys particle board online from a supplier based outside the EU. Under the contract, ownership transfers immediately to timber merchant H while the particle board is still outside the EU. The particle board is transported to an EU Member State and brought through customs by shipping agent J, who delivers it to timber merchant H. Timber merchant H then sells the particle board to builder K:

- timber merchant H becomes an operator when his agent J imports the particle board into the EU for distribution or use in H's business. Shipping agent J is merely acting as an agent, transporting goods on behalf of timber merchant H.

[In this scenario ownership transfers from non-EU entity to the EU entity before the product physically enters the EU]

Scenario 5

A EU based timber merchant H buys particle board online from supplier L, who is based outside the EU. Under the contract, ownership only transfers when the particle board is delivered to timber merchant H's yard in the UK. Shipping agent J imports the board into the EU on behalf of supplier L and delivers it to timber merchant H's yard:

- The timber merchant H becomes an operator when supplier L's shipping agent J imports the particle board into the EU for distribution or use in H's business.

[In this scenario ownership does not transfer from the non-EU entity to the EU entity until after the product has physically entered the EU]

Scenario 6:

A non-EU based supplier L imports a consignment of timber or timber products into the EU and then looks to find a buyer. Timber merchant H purchases the timber or timber products from L once the consignment has physically entered the EU and has been released for free circulation by customs by supplier L, and uses it in his business.

- Supplier L becomes the operator when he imports the products into the EU for distribution through his own business. Timber Merchant H is a trader.

[In this scenario ownership does not transfer from the non-EU entity to an EU entity until after the product has physically entered the EU and no contract exists before this point]

Scenario 7

A EU based retailer M imports timber products into the EU and sells them directly through his shop to non-commercial consumers:

- retailer M becomes an operator when he imports the timber products into the EU for distribution through his own business.

Scenario 8

Energy company E purchases wood chips directly from a third country outside the EU and imports them into the EU, where it uses them to produce energy which it then sells to a EU Member State National Grid. Although the wood chips are within the scope of the EU Timber Regulation the final product,

energy, which the company sells is not:

- energy company E becomes an operator when it imports the woodchips into the EU for use in its own business.

Scenario 9

Timber merchant F purchases wood chips directly from a third country outside the EU and imports them into the EU, where he sells them on to energy company E. Energy company E then uses these wood chips in the EU to produce energy, which it sells to a Member State National Grid:

- timber merchant F becomes an operator when he imports the woodchips into the EU for distribution through his own business.

[Scenarios 10 and 10a highlight the fact that standing trees do not fall within the scope of the Regulation. Depending on the detailed contractual agreements an “operator” could be either the forest owner or the company, which has the right to harvests timber for distribution or use through his own business]

Scenario 10

Forest owner Z fells trees on his own land and sells the timber to customers or processes it in his sawmill

- Forest owner Z becomes an operator when he harvests the timber for distribution or use through his own business

Scenario 10a

Forest owner Z sells to company A the right to harvest on Z's real estate standing trees for distribution or use through A's own business

- Company A becomes an operator when he harvests the timber for distribution or use through his own business

Annex II

Examples of Information on Composite Products

Product Type:	Flat-pack kitchen fittings					Placing on the market possible?
Period:	April 2011-Dec 2012					
Volume	3200 units					
Component	Description	Species	Country/region of harvest	Concession of harvest	Legality evidence	
Core	Medium-density fibreboard	Mixed conifer: mainly Scots pine (<i>Pinus sylvestica</i>)	More than one EU Member State,	Multiple	Previously placed on the market - not required	Not applicable
		Norway spruce (<i>Picea abies</i>),	Third boreal emerging country	Multiple	Proprietary legality audits and traceability	Yes (if well founded confidence)
Surface	Facsimile wood-design paper coating, imported from outside EU	Unknown	Unknown	Unknown	None	No

Product Type:	CKD office furniture					Placing on the market possible?
Period:	Jan 2011-June 2011					
Volume	1500 units					
Component	Description	Species	Country/region of harvest	Concession of harvest	Legality evidence	
Core	particle board	Sitka spruce	EU Member state	Multiple	Previously placed on the market - not required	Not applicable
Face and back	0.5 mm veneer	European beech (<i>Fagus sylvatica</i>)	EU Member state	Private forest owners	Previously placed on the market - not required	Not applicable

Product Type:	Wood chips					Placing on the market possible?
Period:	Jan 2012-Dec 2012					
Volume	10,000 tonnes					
Component	Description	Species	Country/region of harvest	Concession of harvest	Legality evidence	
	From sawmill slabs/off-cuts from trees	Mixed spruce, pine and birch	EU Member State	Multiple private forest	Sighted owners' regeneration	Not applicable

	purchased standing from forest owners			owners	plans	
	From sawmill slabs/off-cuts from logs bought at roadside	Mixed spruce, pine and birch	EU Member State	Multiple private forest owners	Previously placed on the market - not required	Not applicable

Product Type:	Writing paper (90 g/m ²) from Indonesia					Placing on the market possible?
Period:	Apr 2012-Mar 2013					
Volume	1,200 tonnes					
Component	Description	Species	Country/region of harvest	Concession of harvest	Legality evidence	
	Short-fibre pulp	<i>Acacia mangium</i>	Third tropical developing country, specified province	Industrial forest plantation concession XXX	Legality certificate	Yes (if well founded confidence)
	Short-fibre pulp	Mixed tropical hardwoods	Third tropical developing country, specified province	Natural secondary forest clearing for plantation for pulpwood and oil palm plantations	None provided	No
	Long-fibre pulp	<i>Pinus radiata</i>	Third temperate country	Forest plantations	Chain of custody certificate	Yes (if well founded confidence)

Product Type:	12-mm plywood					Placing on the market possible?
Period:	Apr 2012-Mar 2013					
Volume	8500 m ³					
Component	Description	Species	Country/region of harvest	Concession of harvest	Legality evidence	
Face and back	Veneer	Bitangor (<i>Callophyllum sp.</i>)	Third tropical developing country, specified province	YYY concession	Government agent export certificate	Yes (if well founded confidence)
Core	Veneer	Poplar (<i>Populus sp.</i>)	Third temperate emerging country	Farm woodlots, unspecified	None provided	No

Product Type:	Coated Art Board from China					Placing on the market possible?
Period:						
Volume	500 Tonnes					
Component	Description	Species	Country/region of harvest	Concession of harvest	Legality evidence	
	Northern Bleached Kraft Pulp (NBKP) Softwood	Western hemlock (<i>Tsuga heterophylla</i>), Douglas Fir, (<i>Pseudotsuga menziesii</i>) Western Red Cedar (<i>Thuja plicata</i>), White Spruce (<i>Picea glauca</i>), Lodgepole Pine (<i>Pinus contorta</i>)	Third boreal country	Industrial tree farm concession	Classified "Non-Controversial" under certification guidelines	Yes (if well founded confidence)
	Laubholz Bleached Kraft Pulp LBKP Hardwood	Poplar (<i>Populus spp.</i>)	Third boreal country	Industrial tree farm concession	Classified "Non-Controversial" under certification guidelines	Yes (if well founded confidence)
	Mechanical Pulp	Poplar (<i>Populus tremuloides</i> , <i>Populus balsamifera</i>), White Spruce (<i>Picea glauca</i>), Jack pine (<i>Pinus banksiana</i>)	Third boreal country	Multiple private forest owners	Non-Controversial Legality Certificate	Yes (if well founded confidence)

³ OJ L 177, 7.7.2012, p. 16-18.