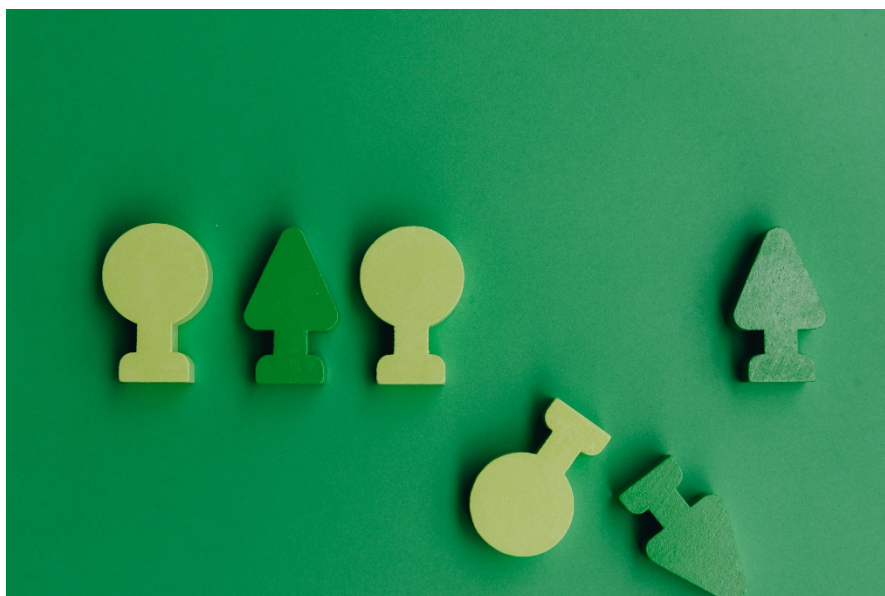


# Internal and external dimension of illegal logging: legal issues and solutions

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## **Abstract**

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the PETI Committee, aims at gaining deeper insights into the legal aspects of illegal logging and related trade in illegally harvested timber and timber products. It analyses the legal requirements and their implications for various actors in the EU and in third countries. The study examines the disparities in enforcement and penalties regimes in Member States and analyses their role in trade diversion. The study further explores the possibility for strengthening the timber regime by broadening its scope and tackling underlying issues such as corruption and human rights violations. The study also assesses the external dimension, specifically focusing on the Voluntary Partnership Agreements with major producers' countries. The study formulates various recommendations to improve the regime taking into account both the internal and external dimension of illegal logging.

This document was requested by the European Parliament's Committee on Citizens' Rights and Constitutional Affairs.

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## LIST OF ABBREVIATIONS

<b>BCM</b>	Bilateral Coordination Mechanism
<b>CA</b>	Competent Authority
<b>CCT</b>	Compagnie de Commerce et de Transport
<b>CITES</b>	Convention on International Trade in Endangered Species of Wild Fauna and Flora
<b>CoC</b>	Chain of Custody
<b>EFTA</b>	European Free Trade Association
<b>EIA</b>	Environmental Investigation Agency
<b>ESA</b>	European Surveillance Authority
<b>ETTF</b>	European Timber Trade Federation
<b>EU</b>	European Union
<b>EUTR</b>	European Union Timber Regulation
<b>FCPSA</b>	Food and Consumer Product Safety Authority
<b>FFP</b>	FAO-FLEGT Program
<b>FLEG</b>	Forest Law Enforcement Governance
<b>FLEGT</b>	Forest Law Enforcement Governance and Trade
<b>FLEGT AP</b>	Forest Law Enforcement Governance and Trade Action Plan
<b>FSC</b>	Forest Stewardship Council
<b>GDPR</b>	General Data Protection Regulation
<b>MCFPE</b>	Ministerial Conference on the Protection of Forests in Europe
<b>MFPMF</b>	Myanmar Forest Products Merchants' Federation



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<b>MO</b>	Monitoring organisation
<b>MONREC</b>	Myanmar Minister of Natural Resources and Environmental Conservation
<b>MS</b>	Member State
<b>MTE</b>	Myanmar Timber Enterprise
<b>MTLAS</b>	Myanmar Timber Legality Assurance System
<b>NGO</b>	Non-Governmental Organization
<b>NVWA</b>	Netherlands Food and Consumer Product Safety Authority
<b>PEFC</b>	Programme for the Endorsement of Forest Certification Systems
<b>REACH</b>	Registration, Evaluation, Authorization and Restriction of Chemicals
<b>SFI</b>	Sustainable Forest Initiative
<b>SFE</b>	State Forestry Enterprise (SFE/ Ukraine)
<b>SUMAL</b>	Sistemul Informațional integrat de Urmărire a Materialelor Lemnoase (Integrated informational wood traceability system/ Romania)
<b>UNODC</b>	United Nations Office on Drugs and Crime
<b>VPA</b>	Voluntary Partnership Agreement
<b>WRI</b>	World Resources Institute
<b>WTR</b>	(EU) Wildlife Trade Regulation
<b>WWF</b>	World Wildlife Fund

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## EXECUTIVE SUMMARY

The general objective of this study is to assess the internal and external dimension of illegal logging in the EU, with the aim of exploring legal issues and propose solutions for an effective timber regime. To achieve this, the study assesses the requirements that are established, with regard to both operators/traders and Competent Authorities. Acknowledging that enforcement may differ across Member States, the study sought to examine national measures and enforcement actions in order to ascertain whether disparities among Member States are likely to undermine the timber regime. Particular petitions that were launched were taken as a starting point. These petitions raised serious concerns with respect to illegal logging and deforestation in certain EU countries, pointing out the multiple consequences that these practices have on the environment. Specifically, the petitions insisted on the unwillingness of national authorities to address the illegal logging issue, and the inaction of the EU despite the increased destruction of protected areas and severe and repeated cases of violence against, and even murder of, whistleblowers and journalists. One petition also pointed out the same issues in Brazil, in more alarming proportions, calling on the EU to dissociate itself from these illegal practices and abuses by putting an end to the free-trade Agreement with Brazil. This study aims at providing an overview of the applicable legislation and looks broadly at the academic literature in order to indicate points, which merit either further EU action or further research.

Illegal logging and related timber trade is a major driver of deforestation and forest degradation. Its impacts on the environment are widely acknowledged, but it is also associated with diverse social (e.g. human rights violations, violence, conflicts, violation of Indigenous People's rights, etc) and economical consequences (e.g. tax evasion, illicit capital flow). Corruption and fraud are essential underlying factors of deforestation and contribute to poor law enforcement, weak rule of law and impairment of access to justice, as well as criminal activities such as bribery and money laundering. The complexity of the regulating illegal logging lies in the fact that illegal practices can occur at any stage in the timber supply chain including harvesting, transportation, processing, manufacturing, exporting, importing and selling. This complexity increases the risk of illegality along the supply chain, making compliance with relevant laws more challenging, and demanding greater scrutiny from all stakeholders. Whereas illegal logging happens at much higher proportions in major producing-countries in Africa, Asia and South America, it is also occurring within the European Union in countries such as Romania, Bulgaria or Greece. The importance of timber products consumption in the EU and the magnitude of the issue indicate the need for adequate and effective regulations as well as increased cooperation between timber-producing and timber-consuming countries.

The endorsement in 2003 of the Forest Law Enforcement, Governance and Trade (FLEGT) Action Plan is the EU's response to the illegal logging issue. The FLEGT AP defines EU's policy to combat illegal logging and associated trade. It gave rise to the FLEGT Regulation and the European Union Timber Regulation (EUTR). These two regulatory instruments combine demand and supply-side measures intended to promote transnational forest governance and, thereby, improve logging practices. The FLEGT Regulation (2005) focuses on supply-side measures and includes Voluntary Partnership Agreements (VPAs) with timber-producing countries outside the EU. The timeframe as regards the implementation of any VPAs and the risk of circumvention and laundering make VPAs alone insufficient to address the problem of illegal logging. As a result, the EUTR (2010, in force 2013) was adopted to prohibit the placing of illegally harvested timber or timber products on the internal market and

establish a due diligence obligation for operators, when first placing these products on the internal market.

FLEGT VPAs are voluntary in nature, but they create binding obligations once they are ratified. After the ratification by a third country, only products with a FLEGT license will be allowed on the EU market from that country. VPAs are built around the definition of 'legality', and consequently the Legality Assurance system (LAS) that enables adequate verification in conformity with specific legality parameters. As there is no universally accepted definition of legality, each VPA takes account of the priority areas and issues in the relevant country and leaves it to stakeholders to agree jointly on a country-specific definition of legal timber. Legality verification, as advocated in the VPAs is a multi-stakeholders, participatory approach to compliance that is designed to help VPA countries to address their own domestic concerns and develop a legality definition fitting to the specific circumstances of their supply chains. VPAs have increased cooperation between the EU and many producer countries. Bilateral negotiations and capacity building have sparked major legal and institutional reforms. In addition, owing to the inclusive participatory approach, a greater acceptance of the laws is expected, which will in turn lead to better implementation and enforcement. However, after eighteen years, only Indonesia has reached a level that was deemed sufficiently satisfactory to issue FLEGT licences. Yet, weak governance, requirements and challenges with enforcement still need to be addressed to make the Indonesian VPA a truly effective instrument for ensuring legal compliance and stopping deforestation.

The EUTR is adopted to create a level playing field by setting equal legality requirements that apply to both domestically harvested timber and timber products imported from all countries. The EUTR is being implemented in each Member State through the national laws and enforced by the national authorities. Member States are to adopt effective, proportionate and dissuasive penalties to sanction infringements of the requirements of the EUTR.

The FLEGT AP and the EUTR have contributed to bring the issue of illegal logging to the fore and have led to greater transparency and awareness on the issue and its underlying causes. This strengthened the international commitment of the EU to address environment issues in general, and has had a positive effect on other demand-side markets and on forest governance. Substantiated concerns by civil society have been one of the major contributors to the progress made because the constant scrutiny of these actors helped enlighten decision-making by both economic operators and enforcement authorities. In Myanmar, for example, enforcement actions of the EUTR and undercover investigations of environmental NGO's unveiled major shortcomings in the verification system, followed by drastic measures for improvement. However, weak implementation and enforcement within the EU itself were highlighted, leading sometimes to trade diversion. Penalties are deemed too low to truly have a deterrent effect on illegal behaviour. Moreover, the disparities in penalties regime and the lack of uniform implementation across Member States undermine the level playing field by putting the operators who strictly comply with the requirements at a disadvantage. The lack of knowledge of relevant laws in the country of harvest and the complexity associated with illegal timber trade constitute additional obstacles for both operators and enforcement authorities, and are major obstacles for the prosecution of offenders. The focus on operators under the EUTR and the limited scope of the regulation contribute to limit its effectiveness.

In spite of the efforts of public authorities in many nations, the intergovernmental failure to sign a global instrument to address illegal logging and the increased scrutiny and concerns by environmental

groups and other actors prompted the emergence of private certification. Domestic and transnational private governance systems gained momentum in several sectors, including forestry, as voluntary commitments that represent a shift from traditional regulatory mechanisms. In the forest sector, certification also provides consumers with a credible assurance that products originate from environmentally responsible, socially beneficial and economically viable and sustainably managed forests. In recent years, some of the most important forest certification schemes (FSC, PEFC) are increasingly being questioned for their lack of independence, weak enforcement, and their vulnerability to manipulation and fraud. Yet, their significant contribution to the improvement of forest governance and timber legality must be acknowledged. FSC, PEFC as well as other third-party verified schemes can be used as tools in due diligence systems, when operators consider them sufficiently credible. However, they do not constitute proof of legality and operators under the EUTR must still assess and mitigate risks to a negligible level. Voluntary certifications schemes lack the mandatory law enforcement authority that are necessary for a comprehensive approach to address illegal logging.

The design of both the FLEGT VPAs and EUTR seems to provide positive assurance that the timber regime would be hard to challenge as discriminatory and unnecessarily trade restrictive. First, trade negotiations within the framework of VPAs, seeking bilateral exchanges, mutually beneficial schemes, and providing a framework for capacity building would most probably not lead to infringement of WTO provisions. Secondly, the EUTR does not seem to discriminate between foreign and domestic (like) products. It does also not prohibit the import of illegal wood, but rather prohibits the 'first' placing of illegally harvested wood on the internal market. However, a consistent implementation and enforcement of the timber regime would play a decisive role in its ability to remain non-discriminatory and withstand a WTO challenge.

At the international level, a shift towards global governance is essential to tackle certain recurrent issues such as trade diversion, especially via China, corruption and human rights violations.

The study concludes with the following recommendations:

### Recommendations

- 1- The EUTR should provide a clear and comprehensive definition of 'Illegal logging'. Such a definition should incorporate laws against corruption and tax evasion, laws protecting the rights of forest communities and laws against human rights violations;
- 2- The product scope of the EUTR should be reviewed and extended to include all timber and timber products sold on the EU market to ensure an effective level-playing field and eliminate unfair competition and trade diversion;
- 3- Taking the example of the interpretation of "operator" in German case law, the definition of an operator under the EUTR could be extended to include "any person who by virtue of its economic or other influence, exerts control over logging or import processes";
- 4- The due diligence obligation should be extended to traders to increase their liability and reduce the risk of trade circumvention. The prohibition to place illegally harvested timber and timber products on the EU market should be addressed both against operators and against traders;
- 5- The EU should promote the use of scientific methods to monitor deforestation and verify the legal origin of timber;

- 6- The EU should support Member States in allocating a more significant budget to the implementation and enforcement of the timber regime. This would contribute to a more consistent approach throughout the EU;
- 7- Existing penalty regimes should be assessed and revised where applicable, taking into account the damage to the environment and the profit derived from illegal activities. A more harmonised approach across Member States should be promoted to limit the risk of changing supply routes;
- 8- As currently data on monitoring, enforcement and sanctioning are largely lacking, it is of crucial importance to collect data on the enforcement of the EUTR in the Member States, i.e. on the inspection activities, the number of violations established and the types and size of the sanctions imposed;
- 9- The necessity for an EU Green Prosecutor should be considered to account for the transnational character of environmental crimes, including illegal logging and associated financial crimes and human rights violations. A Green prosecutor at EU level would facilitate cross-border investigations and harmonised prosecutions across the EU;
- 10- The need for cross-sectoral mandatory human rights and environmental due diligence legislation should be explored. Such regulatory instruments should provide for effective remedies and access to justice for victims, as well as liability for companies.
- 11- Compliance should not be solely motivated by the fear of sanctions. Increased awareness raising among operators/traders can trigger voluntary compliance initiatives and a shift towards more systematic Corporate Social Responsibility- along the supply chain.

## INTRODUCTION

### 1.1 Initiation of the study

The European Parliament received several petitions from citizens concerned about illegal logging and deforestation in Europe and in the Amazon. These citizens are worried about the alarming proportions that these phenomena are taking in forests and some protected areas in European countries such as Romania and Bulgaria. The petitioners fear adverse effects of illegal logging and deforestation on the environment, human health and the economy. Similarly, deforestation in Brazil has been criticized. The interest of voicing concerns about deforestation in Brazil is that the petitioners intend to call on the Commission to stop negotiations with Brazil within the framework of the EU-Mercosur free trade Agreement in order to avoid indirectly contributing to wipe out forests in the Amazonian region.

Forests are indeed essential for humankind because they provide a broad variety of environmental, economic and social benefits including timber and non-timber forest products and environmental services.<sup>1</sup> By contrast, deforestation leads to loss of biodiversity, deprives communities from ecosystem functions and undermines sustainable forest management.

Illegal logging is a major contributor to deforestation and forest degradation. The growing demand for timber and timber products worldwide and the institutional and governance shortcomings in the forest sector in some major timber-producing countries contributed to make illegal logging a global issue that has received increased attention in recent years. Furthermore, there is a growing interest among consumers, retailers, investors, communities and governments to be aware that their purchases and consumption of wood-based products contribute to environmental sustainability and improvement of the livelihood of local people.<sup>2</sup>

It is commonly acknowledged that the G8 action programme on forests, launched in May 1998 was the first step at international level to tackle illegal logging. The G8 Action programme was followed by a series of initiatives at the international level aiming at establishing cooperation mechanisms between producer and consumer countries. In 2003, the EU Council of Ministers endorsed the EU Action Plan on Forest Law Enforcement, Governance and Trade (FLEGT) which defined European Union's policy to fight illegal logging and associated trade. The FLEGT AP covers both supply and demand side measures to address illegal logging. It gave rise to two key pieces of legislation. First, Council Regulation (EC) No 2173/2005 of 20 December 2005 (the FLEGT Regulation) was adopted to address supply-side measures through bilateral FLEGT Voluntary Partnership Agreements (VPA) between timber-producing countries and the EU. Secondly, Regulation (EU) No 995/2010 of 20 October 2010 (the EU Timber Regulation or EUTR) was adopted as an overarching measure that addresses demand-side measures by prohibiting placing of illegal timber and timber products on the internal market.

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<sup>1</sup> Recital 1 of the EUTR.

<sup>2</sup> Nogueron and Cheung 2014, p.2.

## Objectives

The objectives of this study, inter alia, are the following:

- Assessing a selection of the relevant petitions on the topic;
- Assessing the legal framework on illegal logging in the EU;
- Assessing the obligations of operators within the framework of the EU timber regime;
- Assessing the effectiveness of the timber regime through its implementation and enforcement across EU Member States;
- Assessing the question whether FLEGT VPAs are an effective instrument to tackle illegal logging at the international level;
- Assessing the value of private certification as proof of legality in the timber trade;
- Assessing the external dimension of the EU timber regime.

## 1.2 Scope

In line with the objectives of the study, the study will more particularly focus on the possible recommendations that could follow from the analysis. The study will therefore have as main goal to analyse the current regime with respect to illegal logging in order to have some insights about its effectiveness in view of the academic literature.

The study intends to identify best practices among Member States and examine how these can be built upon to ensure greater effectiveness of the timber regime. It will also explore how logging-related information is collected and analysed. This has a twofold objective. First, it will enable to ascertain whether public authorities strive to collect real information on illegal logging to inform their decision-making. Secondly, analysing data collection patterns will help establish whether public authorities properly satisfy their reporting obligations and whether they endeavour to provide sufficient transparency as regards their enforcement actions. In a similar vein, the study will assess the use of satellite information in tracking logging within the EU.

The study will provide elements that could stimulate a debate on possible reforms. Reforms and proposals will, for example, focus on the following questions:

- The need to extend the scope of the EUTR to include, for example, printed products;
- The need to expand the due diligence obligation to traders;
- The need to provide more clarity about enforcement actions by Competent Authorities in Member States;
- The need to develop clear guidelines with regard to substantiated concerns;
- The need to strengthen the concept of monitoring organization ;
- The need to revise the penalty regime in the EUTR;
- The need to officially recognize illegal logging as an environmental crime;
- Generally, the desirability of having further EU action with respect to a wider scope and a stricter timber regime.

The study aims at developing ideas, which could lead to recommendations and policy proposals with respect to the above mentioned topics, thus stimulating the agenda setting with respect to this important topic.



### **1.3 Limits of the study**

While illegal logging can generally not be dissociated from deforestation, this study does not intend to address the broader topic of deforestation and forest degradation. The study may at times refer to deforestation, but only to the extent necessary to deal with specific issues related to illegal logging.

The FLEGT AP addresses demand-side measures by defining legality, taking into consideration relevant laws applicable in the country of harvest. This study does not intend to make any analysis of the legislation of the VPA partner countries. It makes no assumption on the legitimacy of these laws in the VPA country itself. The study does also not assess the ability of these laws to guarantee legality as intended by the EU timber regime.

### **1.4 Approach/Method**

This study will largely rely on a legal analysis and will therefore study the current EU timber regime. To some extent, domestic state law is of importance as well. In those cases, it will be indicated that particular issues, such as penalties, may be within the scope of Member State law, but Member State law itself will not be discussed.

For the interest of the study, enforcement cases in Member States will be considering when they provide useful insights to highlight some strengths or weaknesses in the EU regime. Because the timber regime is particularly recent, these enforcement cases are very important to examine how the law works in practice in order to ascertain how effective it is at attaining its objectives.

Timber regimes in other jurisdictions (US, Australia) will also be considered. The study will however not make a broad analysis of those foreign regimes. It intends simply to examine how specific legal provisions are designed in the foreign laws in order to determine whether or not such an approach could reveal useful when weighing policy alternatives within the EU.

### **1.5 Structure**

After this introduction, the study will first present the issue of illegal logging, looking at its environmental, economic and social consequences, and review some of the petitions (2). This will be followed by the presentation of the legal framework on illegal logging within the EU (3). Chapter 4 will assess the effectiveness of the timber regime, taking into account enforcement experiences and issues in Member States as well as insights from the international regime (4). The focus will then shift to the implications of the concepts of timber legality and verification for the development of both demand and supply-side measures aiming at tackling illegal logging (5). The importance of private governance and its contribution in advancing the EU timber regime will subsequently be explored (6). Chapter 7 will summarize and formulate policy recommendations.

## **1.6 Word of thanks**

I am very grateful to Prof. Dr. Michael Faure, Professor of comparative and international environmental law, at Maastricht University, and Professor of comparative private law and economics, at Erasmus School of Law in Rotterdam (both in the Netherlands), for his invaluable comments and insights.

## 2 ILLEGAL LOGGING: PRESENTING THE ISSUE

### KEY FINDINGS

There is no internationally agreed definition of illegal logging; EU law provides no common definition either;

The devastating economic, environmental and social consequences of illegal logging are widely acknowledged. Cases of violence and murder against whistleblowers and foresters are surging;

Corruption and fraud are the main drivers of illegal logging, leading to weak enforcement and impunity. This also exacerbates various criminal activities such as financing conflicts and money laundering;

EU action is needed to stop illegal logging and deforestation and curb trade in illegally harvested timber and timber products.

In a world increasingly aware of the stakes of human action on nature and climate, the alarming proportions that deforestation has been taking seems to elicit the commitment of political leaders, diverse stakeholders and the society at large towards a common vision aimed at responsible and sustainable management of natural resources. Forests and forest resources are recognized for their contribution to carbon sequestration, air quality, as well as other ecological and anthropological benefits including water supplies, pharmaceuticals, food, fuel, recreation, and wood and timber for construction.<sup>3</sup> Conversely, illegal logging is considered a major issue and an essential contributor to deforestation and forest degradation around the world.<sup>4</sup> Other negative impacts include desertification and soil erosion, threat to biodiversity, undermining of sustainable forest management and development, including the commercial viability of operators acting in accordance with applicable legislation. Additionally, due to its social, political and economic implications, illegal logging impairs progress towards good governance and can contribute to threaten livelihood in local forest-dependent communities.<sup>5</sup> The phenomenon is similarly linked to armed conflicts<sup>6</sup>, promotion of corruption and enormous loss of revenues to governments.<sup>7</sup>

Illegal logging and related trade can be considered subsets of violations of forest law.<sup>8</sup> The illegal logging issue was acknowledged at the fourth Ministerial Conference on the Protection of Forests in Europe (MCPFE) in 2003. The signatory states and the European Community committed themselves to “provide and analyze information about the impact and underlying causes of illegal harvesting of forest products and related trade on forest biological diversity; take effective measures to combat illegal

<sup>3</sup> Tyrväinen et al., 2005 ; see also Nellemann 2012, p.5.

<sup>4</sup> Deforestation and forest degradation are responsible for about 20 % of global CO2 emissions.

<sup>5</sup> EUTR, recital 3.

<sup>6</sup> EUTR, recital 3.

<sup>7</sup> See Forest Europe, available at <https://foresteurope.org/illegal-logging/>

<sup>8</sup> Tacconi et. al. , p.24.

harvesting of forest products and related trade, and build capacity to ensure effective forest law enforcement".<sup>9</sup>

In spite of this commitment, the various attempts at the international level to tackle the issue of illegal logging face challenges such as the lack of consensus about a definition of illegal logging, the growing scale of the issue despite the diverse initiatives, as well as the substantial differences with regard to the nature of illegal logging, both within different regions of a one country and between different countries.<sup>10</sup> Moreover, the magnitude of illegal logging is increasing because actors are finding new ways to circumventing legislations, moving from "direct illegal logging to more advanced methods of concealment and timber laundering" operations that mask criminal activities.<sup>11</sup> These practices contribute to a misleading apparent decline of the extent of illegal logging.<sup>12</sup> The clandestine nature of the phenomenon contributes to the difficulties in having reliable statistics on its extent and realistic estimates of its harmful effects. The European Commission acknowledged that illegal logging is in many countries similar in size or even higher than legal logging activities, and is closely linked to human rights abuses.<sup>13</sup>

This chapter explores the definition of illegal logging (2.1) and its impacts (2.2). It then summarizes the main issues that have been identified (2.3).

## 2.1 Definition of illegal logging

The definition and estimation of the magnitude of illegal logging have often been faced with the major challenge of the lack of an internationally recognized definition. Illegal logging is neither a legal term derived from treaties, statutes, or court opinions, nor is it a technical term used in a consistent way by professionals.<sup>14</sup> Various stakeholders attempt to define the concept from their vantage point, taking into account real or perceived issues that are considered important to entirely grasp the scale of the phenomenon.<sup>15</sup> Ongoing discussions also focus on the appropriateness of including the violations against taxation regulations (e.g. property-, income-, value-added taxes) in the definition of illegal logging, especially the extent to which these laws could be taken into account and how such requirements could be implemented, if they were to be considered.<sup>16</sup> According to the Ministerial Conference on the Protection of Forests in Europe (MCPFE), in various countries and even within a single country, the nature of illegal logging can vary substantially ranging from subsistence-based activities to operations on industrial scale.<sup>17</sup> The existing definitions range from a narrow understanding that refers to taking timber from outside authorised forest concessions or exceeding

<sup>9</sup> Vienna Resolution 4, para. 7.

<sup>10</sup> MCPFE 2007, p.9.

<sup>11</sup> Nellemann 2012, p.6.

<sup>12</sup> Nellemann 2012, p.7. It is worth mentioning that the different approaches with regard to definitions of illegal logging leads sometimes to different assessment with regard to the extent of the issues. Three years before these findings Nellemann, Hoare (2015) reported that "important progress has been made in reducing illegality in the forest sector over the last decade"; see Kleinschmit et al. 2016, p.15.

<sup>13</sup> COM(2008) 644 final, p.2.

<sup>14</sup> Brack & Hayman 2001, p.5.

<sup>15</sup> For instance, environmental NGO's would often prefer a broader definition that includes illegal relevant acts, while industry representatives and governments would lean towards a more restricted definition. (See MCPFE 2007, p.7.)

<sup>16</sup> MCPFE 2007, p.9. Some countries such as Lithuania or Czech Republic adopt a definition of illegal logging that is not forest-specific, and their statistics on illegal logging records also include violations against other administrative norms, e.g. environmental, labor protection, tax rules, etc. (See Bouriaud and Niskanen 2003, p.2)

<sup>17</sup> MCPFE 2007, p.10.

assigned timber quotas to broad definitions encompassing the entire supply chains, including the processing and trading of timber and timber products.<sup>18</sup>

Broadly defined illegal logging can include “almost any illegal act that may occur between the actual growing of the tree to the arrival of the forest-based product in the hand of the consumer.”<sup>19</sup> Considered from this perspective, illegal logging refers to activities such as illegal clearance of forests for other land uses, operating under an illegally obtained licence, including corrupt processes or even the harvesting of timber from illegally-established plantations.<sup>20</sup>

The WWF/World Bank Alliance provides a rather extensive definition encompassing individual acts considered illegal logging.

### Box 1: WWF/World Bank Alliance definition of illegal logging

Individual illegal logging acts
<p><i>Illegal logging includes logging:</i></p> <ul style="list-style-type: none"> <li>- outside a concession area;</li> <li>- in excess of quota;</li> <li>- in a protected area;</li> <li>- without appropriate permits;</li> <li>- without complying with bidding regulations;</li> <li>- without submission of required management plans;</li> <li>- in prohibited areas such as steep slopes, river banks, and water catchments;</li> <li>- protected species (as defined by CITES or other international law);</li> <li>- with duplicate felling licenses;</li> <li>- using girdling or ring-barking to kill trees so they can be logged legally;</li> <li>- that contracts with local entrepreneurs to buy logs from protected areas;</li> <li>- removing of under/over sized trees from public forests;</li> <li>- reporting high volumes extracted from forest concessions to mask that part of the volume is from non-authorised areas outside of the concession boundaries;</li> <li>- using bribes to obtain logging concessions;</li> <li>- using deceptive transfer pricing and other illegal accounting practices to distort prices, volumes, cash flows and debt service levels (for example some companies will inflate the price of imported inputs such as machinery and deflate prices and volumes of their exports to reduce nominal profits, their tax liability with the host country and to illegally transfer funds abroad);</li> <li>- that engages in the illegal transport and trade of timber or the smuggling of timber;</li> <li>- that is processed without the required licenses and that is not in compliance with environmental, social and labour laws.</li> </ul>

Source: WWF/World Bank Alliance 2003, p.12.

<sup>18</sup> Kleinschmit et al. 2016, p.14.

<sup>19</sup> Rosenbaum 2003.

<sup>20</sup> Hoare 2015, p.2.

Such a broad approach to define illegal logging is quite useful because it can support stakeholders, legislators and enforcement authorities in their endeavours to tackle the issue by providing a repository that helps characterize various practices in the forest sector. From a less-detailed perspective, illegal logging is seen as a process consisting in illegal activities pre-logging (getting permits), illegal logging, illegal transportation and illegal processing.<sup>21</sup> Interestingly, most definitions assess these activities from the perspective of the laws applicable in the country where they are performed. Following this approach, illegal logging can be considered all activities taking place when timber is harvested, transported or sold in violation of national laws.<sup>22</sup> A rather similar definition encompasses "all practices related to the harvesting, processing and trading of timber inconsistent with national and sub-national law".<sup>23</sup> In this regard, "the harvesting procedure itself may be illegal, including corrupt<sup>24</sup> means to gain access to forests, extraction without permission or from a protected area, cutting of protected species or extraction of timber in excess of agreed limits. Illegalities may also occur during transport, including illegal processing and export, misdeclaration to customs, and avoidance of taxes and other monies".<sup>25</sup>

From the legal perspective, "illegal logging can be understood as logging done with the infringement of criminal law (timber robbery) or of administrative law (e.g. legally binding forest management and harvesting regulations)".<sup>26</sup> Illegal logging may therefore be defined as "trees harvested without the owner's agreement (robbery, or illegal appropriation) or without respecting the constraints imposed by law (unauthorized harvests)".<sup>27</sup>

Within the EU, the timber regime underlines the pervasive nature of illegal logging, pointing out its consequences and its transnational character. But, even though the 14<sup>th</sup> recital of the European Union Timber Regime (EUTR) acknowledged the absence of an internationally<sup>28</sup> agreed definition of illegal logging, the Regulation did not attempt to provide a clear definition of the phenomenon. Rather, the EUTR leaves the responsibility to define the issue to the country where the timber was harvested, taking into account its domestic regulations as well as relevant international conventions to which that country is party. As such, regulatory steps in the EU endeavoured to tackle the issue of illegal logging without really clarifying its meaning within its own jurisdiction. The ambiguity of this approach is due to the fact that illegal logging is not just an issue in third countries, but the phenomenon is also occurring in EU countries such as Romania and Bulgaria as will be illustrated by the petitions described below (section 2.2.2).

<sup>21</sup> Forest Europe, available at <https://foresteurope.org/illegal-logging/>

<sup>22</sup> Brack & Hayman 2001, p.5.

<sup>23</sup> Kleinschmit et al. 2016, p.16.

<sup>24</sup> While corruption is often cited as an important element with regard to illegal logging, it remained difficult to provide one single formal explanation for the concept. Most generally, even if the distinction can often be blurred, corruption can be divided into 'grand' and 'petty' corruption, mainly "based on who is acting corruptly and their rank and status in the community, rather than the size of the bribe or the scale of the impact of the resulting activity" (see Callister 1999, p.8). From the standpoint of illegal logging, "corruption could be narrowly defined as the illegal logging done or facilitated by public officials" (see Bouriaud and Niskanen 2003, p.3).

<sup>25</sup> Brack and Hayman 2001, p.5.

<sup>26</sup> Bouriaud and Niskanen 2003, p.2.

<sup>27</sup> Bouriaud and Niskanen 2003, p.2.

<sup>28</sup> Regulation (EU) No 995/2010 laying down the obligations of operators who place timber and timber products on the market (the EU Timber Regulation or EUTR), OJ L 295, 12.11.2010 p. 23, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010R0995&from=EN>

In the same way, the timber regime outlines the categories of laws that fall within the 'applicable legislation' in force in the country of harvest, but does not specify the exact laws that are relevant in this context. While this approach enables to apply the same criteria to timber, irrespective of the country of harvest, it also leaves room for different actors to consider different laws to be relevant.<sup>29</sup> The drawback with this approach is that those impacted by the Timber Regulation are left with the task of identifying the exact laws to be complied with at national level, thereby increasing the burden on individual actors and raising a question of coherence.<sup>30</sup> For an appropriate implementation and enforcement of the illegal logging framework, clear and effective guidance is needed from public authorities at both Member State and EU level.

## 2.2 Impacts of illegal logging

Due to the magnitude of the illegal logging, several international initiatives attempted to tackle the issue including the "G8 Action Programme on Forest" (1998), the "Forest Law Enforcement and Governance East Asia Ministerial Conference" (2001), the "Proposal for an EU Action Plan for Forest Law Enforcement, Governance and Trade (EU FLEGT)" (2003), the "Africa Forest Law Enforcement and Governance Ministerial Conference (AFLEG)" (2003) and the European Neighbourhood and Partnership instrument (ENPI) FLEG Program "Improving Forest Law Enforcement and Governance in the European Neighbourhood Policy East Countries and Russia (2005).

Illegal logging is indeed decried for its negative impacts. These effects extend beyond the limits of one specific country. With the increasing demand in timber, paper and derivative products, international trade in timber has been growing, bringing along an increased risk of illegal logging. The various infringements constitutive of illegal logging have, according to their nature, different effects on the environment, economy or society.<sup>31</sup> Whereas infringements of forests harvesting regulations will adversely affect the environment, a breach of land laws that dispossess communities of land would rather have social impacts.<sup>32</sup> This section intends to first briefly present the environmental, economic and social impacts of illegal logging. It will then give a short overview of the illegal logging phenomenon in the EU.

### 2.2.1 Environmental, economic and social impacts

Illegal activities lead to unsustainable practices, reduce the value of forests stands and result in the depreciation of the various environmental, economic and social services of forests,<sup>33</sup> thereby leading to outright deforestation<sup>34</sup> and forest degradation. Forests are indeed the largest reservoir of plants, animals and biodiversity on land, protecting watersheds and beneficial for agricultural, production and fisheries.<sup>35</sup> Illegal logging is responsible for 15-30% of global timber production. It represents 50-90%

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<sup>29</sup> Unwin 2012.

<sup>30</sup> *Idem*.

<sup>31</sup> Tacconi 2006, p.3.; Brack 2007, pp.1-2.

<sup>32</sup> Tacconi 2006, p.3.

<sup>33</sup> MCPFE 2007, p.48. The contribution of illegal logging to resource depletion is not always significant, and the risk might be limited, when other types of felling of illegal nature are not taken into consideration. As explained by Bouriaud and Niskanen (2003, p.8), in many countries the amount of illegally cut timber does not necessarily exceed the annual allowable cut.

<sup>34</sup> Contreras-Hermosilla, 2002, p.15.

<sup>35</sup> With the current debate on the shift towards a Green Economy, it is important to acknowledge the role of forests (e.g. benefits in terms of water supplies, pharmaceuticals, etc) and their contribution to sustainable development and poverty eradication.

of logging in all forestry activities in key producer tropical forests, such as those of the Amazon Basin, Central Africa and Southeast Asia. Illegal trade of timber is worth USD 51-152 billion per year.<sup>36</sup> According to estimates, the percentage of illegal logging is highest in Cameroon (50-65%), Indonesia (60-80%), Brazil (50%), Democratic Republic of the Congo (DRC) (90%), Myanmar, Papua New Guinea, Ghana (34-70%), Peru, and Laos (35-80%)<sup>37</sup>.

Illegal logging leads to forest degradation, which is responsible for about 20 % of global CO<sub>2</sub> emissions, undermines sustainable forest management and contributes to desertification, soil erosion, global warming and flooding.<sup>38</sup> Moreover, illegal logging can result in the extinction of large mammals and specific habitats for different plant and animal species because illegal activities tend to disregard laws that protect forest resources values (e.g. protected species, protected habitats, temporal or spatial exclusion criteria for logging activities).<sup>39</sup> In countries with severe prevalence of illegal logging, the obvious violations against sustainability principles will most probably have long-term impacts not only on forest management and forest environment, but also the system of forest and the related policies aiming at supporting sustainable development.<sup>40</sup> Depreciation of forests has a significant impact on human habitat, both locally and globally.<sup>41</sup>

From the economical perspective, illegal logging deprives local and responsible communities of their economic livelihood. It is often associated with tax evasion, which enables illegal loggers to depress the market value of forest products, leading to the distortion of the market balance and unfair competition. Subsequently, the profitability of forest investments is reduced and this is a disincentive for investors. Furthermore, individuals or corporations may not only smuggle forest products across international borders, but also process illegally logged forest products without a license. Corporations with strong international links may also artificially inflate the price of imported inputs or deflate the volume and prices of their exports to reduce their tax liability and facilitate the illegal transfer of capital abroad.<sup>42</sup> All these practices generate revenue loss for the government in terms of lost taxes and duties,<sup>43</sup> and contribute to increase forest management and transaction costs.<sup>44</sup> These losses to national budgets can run significantly high, undermining in some cases economic progress of developing nations.<sup>45</sup>

From the social vantage point, systemic poor law enforcement impairs economic growth and increases poverty, especially affecting the most disadvantaged populations.<sup>46</sup> Illegal logging occurs in areas that are of vital importance for the poor and might deprive the latter from important source of agricultural implements, construction materials, medicines, and fuelwood. Illegal logging can generate conflicts

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<sup>36</sup> Interpol, Global Forestry Enforcement, Strengthening Law Enforcement Cooperation Against Forestry Crime, 2019.

<sup>37</sup> Congressional Research Service, International Illegal Logging: Background and Issues, In focus, 2019. Available at <https://sgp.fas.org/crs/misc/IF11114.pdf>

<sup>38</sup> EUTR, recital 3. See also Contreras-Hermosilla 2002.

<sup>39</sup> Ottitsch et al., p51.

<sup>40</sup> Bouriaud and Niskanen 2003, p.8.

<sup>41</sup> Contreras-Hermosilla, 2002, p.15.

<sup>42</sup> FAO 2001, pp. 88 & 90.

<sup>43</sup> WWF, Illegal logging, The global trade in roundwood, paper, furniture, and other products originating from illegally extracted timber is a multi-million dollar industry, available at:

[https://wwf.panda.org/discover/our\\_focus/forests\\_practice/deforestation\\_causes2/illegal\\_logging/](https://wwf.panda.org/discover/our_focus/forests_practice/deforestation_causes2/illegal_logging/)

<sup>44</sup> Bouriaud and Niskanen 2003, p.6.

<sup>45</sup> Brack and Hayman 2001, p.6.

<sup>46</sup> Contreras-Hermosilla, 2002, p.15.



over land and resources. While for some people living in the largest forests, illegal logging might sometimes be a vital source of income, very often it is a threat to their livelihood as they often lose out to powerful interests, logging companies and migrant workers due to their little control over ownership of their land.<sup>47</sup> This vulnerability can also result in repression, exploitation, and human rights violations. The loss of rural subsistence, in turn, increases food insecurity.<sup>48</sup>

As far as governance is concerned, the illegal extraction, exploitation and smuggling of natural resources such as timber can be considered a transnational environmental crime<sup>49</sup> committed and supported by various actors and several countries. Illegal logging, which has topped the ranking of environmental crimes with an estimated value of \$50-152 billion annually is indeed mainly driven by corruption and organized crime.<sup>50</sup> Corruption in the forestry sector often manifests itself through corporate crimes, involving a system of fraud, tax fraud, forged permits or permits acquired through bribes, laundering of illegally procured timber and extensive smuggling operations. In addition, complex schemes of multi-layered shell companies based in offshore jurisdictions are often used in the sectors of palm oil production, agricultural plantations or grazing (that rarely produce any primary products) for the acquisition or lease of land officially for agricultural purposes, but that in reality serves as a way to clear forests for timber trade and pulp supply.<sup>51</sup>

Some of the key sources and manifestations of corruption in the forestry sector are: “the lack of proper public procurement practices in the awarding of licences and concessions; the lack of both accountability and transparency in contracts; political leverage and regulatory capture in timber-producing countries; non-compliance with procedures and legal requirements; inadequate consultations with landowners, civil society and forest-dependent communities; as well as inadequate corporate accountability of multinational companies due to opaque chains of subcontracting; and the lack of annual financial reports providing a country-by-country breakdown of operations.”<sup>52</sup> It is reported that donor governments have also used aid programmes to favour their own companies and protect the timber supply chain.<sup>53</sup>

Corruption is equally known to compromise judicial integrity, leading to weak law enforcement. Yet, the proper enforcement of laws governing forests is essential to securing accountability and combating impunity, which undermines anti-corruption efforts. Despite the magnitude and diversity of corruption risks in the timber sector, there are few instances of prosecution and punishment.<sup>54</sup>

Most of the time, the illegal timber trade is supported by other forms of illicit and criminal activity including money laundering, violence and at times murder. Its scale in Asia Pacific, for instance, would be impossible without a well-organized network of shipping companies and agents, brokers and middlemen in places such as Singapore, Malaysia, Hong Kong and China who support relabeling,

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<sup>47</sup> WWF, *Illegal Logging*.

<sup>48</sup> Contreras-Hermosilla, 2002, p.15.

<sup>49</sup> According to the United Nations, a crime is transnational if it is committed in more than one state; is committed in one state but a substantial part of its preparation, planning, direction or control takes place in another state; is committed in one state but involves an organized criminal group that engages in criminal activities in more than one state; or is committed in one state but has substantial effects in another state (See United Nations General Assembly 2000: article 3).

<sup>50</sup> Transparency International EU/ Global Witness 2017, p.6.

<sup>51</sup> Transparency International EU/ Global Witness 2017, p.15.

<sup>52</sup> Transparency International EU/Global Witness 2016, p.6.

<sup>53</sup> *Idem*.

<sup>54</sup> Transparency International EU/Global Witness 2016, p.11.

processing and transportation crimes.<sup>55</sup> Due to these specificities, illegal logging also contributes to undermine the rule of law and the principles of democratic governance.<sup>56</sup>

### *Illegal logging as major environmental crime*

Illegal logging is the most lucrative environmental crime and one of the most profitable organized criminal activities, alongside narcotics trafficking, counterfeiting and human trafficking. It accounts for more illicit proceeds than illegal, unreported and unregulated fishing (IUU), and wildlife trafficking.<sup>57</sup> The illegal logging industry is worth almost USD 152 billion a year and accounts for up to 90% of tropical deforestation in some countries, attracting the world's biggest organized crime groups.<sup>58</sup> The issue is at the roots of conflicts in forest regions where criminal gangs compete for available markets. Forest crimes can take many forms, including tax evasion, corruption, violent crime, fraud and money laundering, and even the hacking of government websites to obtain permits.<sup>59</sup> In recent years, a series of prosecutions by law enforcers and regulators around the world highlights the scale of the problem.

*"In 2010, the Council of Ethics of the Norwegian Ministry of Finance blacklisted Malaysia's largest timber companies for corruption, bribery, illegal logging, severe and irreversible environmental damage, and human rights abuses. Two years later, Swiss prosecutors initiated a money-laundering investigation into one of Switzerland's largest global financial services companies for its relationship with Malaysia's Chief Minister of Sabah, a state in Borneo, and his alleged proceeds from illegal logging. The spotlight on Malaysia has continued because, shortly after, one of the largest publically traded banks in the world was accused of financing Malaysia's top timber companies, which in turn were contributing to the unsustainable logging and massive deforestation that has taken place in Borneo."*<sup>60</sup>

The growing demand for products, including timber, has been leading governments, companies and criminal gangs to exploiting land with little regard for the people who live on it. Human rights abuse surged to unprecedented levels and communities that take a stand are finding themselves in the firing line of companies' private security, state forces and a thriving market for contract killers. In 2016, Global Witness documented 185 killings across 16 countries, a 59% increase on 2014 and the highest annual toll on record.<sup>61</sup> According to the report, the worst hit countries were Brazil (50 killings), the Philippines (33) and Colombia (26). Also within the EU, 6 forest rangers have been killed in the last years in Romania, while 650 violent incidents have occurred against forest workers, including physical assaults, death threats and destruction of property.<sup>62</sup>

<sup>55</sup> Elliott 2007, p.503.

<sup>56</sup> FLEGT Action Plan, 2003 (Com(2003)251 final), p.4.

<sup>57</sup> Huerbsch 2016, p.4.

<sup>58</sup> Interpol, Forest crimes: Targeting the most lucrative of environmental crimes, 2020. Available at: <https://www.interpol.int/en/News-and-Events/News/2020/Forestry-crime-targeting-the-most-lucrative-of-environmental-crimes>.

<sup>59</sup> *Idem*.

<sup>60</sup> Huerbsch 2016, p.4.

<sup>61</sup> Global Witness 2016, On Dangerous Grounds, 2015's deadly environment: the killing and criminalization of land and environmental defenders worldwide, 2016, p.5, available at: <https://www.globalwitness.org/en/campaigns/environmental-activists/dangerous-ground/>

<sup>62</sup> Diab, K. Romania's brutal 'forest mafia' kills environmental defenders, 2019, available at: <https://meta.eeb.org/2019/11/12/romania-brutal-forest-mafia-kills-environmental-defenders/>

Indigenous people are acutely vulnerable as their weak land rights and geographic isolation make them particularly exposed to land grabbing for natural resource exploitation. Governments and powerful business interests, especially in Africa, are taking advantage of impunity to marginalise land and environmental activists and turn public opinion against them, branding their actions as 'anti-development'. In the Amazon states of Brazil, communities are exposed to increased levels of violence and are being encroached on by ranches and agricultural plantations or gangs of illegal loggers.<sup>63</sup> In Brazil and Peru, illegal logging is also linked with slavery and human trafficking. These issues are relevant because these countries export large quantities of timber to the major importing countries. For example, experts estimate that as much as 90% of Peru's timber exports are illegal.<sup>64</sup> Similarly, 80 % of timber from Brazil is reported to be illegal, and accounts for 25% of illegal wood on global markets, which is mostly being sold on to buyers in the US, Europe and China.<sup>65</sup>

Due to the hidden nature of these environmental crimes, it is challenging to identify risks and ensure compliance with relevant legislation, and consumers may be also be unwittingly involved in this illicit trade, as timber ends up in construction materials for housing, furniture, paper, textiles, food thickeners and more.<sup>66</sup>

### 2.2.2 Illegal logging in the EU

The vast majority of deforestation and illegal logging occurs in the tropical forests of the Amazon basin, Central Africa and Southeast Asia.<sup>67</sup> However, the illegal logging issue is not confined to these regions. Illegal logging is also an issue in some EU countries such as Romania, Greece, Latvia or Cyprus. Moreover, timber and timber products traded at the international level have a major influence on the growing scale of the issue. By some estimates, 15 to 30 per cent of the volume of wood traded globally has been obtained illegally.<sup>68</sup>

Also within the EU, timber trade plays a significant role. The EU's wood-based industries cover a range of downstream activities, including woodworking industries, large parts of the furniture industry, pulp and paper manufacturing and converting industries, and the printing industry. According to Eurostat, more than 2 billion tonnes of timber and timber products (worth more than EUR 1 trillion) were placed on the EU market in 2006-2016, of which 25 % of this timber was imported from outside the EU. In 2018, about 397 000 enterprises were active in wood-based industries across the EU-27, representing one in five (19.6 %) manufacturing enterprises across the EU-27.<sup>69</sup> The wood-based industries within the EU-27's, as measured by gross value added, amounted to EUR 139 billion or 7.1 % of the total manufacturing industry, and employed 3.1 million people. In terms of importance, the largest GVA was record for pulp, paper and paper products manufacturing (35 % or EUR 48 billion).

In view of the scale of this timber industry, considering the EU at the sidelines of the negative repercussions of illegal logging would be utterly unrealistic. Moreover, there are also concerns that the importance of the problem within the EU itself is considerable and can no longer be overlooked. In

<sup>63</sup> Global Witness, 2016, p.6.

<sup>64</sup> Huerbsch 2016, p.7.

<sup>65</sup> Global Witness 2016, p.6.

<sup>66</sup> Huerbsch 2016, p.7.

<sup>67</sup> Nellemann 2012, p.6

<sup>68</sup> Nellemann 2012, p.5.

<sup>69</sup> Eurostat, Wood products - production and trade, 2020; available at [https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Wood\\_products\\_-\\_production\\_and\\_trade#Wood\\_based\\_industries](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Wood_products_-_production_and_trade#Wood_based_industries).

recent years, Romania has been very often in the spotlight for issues related to deforestation. Experiences with the enforcement of the EU Timber Regulation also show that despite regulatory efforts, potentially illegally harvested timber might still be found on the EU market. For instance, products such as furniture that are harvested in countries like China are often suspected to contain illegally sourced wood.

In importing EU countries, trade in potentially illegal wood is also a subject of concern. A small number of cases have had regional repercussions with regard to allegedly illegal timber circulating freely from one country to another within the EU. The case of Myanmar's teak is an example of this phenomenon. Although this teak has been the subject of penalties and import bans in EU countries such as Sweden and the Netherlands, some importers have cheerfully continued trading in this teak by letting operators in Croatia – and later Slovenia and Czech Republic – import the Myanmar teak, which was then redirected to other EU countries, where the import of this wood was no longer authorized. Recent evidence from the EIA revealed that nearly 30 Italian operators continued to export that same teak in 2020/2021.<sup>70</sup> Quite strikingly, Italian Competent Authorities have continued to approve shipments of the Myanmar teak despite agreement among EU authorities that this wood could not comply with EU law<sup>71</sup>, and in disregard of trade sanctions laid on Myanmar after the military coup in that country. Trade data show Italian traders imported between €1.3-1.5 million worth of wood products from Myanmar during March, April and May 2021. By continuing the trade, these companies are effectively supporting the military junta and its repression of the Myanmar people as well as the destruction of the country's forests.<sup>72</sup>

The Myanmar teak example illustrates that companies find clever ways to circumvent regulatory hurdles, attempting to take advantage of perceived lax enforcement in other jurisdictions. This kind of trade diversion or trade redirection show that some stakeholders may wittingly take part in trade in products that can adversely affect the environment, as long as they can find a loophole in EU law that enables them to escape liability.

In the following section, a few petitions addressed to the EU Commission will be presented, illustrating the concerns of European citizens as regards the issue of illegal logging.

## 2.3 Petitions

The adverse effects of the trade in illegal timber have not gone unnoticed by the public. Several individual and associations have found it useful to express their concerns about these issues and addressed petitions to this effect in order not only to emphasize the seriousness of the issue, but also and above all to invite the European Commission to use its competences to address devastating logging activities of individuals and potentially culpable inaction of public authorities. Together with the policy department on citizens' rights and constitutional affairs of the European Parliament, a

<sup>70</sup> Environmental Investigation Agency, The Italian Job. How Myanmar timber is trafficked through Italy to the rest of Europe despite EU laws, 2021. <https://eia-international.org/wp-content/uploads/The-Italian-Job-2021-SPREADS.pdf>.

<sup>71</sup> Risk assessment regarding timber import from Myanmar was discussed at the 25th FLEGT/EUTR Expert Group meeting, which took place on 12<sup>th</sup> September 2019. It was concluded that it was still not possible for timber coming from Myanmar to have a negligible risk of illegal harvest. This is in particular due to insufficient access to the applicable legislation and documentation from governmental sources.

<sup>72</sup> Environmental Investigation Agency, The Italian Job How Myanmar timber is trafficked through Italy to the rest of Europe despite EU laws, 2021, available at <https://eia-international.org/wp-content/uploads/The-Italian-Job-2021-SPREADS.pdf>.

number of representative petitions on illegal logging have been selected within the framework of this study.

Within the European Union, the most noticeable cases referred to deforestation and illegal logging in Romania. Bulgaria was also mentioned blamed for deforestation and trade restriction. Finally, the EU Commission was invited to put an end to its free trade agreement with Brazil due to alleged questionable practices of that country with regard to environment and human rights violation. While this study focuses solely on illegal logging and related issues, it presents petitions that go beyond the mere logging of trees and include the broader issue of deforestation. As explained above, illegal logging is not always to be dissociated from deforestation as their causes and consequences are frequently interrelated.

The following petitions are considered in this study:

**Table 1: Petitions considered**

Case No	Petition reference number	Title of the petition	Member third State or country involved
1	1248/2019	Stopping illegal logging in Romania	Romania
2	0408/2020	Illegal logging in Romania	Romania
3	0722/2020	Deforestation in Romania	Romania
4	1056/2021	Protection of whistleblowers and journalists who report on Forestry crimes	Romania
5	0289/2015	Problems caused by the decision of the National Assembly of the Republic of Bulgaria to stop timber exports	Bulgaria
6	0625/2018	Alleged uncontrolled deforestation in the town of Shumen, Bulgaria	Bulgaria
7	0745/2019	EU-Mercosur free-trade agreement, and in particular the case of Brazil	Brazil

### 2.3.1 A case of alleged lax enforcement: Illegal logging in Romania

Illegal logging in Romania is a long-standing issue that is reported to have increased significantly during the Covid-19 pandemic period. While almost half of the total amount of the timber (8.8 million cubic metres of timber per year) logged between 2008 and 2014 would allegedly be illegally harvested, data from Romania's National Forestry Inventory reported 20.6 million cubic metres logged each year in excess of the allowances in approved forest management plans.<sup>73</sup> Illegal logging and deforestation would have also resulted in a few murder cases and violence against activists.

These different reasons motivated the petitions that were addressed to the Committee.

#### **Case 1: Petition No 1248/2019 on stopping illegal logging in Romania**

This petition was initiated by a Romanian individual. The petitioner pointed out a massive increase of illegal logging due to the discontinuation of the forest surveillance system via satellite as a result of political pressure. The petitioner fears adverse effects of these activities on the environment, human health and the economy, and calls for the adoption and implementation of urgent measures to protect Romanian forests. He points out the need for European legislative actions to ensure that operators properly label the source of wood products they trade in, as well as their registration in a European-wide database.

##### *Reply of the Commission*

The Commission is deeply concerned about the illegal logging phenomenon in Romania and will continue to closely monitor the situation. In this respect, the Commission recalled that an infringement procedure under Article 258 of the Treaty on the Functioning of the European Union (TFEU) was launched against Romania for breaches of EU environmental law in relation to forestry activities. The infringement procedure was the result of the failure of Romania to carry out efficient and adequate checks to verify operators' compliance with the obligations imposed by the EU Timber Regulation and to apply appropriate penalties. Moreover, the Commission found that the Romanian authorities manage forests, including by authorising logging, without evaluating beforehand the impacts on protected habitats as required under the Habitats Directive and Strategic Environmental Assessment Directive. Using satellite imagery, the Commission also found that protected forest habitats have been lost within protected Natura 2000 sites in breach of the Birds and Habitats Directives. In addition, there are shortcomings in the access of the public to environmental information in the forest management plans. The Commission expects the Romanian authorities to take several immediate measures to ensure full compliance with EU law.

#### **Case 2: Petition No 0408/2020 on illegal logging in Romania**

##### *Summary*

The petitioner denounces recent massive illegal logging activities in Romania, arguing that the Romanian authorities are lax in enforcing EU legislation on protected areas. She also references the murders of two forest rangers that were trying to stop illegal deforestation activities.

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<sup>73</sup> Fern, 2019.



*Reply of the Commission*

The Commission has launched an infringement procedure under Article 258 of the TFEU against Romania for breaches of the EU environmental law in relation to forestry activities. The Commission expects the Romanian authorities to take several immediate measures to ensure full compliance with EU law. In this respect, the Romanian authorities must make the timber tracking system (SUMAL) fully operable immediately and revise the legislation on forestry sanctions. Moreover, they need to revise the forest management plans already adopted in order to bring them in line with the Habitats and Strategic Environmental Assessment Directives and to remedy the damage to protected habitats and species. They should also amend their laws and regulations in order to assess the environmental impacts of each forest management plan and make changes accordingly, as required under EU environmental rules. Lastly, Romanian authorities should provide access to the public to environmental information as regards the forest management plans. In conclusion, the Romanian authorities should strengthen as soon as possible their efforts to tackle the illegal logging phenomenon. The Commission would continue to monitor very closely the implementation and enforcement of EU environmental legislation in relation to forestry activities in Romania and will not hesitate to take further steps when appropriate.

**Case 3: Petition No 0722/2020 on deforestation in Romania**

The petitioner condemns the increased illegal deforestation taking place in Romania. Various environmental organisations have recently contacted the Romanian Government to ask it to intervene in this serious matter. The petitioner states that the deforestation of virgin forests in Romania infringes the Habitats Directive, which requires Member States to comply with a series of specific obligations and procedures in order to ensure the maintenance or, where appropriate, the restoration at a favourable conservation status of natural habitats and species of wild flora and fauna of Community interest, with the more general aim of ensuring a high level of environmental protection. The petitioner asks the European Parliament to urge the Commission to launch an investigation into this situation concerning Europe's last remaining virgin forests.

**Case 4: Petition 1056/2021 on the protection of whistleblowers and journalists who report on forestry crimes**

The petitioner draws attention to the illegal exploitation of Romania's forests and the total lack of interest of the Romanian Government as regards the consequences of these actions on the environment. Romania hosts two-thirds of remaining European forests in temperate areas, and, as such, these forests represent an asset of public, national and European interest. This petition also pointed out the increased rate of illegal deforestation in Romania during the Covid-19 pandemic, along with corruption and the import of industrial waste.

While pointing out the environmental impacts of illegal deforestation, the petitioner also emphasized the social impacts of environmental crimes in Romania. The petitioner reports many cases of loss of human lives, representing more than 10% of the 800 reported cases. Forestry Union in Romania pointed out a dramatic increase in 2021 of aggressions on foresters, amounting to more than 60 cases ranging from physical violence, to death threats, car arsons and harassments of family members. Environmental activists and journalists are also regularly assaulted and threatened. Several actions (e.g protests, petitions, and claims towards state authorities) were initiated to no avail. Moreover, the complaints brought to the police department and the prosecutor's office for investigation and prosecution of the aggressors did not succeed in gaining the support of public authorities. All the

actions would be met with the silence and passivity of forestry authorities. Similarly over 1.500 cases are pending before Romanian Courts since 2016, concerning woods smuggling and aggressions against people who protect the forests. For these reasons, the petitioner is calling on the European Parliament to intervene firmly in accordance with its powers to stop attacks against journalists and whistleblowers who warn of the dangers to European Forests.

### ***Background of the illegal logging issue in Romania***

Although the problem apparently seems to be confined to Romania, its ramifications extend to other countries. Romania is recognised for sheltering two-thirds of Europe's last remaining virgin forests and largest populations of wolves, bears and lynx. However, these natural resources have been threatened for more than a decade by the preponderance of illegal logging in the country, which is stimulated by foreign companies. According to a study by the Romanian government, only focused on a limited set of illegal harvesting methods, an estimated volume of 80 million m<sup>3</sup> of timber was cut illegally in Romania between 1990 and 2011. This represents 24% of the total volume of wood cut during this period - worth at least €5 billion. Another study based on a more detailed approach revealed that "8.8 million m<sup>3</sup> of timber was cut illegally each year between 2008 and 2014, equivalent to 49% of the timber cut during this period". None of these studies took into account all sorts of illegal logging, suggesting a wider magnitude of the issue.

One of the major players in the Romanian timber industry is the Austrian timber and wood processing company named Holzindustrie Schweighofer (Schweighofer) that processes around 40%<sup>74</sup> of the country's total annual softwood production, of which an important share of illegal wood. This company has long been involved in questionable practices of all kinds, including openly accepting illegal wood, offering bonuses for suppliers of illicit timber, and putting pressure on Romanian's government to refrain for policy reforms that could hinder its activities.<sup>75</sup> Schweighofer is suspected not to put any care into setting up measures to avoid sourcing illegal wood. The products obtained in breach of the laws are sold to customers in 21 EU Member States, including "Europe's top biomass companies such as Austrian firms Genol and Drauholz, and some of Europe's largest DIY ("Do-It-Yourself " home improvement) stores, including Hornbach (Germany), Baumax (Austria/Germany), and Bricostore (owned by UK-based Kingfisher)".<sup>76</sup>

The growing scale of deforestation by illegal logging is well-known to politicians and environmental activists in Romania, but also across the EU.

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<sup>74</sup> Fern 2019.

<sup>75</sup> Schweighofer's questionable practices have not gone unnoticed by the Romanian authorities either. In May, 2015, the Romanian Ministry of the Environment conducted an investigation into Schweighofer's Sebes and Radauti mills. That revealed over 130,000 m<sup>3</sup> of illegal timber purchased from 27 suppliers in a single county. "The Ministry's report documented cases in which Schweighofer employees formed part of organized criminal networks for the purpose of obtaining illegal timber. Due to the seriousness of these findings, the Ministry handed the case to prosecutors in Romania's organized crimes division." In April 2016, the FSC also launched an official investigation into suspected violations by Schweighofer of FSC's Policy of Association. See EIA 2015.

<sup>76</sup> EIA 2015. EIA emphasized that Schweighofer also export substantial amounts of timber and timber products to third countries. The company's largest market is Japan, comprising an estimated 47% of total sales in 2014. Japan's largest trading companies, chief among them Hanwa, Sumitomo Forestry, and Lamsell Corporation, bought ¥20 billion of sawn lumber and glulam structural timber produced in Schweighofer's Romanian mills."



Following protests across the country against illegal logging, new revisions to the country's Forest Code were made, including tighter controls against illegal logging. In early 2016, Romania's President Klaus Iohannis also signed a bill that makes illegal logging of more than one hectare a threat to national security.<sup>77</sup> The New Forest Code was based on an inclusive approach that would involve, by way of implementing regulations, civil society and all stakeholders in an attempt to strengthen forest protection and sustainability.<sup>78</sup>

Yet, on 12 February 2020, the European Commission launched an infringement procedure against Romania for failing to establish effective measures against illegal logging, and urging the country to implement properly the European Union Timber Regulation.

In a letter of formal notice in February 2020, the EU Commission urged Romania to stop illegal logging, emphasizing the failure of national authorities to carry out effective checks on operators and apply the appropriate sanctions. Moreover, the company did not perform checks on large amounts of illegally harvested timber due to inconsistencies in national legislation.<sup>79</sup> Romania was given a period of one month to address the identified shortcomings. In July 2020, the Commission concluded that the arguments put forward by Romania in response to the letter of formal notice did not show that the problems on the ground were addressed. As a result, the Commission sent a 'reasoned opinion' to Romanian authorities, giving them one month to address the issue. In case of failure to comply, the case would be referred to the Court of Justice of the European Union.<sup>80</sup>

In a letter on 11 November 2020, 83 Members of the European Parliament underlined that thousands more hectares of forests were destroyed despite that infringement procedure. The members of Parliament denounced "ruthless greed and large-scale corruption" that are leading to "massive violations of the protection of Natura 2000 areas, primary and ancient forests and UNESCO World Heritage Sites in Romania." The Members of Parliament were therefore inviting the European Commission "to do everything in its power to force the Romanian government to end the destruction of these forests by illegal logging."<sup>81</sup>

### 2.3.2 A case of trade restriction in Bulgaria

#### **Case 5: Petition No 0289/2015 on problems caused by the decision of the National Assembly of the Republic of Bulgaria to stop timber exports**

##### *Summary*

On 04 March 2015, the National Assembly of the Republic of Bulgaria adopted the decision to stop timber exports in order to combat illegal activities in forest areas, including illegal logging. The petitioner claims that the implementation of this decision has a negative effect on the timber industries which legitimately market timber. The implementation of the decision will lead to a significant reduction in the price of raw timber, reduce operating income and lead companies to pay huge damages and compensation to counterparts, not to mention socioeconomic impacts such as

<sup>77</sup> EIA 2015.

<sup>78</sup> *Idem*.

<sup>79</sup> European Commission 2020. The Commission also found that logging activities are conducted disregarding the requirements under the Habitats Directive and Strategic Environmental Assessment Directive to evaluate beforehand their impacts on protected habitats. Similarly, the Commission also highlighted the shortcomings in the public's access to environmental information in Romania's forest management plans.

<sup>80</sup> European Commission, Infringement decisions, July Infringements Package : Key Decisions, 2020.

<sup>81</sup> European Parliament 2020.

unemployment, the creation of a monopoly by companies in the timber sector and restriction of competition in the timber sector and in the internal market.

#### *Reply of the Commission*

The petitioner is one of the complainants that lodged a complaint with the European Commission on 20 April 2015. Following this complaint, the services of the European Commission contacted the Bulgarian authorities via the EU Pilot mechanism in order to request information concerning the Moratorium adopted on 4 March 2015 by the National Assembly that prohibits the export of wood. At the same time, the Bulgarian authorities notified, within the framework of Directive 98/34 (ref. TRIS 2015/0313 / BG) the modifications to the Forest Code aimed at improving the control of deforestation in forest areas and resolving the issue of illegal deforestation on the national territory.

As explained in the notification message, the changes proposed by the draft law amending the Forest Code mainly concern the improvement of controls over the planning and execution of forest activities, as well as the adoption of measures aiming at protecting against illegal attacks and laying greater responsibilities with corresponding sanctions for the people who operate in the forests. The amendments also relate to the changes provided for in the regulations, mainly related to wood production, tree felling and control. The Law amending the Forest Code was adopted by the National Assembly on 23 July 2015 and was promulgated and published in the Official Journal No. 60 of 7 August 2015. In the opinion of the Commission services, the combined application of Regulation 2658/87 and of the new national legislation constitutes an effective instrument in the fight against illegal logging in Bulgaria and the maintenance of the Moratorium in question is no longer justified.

By note of November 27, 2015, the Bulgarian authorities confirmed that, with the promulgation of the Law amending the Forest Code, the ban on timber exports has been completely lifted. In the light of the above, the Commission services were of the opinion that the ban on timber exports ceased to exist and that the export of rough timber from Bulgaria to other Member States was therefore free. The Commission would however monitor the implementation of the new national legislation to ensure that the rules on Bulgarian timber exports are compatible with Articles 35 and 36 TFEU.

### 2.3.3 A case of deforestation in Bulgaria

#### **Case 6: Petition No 0625/2018 on alleged uncontrolled deforestation in the town of Shumen, Bulgaria**

##### *Summary*

The petitioner voiced concerns about an alleged uncontrolled deforestation in the town of Shumen. She explained that while healthy old and young trees were being cut, other potentially dangerous were at the same time neglected. The municipality argued that a European project for the rehabilitation of the infrastructure of Shumen was being carried out. The petitioner urged the European institutions to take action and stop the uncontrolled tree felling to prevent negative long-term effect on the environment because no afforestation had been performed.

##### *Recommendation to the petitioner*

The commission referred the petitioner to the DG Environment web-page and informed her that the responsibility for forest policy falls on individual EU Member States. There is, nevertheless, a long tradition by the EU of supporting forest-related activities such as sustainable forest management in

cooperation with Member States. In October 2008 the Commission presented a communication on deforestation to help protect forests in EU and around the world.

### 2.3.4 A case of EU regulatory intervention in trade with third countries: Banning Brazilian timber?

#### **Case 7: Petition No 0745/2019 on the EU-Mercosur free-trade agreement, and in particular the case of Brazil**

##### *Summary*

This petition was filed by a German citizen on behalf of 340 organizations. The petition calls for an immediate halt to the negotiations on the EU-Mercosur free trade agreement. The petitioners ask the EU to use its influence to prevent a worsening human rights and environmental situation in Brazil, respect and promotion of human rights being an overarching objective of the Union. The petitioners claim that the Brazil administration actions are facilitating an increase in cattle and soy agribusiness that would result in more deforestation. Climate change issues are being ignored, compromising all chances of implementing the Paris Agreement. In that context the petitioners also ask the EU to guarantee that no Brazilian products are sold, in case these products have led to more deforestation, land grabbing of native lands or human rights violations. The petitioners ask also for support to Brazilian civil society and for monitoring of human rights violations, in particular towards indigenous people and environmental defenders.

##### *The Commission's observations*

On 28 June 2019, political agreement was reached on an ambitious, balanced and comprehensive trade agreement between the European Union and Mercosur. The trade Agreement is part of an overall Association Agreement with Mercosur that will include provisions on political dialogue and cooperation as well as on trade.

The EU-Mercosur Agreement is based on the premise that trade should not happen at the expense of the environment, social or labour rights, but rather, promote sustainable development. In this regard, the Parties agree not to derogate from or fail to enforce effectively their environmental or labour laws in order to attract trade and investment. They also commit to respect relevant international guidelines and laws, where applicable.

As regards any possible impact of the agreement on deforestation, commodities such as soya and coffee beans that make up a large share of the EU's imports from Mercosur, are already duty free and will therefore not be affected by the Agreement. Other important products such as beef are subject to tariff-rate quotas, limited to very small percentages of Mercosur's production and should therefore not have significant impact on direct or indirect land use change.

The diverse commitments under the Agreement were reinforced by actions under the 2019 EU Communication on Stepping up EU Action to Protect and Restore the World's Forests.<sup>82</sup> The Commission is therefore of the view that the Agreement will not weaken the enforcement of EU legislation. For example, the EU Timber Regulation continues to apply to timber and derived products from Brazil.

Considering that the Agreement builds on 20 years of negotiations and will consolidate a strategic political and economic partnership between the EU and Mercosur, the Commission is of the view that

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<sup>82</sup> COM(2019) 352 final.

it will provide the EU with additional instruments with which to project its values, including in the field of human rights and the environment. A legally binding Trade and Sustainable Development (TSD) Chapter will guarantee that the EU will have additional mechanisms for monitoring and ensuring compliance with the commitments of Mercosur in the area of human rights and the environment under the Agreement.

## **2.4 Summary of the main issues**

The petitions highlighted the extent to which civil society actors are concerned with environment-related issues. Even if the more complex problem of deforestation seems to take precedence over that of illegal logging, the fact remains that citizens are aware of the relationship between the two phenomena. The various pleas to the Commission are all aimed at asking the latter to use its competences to enforce environmental laws in order to curb the effects of deforestation and illegal logging. A particular emphasis was put on protected areas, especially in Romania. The last petition is a plea to stop negotiations with Brazil for a free-trade agreement. This initiative was essentially aimed at preventing the EU from becoming complicit in the actions of a government that cares little about the environment and the respect of human rights. Putting an end to these negotiations would ensure that timber obtained in disregard to environmental and human rights laws are offered a market under the guise of a free-trade agreement.

It is worth noting that none of the petitions considered referred to the timber regime within the EU to support their arguments. This is because the EU Timber Regulation is not concerned with deforestation, but is specifically focused on the prohibition of illegal logging and the trade in illegally logged timber. Nevertheless, the Commission did refer to the illegal logging framework, especially with regard to the petition on the Mercosur free trade Agreement (Case 7), to emphasize that the relevant products from Brazil would fall under the scrutiny of the EU Timber Regulation. Moreover, the Commission was given the opportunity (Cases, 1-4) to shed light on its actions against infringements by Romania of the EU Timber Regulation and other environmental instruments.

### 3 THE EU LEGAL FRAMEWORK ON ILLEGAL LOGGING

#### KEY FINDINGS

The EU adopted an innovative framework, based on the FLEGT Action Plan aiming at tackling illegal logging by combining supply-side (FLEGT VPA) and demand-side measures (EUTR);

The FLEGT Regulation promotes bilateral Voluntary Partnership Agreements (VPA) between the EU and timber-exporting third countries. VPAs are voluntary in nature, but create binding obligations once ratified;

Products with a FLEGT or CITES license are deemed compliant with the EUTR;

The EUTR prohibits the placing on the internal market for the first time illegally harvested timber or timber products derived from such timber; it lays down due diligence obligations for operator;

Member States enforce the EUTR and lay down effective, proportionate and dissuasive penalties for infringements.

The EU has adopted an innovative architecture aiming at preventing illegal logging and trade in illegal sourced timber. In 2003, the Forest Law Enforcement, Governance and Trade (FLEGT) Action Plan (AP)<sup>83</sup> was endorsed as the EU response to the fight against illegal logging and trade in illegally sourced timber products. The FLEGT AP equally intends to improve forest governance, strengthen law enforcement and promote trade in legally and sustainably harvested timber and timber products. The FLEGT AP gave rise to the Forest Law Enforcement, Governance and Trade Regulation (FLEGT Regulation)<sup>84</sup> and the European Union Timber Regulation (EUTR)<sup>85</sup>.

This chapter will start by describing the EU FLEGT Action Plan (3.1). It will then endeavour to present the FLEGT Regulation (3.2) and the EU Timber Regulation (3.3) which are the two main legislations

<sup>83</sup> Communication from the Commission to the Council and the European Parliament - Forest Law Enforcement, Governance and Trade (FLEGT) - Proposal for an EU Action Plan /\* COM/2003/0251 final \*/ available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52003DC0251&from=EN>

<sup>84</sup> Council Regulation (EC) No 2173/2005 of 20 December 2005 on the establishment of a FLEGT licensing scheme for imports of timber into the European Community, OJ L 347 30.12.2005, p. 1. Available at : <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32005R2173&from=EN>

<sup>85</sup> Regulation (EU) No 995/2010 laying down the obligations of operators who place timber and timber products on the market (the EU Timber Regulation or EUTR), OJ L 295, 12.11.2010 p. 23, available at : <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010R0995&from=EN>

adopted within the framework of the FLEGT AP. The fourth section will look at the insights from international regime (US Lacey Act and Australian Illegal Logging Prohibition Act) (3.4).

### 3.1 Forest Law Enforcement Governance and Trade (FLEGT) Action Plan

Endorsed by the EU Council of Ministers in November 2003, the Forest Law Enforcement Governance and Trade (FLEGT) Action Plan (hereinafter FLEGT AP) defined the first policies aiming at eradicating illegal logging in producer countries and combating trade in illegally harvested timber and timber products. The FLEGT AP is part of the overall efforts of the European Community to contribute to sustainable forest management both within and outside the EU<sup>86</sup>, enhance law enforcement and eliminate unfair competition in timber supply chains. To reach these goals, this policy instrument aims at the adoption of an interlocking set of measures reconciling both supply and demand sides to address illegal logging, as well as various cooperation schemes with other consumer and processing countries. The FLEGT AP focuses on seven broad areas to tackle illegal logging in the world's forests. These areas are summarized in the following table:

**Table 2: FLEGT Action Plan's aims**

Actions	Steps
Support to timber producing countries	<ul style="list-style-type: none"> <li>• Promoting equitable and just solutions that target both weak and powerful players;</li> <li>• Support verifications systems to identify legally harvested timber;</li> <li>• Encourage transparency through better information within the forest sector, the involvement of independent monitoring and auditing;</li> <li>• Improved technologies;</li> <li>• Support capacity-building for broad forest governance reforms, including support to civil society and private sector.</li> <li>• Encourage policy reforms, particularly in the judiciary, police or military sectors, to better tackle corruption, to gather evidence of environmental crime and to build legal cases.</li> </ul>
Promoting trade in legal timber	<ul style="list-style-type: none"> <li>• Develop a multilateral framework and international cooperation gathering main importers and exporters;</li> <li>• Conclude bilateral or regional FLEGT partnership agreements;</li> <li>• Explore additional legislative options for prohibiting the import and marketing of illegal timber and timber products within the EU.</li> </ul>
Promoting Public procurement policies	<ul style="list-style-type: none"> <li>• Develop guidance for including environmental considerations in public procurement procedures;</li> <li>• Raise awareness on the possibility to tackle illegal logging through procurement policies.</li> </ul>

<sup>86</sup> COM (2003) 251 final, p.5.

Support private initiatives	Encourage the private sector towards voluntary initiatives based on the principles of corporate social responsibility, including capacity-building in developing countries for private sector initiatives.
Monitoring financing and investment	Encourage bank and financial institutions investing in the forest sector to develop due diligence procedures, taking into account environmental and social factors.
Supporting the Action Plan with existing legislative measures	<ul style="list-style-type: none"> <li>• Explore avenues to apply money laundering laws to forest crimes;</li> <li>• Promote research on endangered timber species and encourage greater consideration of CITES-listed timber species (also in third countries);</li> <li>• Raise awareness and encourage the involvement of other legislative instruments (legislation for stolen goods, OECD Convention on Bribery and Corruption) to promote legality in the timber sector.</li> </ul>
Tackle the issue of conflict timber <sup>87</sup>	<ul style="list-style-type: none"> <li>• Support work for an internationally recognized definition of conflict timber;</li> <li>• Work towards the recognition of the role of forests in times of conflicts both within the EU and at the international level.</li> </ul>

Source: European Commission 2003, p.8-21.

The FLEGT Action Plan led to the adoption of a set of measures primarily defined in two pieces of legislation, namely the FLEGT Regulation<sup>88</sup> and the EU Timber Regulation.<sup>89</sup> While the FLEGT Regulation addresses supply-side measures, the EUTR tackle demand-side measures. Furthermore, the FLEGT Regulation targets licensing scheme with specific countries willing to enter in a partnership with the EU, whilst the EUTR lays down rules for the trade in timber and timber products not only within the EU but with all other third countries. The FLEGT AP therefore creates two voluntary and compulsory regimes for ensuring the legality of the timber imported into the EU.<sup>90</sup>

### 3.2 FLEGT Regulation

The FLEGT Regulation consecrated the advent of bilateral FLEGT Voluntary Partnership Agreements (VPA) between the EU and timber-exporting third countries. It includes a prohibition on imports into the EU of timber products exported from VPA partner countries, unless the shipment is covered by a FLEGT licence.<sup>91</sup> These contracts give the possibility to the EU to control the entry of timber originating from VPA partner countries into the EU. VPAs rely on a licensing scheme conferring a presumption of legality on the timber covered by the license that is released by Customs in the EU and approved by a Competent Authority. These licences should demonstrate the legality of the timber products covered in accordance with the provisions that were adopted in the FLEGT VPA.<sup>92</sup> The timber covered by the

<sup>87</sup> Conflict timber is "loosely defined as timber traded by armed groups, the proceeds of which are used to fund armed conflicts" See COM (2003) 251 final, p.21.

<sup>88</sup> Council Regulation (EC) No 2173/2005 of 20 December 2005 on the establishment of a FLEGT licensing scheme for imports of timber into the European Community, OJ L 347, 30.12.2005, pp. 1-6.

<sup>89</sup> Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010.

<sup>90</sup> Pontecorvo 2019, p.230.

<sup>91</sup> FLEGT Regulation, Article 4(1).

<sup>92</sup> Commission Regulation 1024/2008, recital 2.



licence can be domestic timber that was legally harvested or timber that was legally harvested in a third country and imported in the VPA partner country in accordance with its national laws.<sup>93</sup> Timber covered by CITES are exempted from the requirement of a FLEGT licence.<sup>94</sup>

Through this system, the EU is targeting key timber-rich regions and countries of central Africa, Russia, south-east Asia, and parts of South America representing nearly 60% of the world's forest and supplying a large proportion of internationally traded timber.

While the first VPA was signed with Ghana in November 2009<sup>95</sup>, Indonesia was the first partner country to have an operational FLEGT licensing scheme and started issuing FLEGT licences<sup>96</sup> on 15 November 2016.<sup>97</sup> Other countries in the process have not reached the operational readiness to effectively certify timber legality. Although there remained important gaps to address, the Vietnamese Timber Legality Assurance System Government Decree was adopted in September 2020.<sup>98</sup>

### 3.2.1 Voluntary Partnership Agreements (VPAs)

A partnership Agreement is defined in Article 2.3 of the FLEGT Regulation as “an agreement between the Community and a partner country by which the Community and that partner country undertake to work together in support of the FLEGT Action Plan and to implement the FLEGT licensing scheme”.

The implementation of VPAs is legally supported not only by FLEGT Action Plan, but also by its Implementing Regulation 1024/2008<sup>99</sup> that lays the rules for the establishment of a FLEGT licensing scheme<sup>100</sup> enabling the control of entry of timber into the EU. Through these voluntary schemes, the EU intends to ensure that only legally harvested timber is imported into the EU from countries entering into bilateral FLEGT Voluntary Partnership Agreements (VPA) with the EU. The ability to issue FLEGT licenses is subject to the implementation of a legality assurance system (LAS) and other measures specified in the VPA. The ultimate goal of the VPA is to provide strong and reliable legality schemes that would enable effective supply chain controls and provide mechanisms for verifying compliance.

The VPA is not a standard contract that applies indiscriminately to any third country that is willing to comply with it. Each VPA is a bilateral trade agreement, defining its specific schedule and commitments

<sup>93</sup> 2020/C20/02.

<sup>94</sup> The same applies to non-commercial goods and timber transiting through a VPA country.

<sup>95</sup> VPA were afterwards signed with Republic of the Congo, Cameroon, Indonesia, the Central African Republic, Liberia and Vietnam. Negotiations were concluded with Honduras and Guyana and VPAs are under way in these countries. Negotiations are also ongoing with Côte d'Ivoire, Democratic Republic of the Congo, Gabon, Laos and Thailand. (see <https://ec.europa.eu/environment/forests/flegt.htm>, last visited August 2021).

<sup>96</sup> A 'FLEGT licence' is defined as “a shipment-based or market participant-based document of a standard format which is to be forgery-resistant, tamper-proof, and verifiable, and which refers to a shipment as being in compliance with the requirements of the FLEGT licensing scheme, duly issued and validated by a partner country's licensing authority.” (Article 2(5) FLEGT Regulation).

<sup>97</sup> Commission Delegated Regulation (EU) 2016/1387 of 9 June 2016 amending Annexes I and III to Council Regulation (EC) No 2173/2005 following a Voluntary Partnership Agreement with Indonesia for a FLEGT licensing scheme for imports of timber into the European Union.

<sup>98</sup> See European Commission, 2021.

<sup>99</sup> Commission Regulation (EC) No 1024/2008 of 17 October 2008 laying down detailed measures for the implementation of Council Regulation (EC) No 2173/2005 on the establishment of a FLEGT licensing scheme for imports of timber into the European Community.

<sup>100</sup> A FLEGT licensing scheme is “the issuing of licences for timber products for export to the Community from partner countries and its implementation in the Community, in particular in Community provisions on border controls”; see Article 2.3 FLEGT Regulation.



between the EU and a timber-exporting third country.<sup>101</sup> While parties enter voluntarily into a VPA, the agreement creates binding obligations once it is ratified.<sup>102</sup> Unlike ordinary trade agreements, VPAs involve a set of processes that extend beyond mere negotiations between two countries, where each party is aiming at safeguarding their own interests. Instead, VPA negotiations aim to rally the parties around the common cause of eliminating illegal logging. In this regard, the EU engages bilateral negotiations for the formalization of the VPA with the timber-exporting third countries, but the content of the agreement is defined through a process of national consultation in the third country. The VPA LAS is indeed designed to be the result of a participatory process bringing together a wide range of stakeholders who mutually agree on a definition of legality. This participatory process involves the government, the private sector, civil society organisations and, where possible, local communities in order to ensure a national consensus in order to tackle stakeholders' issues, thereby reaching better adhesion.<sup>103</sup>

The ratification of the VPA in itself does not confer to the timber-exporting country the capacity to issue FLEGT licenses. A well-functioning timber legality assurance system is a prerequisite to the ability of the exporting third country to issue valid FLEGT licences. For this purpose, a systemic audit and governance reforms of existing systems and regulatory frameworks may be necessary to reach the level of compliance that is agreed in the VPA. When a satisfactory level has been reached, both parties will jointly evaluate the VPA timber legality assurance system and positively assert its ability to function as intended.

The exporting third country is responsible for maintaining a verification system that continues to ensure the legality of the exported timber products. Thanks to this system, timber shipments from that country benefit from a FLEGT license that certifies compliance with the licensing scheme and gives these shipments the status of legally harvested timber.<sup>104</sup> Once the VPA has been agreed and the licensing has started, timber from that particular country will only be allowed on the EU market when it is covered by the FLEGT license.<sup>105</sup> By contrast, products with FLEGT licences are deemed compliant with EU law and are granted automatic access to the EU market. For these licensed products, operators do not have to exercise due diligence to demonstrate their legality.

Competent Authorities in importing EU Member States still do have the responsibility to ensure that the imported timber is covered by a valid FLEGT license. In case of doubt as to the validity of a license, customs authorities may suspend the release of the timber. Additional verification can be asked to the issuing authority to dispel uncertainties.<sup>106</sup>

It is worth mentioning that specific products are mandatory in all VPAs, including logs, sawn wood, veneers, plywood and railway sleepers. Depending on the exporting country, other products can be

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<sup>101</sup> Although each VPA is unique, the outputs of each agreement include elements that are common to all VPAs, including a timber legality assurance system, frameworks for monitoring and evaluating implementation, Commitments to improve transparency and other aspects of forest governance. These country-specific details are contained in the annexes. The main text of the VPA contains basic principles and structures and is mostly similar in all VPAs. See VPA Unpacked, p.53.

<sup>102</sup> VPA Unpacked, p.5.

<sup>103</sup> VPA unpacked, p.5-6.

<sup>104</sup> In this regard, the weight/volume of a shipment may not differ by more than 10% indicated in the licence (Article 10(2), Reg. 1024/2008)

<sup>105</sup> Article 4(1) of the FLEGT Regulation.

<sup>106</sup> Article 5(5) of the Regulation 2173/2005. Usually the costs for additional checks will be borne by the importer, unless otherwise decided by the EU country.

added. In Ghana, for instance, only furniture was additionally included. Other VPAs also cover products such as fuel woods, or wooden tools, paper and paper products.<sup>107</sup> Furthermore, VPAs coverage extends beyond timber exported into the EU, and include all timber exports in general, as well as domestic timber trade. The importance of this is that it helps prevent the co-existence of two timber enforcement regimes, whereby one produces sub-standards timber destined for the local market or other less-demanding importing countries.

### 3.2.2 FLEGT Implementation and enforcement

Each EU member state is responsible for setting up measures and mechanisms to prevent the entry of unlicensed timber from VPA partner countries. Competent Authorities, in collaboration with Customs in the EU country where the shipment is released for free circulation must ensure that proper verification is made as regards the validity of the licence and the conformity of the shipment with the information on the licence. Customs may decide to suspend the release of or detain timber products where they have reason to believe that the licence may not be valid<sup>108</sup> According to Article 5(4) of the FLEGT Regulation, the CAs may decide to conduct further verification of shipments using a risk-based approach.

Infringements to the provisions of the FLEGT Regulation should be sanctioned by penalties established by the Member States. These penalties must be effective, proportionate and dissuasive.<sup>109</sup> Sanctions in Member States include administrative fines, criminal fines, notices of remedial action or warning letters, as well as imprisonment.<sup>110</sup>

### 3.2.3 Competence of the Commission

Member States are required to disseminate every year to the public and the Commission a report that includes information such as the quantities of timber imported into the Member State under the FLEGT licensing scheme, the number of FLEGT licences received and the number of cases and quantities of timber products that were not covered by a FLEGT licence.<sup>111</sup> Based on this information and the experience acquired through the implementation of the FLEGT Regulation, the Commission shall review the functioning and effectiveness of the Regulation by December 2021 and every five years thereafter. In addition, the Commission has a reporting obligation towards the European Parliament and the Council including where appropriate, proposals to improve the FLEGT licensing scheme.<sup>112</sup> The Commission is also empowered to amend by way of delegated acts the list of partner countries and their designated licensing authorities or the list of timber products.<sup>113</sup>

As far as partner countries are concerned, the Commission must provide necessary assurance of the legality of their timber products by assessing their existing legality assurance systems and adopt implementing acts to approve them.<sup>114</sup> Furthermore, the Commission is required to adopt the

<sup>107</sup> VPA unpacked, p.53.

<sup>108</sup> Article 5(9) of the FLEGT Regulation.

<sup>109</sup> Article 5(8) of the FLEGT Regulation

<sup>110</sup> See for example COM/2019/249 final. In 2019, 21 Member States reported to have included provisions in their national legislation for the disposal of confiscated timber.

<sup>111</sup> Article 8(1) of the FLEGT Regulation,

<sup>112</sup> Article 9 of the FLEGT Regulation.

<sup>113</sup> FLEGT Regulation, Article 10.

<sup>114</sup> FLEGT Regulation, Article 4(1).

procedural modalities and documents of a standard format that could guarantee uniform conditions for the implementation of the FLEGT Regulation.<sup>115</sup>

### 3.3 Beyond legislative measures: External cooperation

Given the importance of trade relations with certain countries, the EU invested efforts in collaborative mechanisms. These mechanisms could be very important to tackle the issues of trade substitution or trade diversion that could undermine EU efforts to address illegal logging. In this regard, cooperation was sought with China, for example, which not only consumes a lot of timber, but is also quite involved in the processing and re-export timber-products. The size of the Chinese timber industry has even often led many stakeholders to criticize the roundabout routes by which illegal timber nevertheless found their way to the European market.

To tackle these issues, the EU and China agreed on a Bilateral Coordination Mechanism (BCM) on Forest Law Enforcement and Governance (FLEG) intended to develop multi-annual work plan as well as operating modalities intended to contribute to the reduction of illegal logging and associated trade globally in order to promote sustainable development. Signed in 2009, this mechanism will enable both parties to explore opportunities to “develop a shared approach towards legality verification schemes for timber and timber products implemented by timber exporting countries, including in the context of FLEGT Voluntary Partnership Agreements”.<sup>116</sup> The BCM provides a framework for the policy dialogues on the promotion of legally-sourced timber and timber products, not only in China, but also learning from experiences within the context of the EUTR and VPAs to initiate dialogue with Indonesia or African countries.

Other countries such as Myanmar also benefit from the close cooperation with the EU to improve their forest governance and address illegal logging.

### 3.4 The European Union Timber Regulation (EUTR)

Over the past decades a broad range of environmental legislation were adopted in the EU, including regulations, directives and international conventions. In accordance with Article 192(3) of the Treaty on the Functioning of the European Union (TFEU), the EU has put in place various legally binding environmental actions programmes.<sup>117</sup> Article 3(3) of the Treaty on European Union (TEU) lays the foundation within the EU for a “high level of protection and improvement of the quality of the environment”.<sup>118</sup> The objectives of this article are supported by further environmental objectives laid down in Articles 191 and 192 TFEU. The latter specify the objectives of the Union policy on environment, covering preserving, protecting and improving the environmental quality; protecting human health; prudent and rational utilisation of natural resources; and promoting measures at international level to deal with regional or worldwide environmental problems.

The European Union Regulation No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the

<sup>115</sup> Article 5(9) of the FLEGT Regulation.

<sup>116</sup> EU-China Bilateral Coordination Mechanism on Forest Law Enforcement and Governance, para. 3.1. It is worth noting that the BCM does not give rise to any obligations for the parties under international law (para. 5.1)

<sup>117</sup> Decision No 1386/213/EU

<sup>118</sup> [2012] OJ C 326/13

market (hereinafter 'the EUTR')<sup>119</sup> has been enacted by the Article 192(1) TFEU and therefore becomes part of the environment action programme. The EUTR was adopted in 2010 as part of the implementation of FLEGT Action Plan and came into force on 3 March 2013. It represents a response to the growing concern as regards illegal logging and the associated trade resulting from the increasing global demand for these products and the institutional and governance deficiencies in the forest sector.<sup>120</sup> The EUTR is complemented by the regulation 363/2012<sup>121</sup> laying down the rules for the recognition of monitoring organizations by the Commission, and by the regulation 607/2012<sup>122</sup> providing detailed rules for due diligence systems and for the checks of monitoring organizations by Competent Authorities. The legislation is relevant for the European Economic Area (EEA) and therefore applies since the May 2015 to Iceland, Liechtenstein and Norway.<sup>123</sup>

### 3.4.1 Scope

The EUTR is a legislative instrument that establishes demand-side measures to address the global problem of illegal logging. The regulation covers a broad range of timber products, but its scope is strictly defined and does not apply to all timber and timber products. The EUTR does apply to both timber products that are harvested and traded within the EU and timber harvested in third countries and imported into the EU.

#### 3.4.1.1 Scope rationae personae

The obligations defined by the EUTR apply differently depending on the quality of the stakeholder who is involved in selling the timber product on the EU market. The EUTR essentially lays down obligations for two types of stakeholders. First, it applies to operators who place timber and timber products on the internal market for the first time, and secondly there are obligations for traders.<sup>124</sup>

On the one hand, an operator is defined in Article 2(c) of the EUTR as *"any natural or legal person that places timber or timber products on the market"*. Placing on the market occurs when an operator *"first makes timber or timber products available on the EU market for distribution or for use in the course of its commercial activity"*.<sup>125</sup>

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<sup>119</sup> Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market Text with EEA relevance, *OJ L 295*, 12.11.2010, p. 23–34.

<sup>120</sup> Recital 2 of the EUTR.

<sup>121</sup> Commission delegated Regulation 363/2012 of 23 February 2012 on the procedural rules for the recognition and withdrawal of recognition of monitoring organisations, *OJ L 115*, 27.4.2012, p. 12.

<sup>122</sup> Commission implementing Regulation (EU) No 607/2012 of 6 July 2012 on the detailed rules concerning the due diligence system and the frequency and nature of the checks on monitoring organisations

<sup>123</sup> COM/2018/668 final, p.2. The application of the EUTR in EEA countries is monitored by the European Free Trade Association (EFTA) Surveillance Authority (ESA).

<sup>124</sup> Article 1 of the EUTR.

<sup>125</sup> C(2016) 755 final, p.3.

Two main obligations apply to operators, whether they are based in the EU or non-EU based:

- the prohibition to place illegally harvested timber or timber products derived from such timber on the market when they place timber on the internal market for the first time, whether this timber comes from within the EU or from a third country (Article 4(1)).
- the obligation to exercise due diligence when placing timber or timber products on the market through the maintenance and regular evaluation of a due diligence system aiming at minimizing the risk of placing illegal timber on the internal market. (Article 4(2)).

On the other hand, a trader is *“any natural or legal person who, in the course of a commercial activity, sells or buys on the internal market timber or timber products already placed on the internal market”*.<sup>126</sup> Unlike operators, traders are not under an obligation to comply with due diligence requirements. Throughout the supply chain, traders are only subject to an obligation of traceability which is essentially a record-keeping obligation involving the ability of traders to identify their suppliers and customers.<sup>127</sup>

### 3.4.1.2 Scope rationae materiae

The EUTR applies exclusively to timber and timber products that are first placed on the internal market, which means that these products are physically present on the EU market, either because they are harvested in the EU, or because they are imported and cleared by customs for free circulation in the EU.<sup>128</sup> Moreover, the timber and timber products that are covered by the EUTR must be placed on the market in the course of a commercial activity, which means for *“the purpose of processing or for distribution to commercial or non-commercial consumers, or for use in the business of the operator itself”*.<sup>129</sup> As such, the EUTR’s obligations do not apply to non-commercial consumers.<sup>130</sup>

The EUTR covers a wide variety of timber and timber products listed in Annex I of the Regulation, including roundwood, primary-processed products such as sawn hardwood, and secondary-processed products such as wooden furniture and paper products. The Regulation’s coverage also extends to fuelwood, panel products (plywood, particle-board, and fiberboard), packaging such as pallets, builders’ joinery and carpentry, and prefabricated wooden buildings. Despite this broad coverage, many wood-based products also fall outside the scope of the EUTR such as recycled products,<sup>131</sup> and printed papers such as books, magazines and newspapers.

The EUTR uses the Combined Nomenclature (CN) codes as a way of identifying the products that are covered by the regulation. The Regulation leaves room to expand the product coverage. The following list presents the products which are currently covered by the EUTR, including their CN codes.

- 4401 Fuel wood, in logs, in billets, in twigs, in faggots or in similar forms; wood in chips or particles; sawdust and wood waste and scrap, whether or not

<sup>126</sup> Article 2(d) of the EUTR.

<sup>127</sup> Article 5 of the EUTR.

<sup>128</sup> C(2016) 755 final, p.3. In this regard, the guidance document on the EUTR further underlines that *“Goods subject to special customs procedures (e.g. temporary importation, inward processing, processing under customs control, customs warehouses, free zones), in transit or being re-exported are not considered to be placed on the market.”*

<sup>129</sup> C(2016) 755 final, p.3.

<sup>130</sup> C(2016) 755 final, p.3.

<sup>131</sup> Recital 11 of the EUTR considered that including recycled product in the product scope would place a disproportionate burden on operators. Therefore *“used timber and timber products that have completed their lifecycle, and would otherwise be disposed of as waste, should be excluded from the scope of this Regulation.”*

agglomerated in logs, briquettes, pellets or similar forms

- 4403 Wood in the rough, whether or not stripped of bark or sapwood, or roughly squared
- 4406 Railway or tramway sleepers of wood
- 4407 Wood sawn or chipped lengthwise, sliced or peeled, whether or not planed, sanded or end-jointed, of a thickness exceeding 6 mm
- 4408 Sheets for veneering (including those obtained by slicing laminated wood), for plywood or for other similar laminated wood and other wood, sawn lengthwise, sliced or peeled, whether or not planed, sanded, spliced or end-jointed, of a thickness not exceeding 6 mm
- 4409 Wood (including strips and friezes for parquet flooring, not assembled) continuously shaped (tongued, grooved, rebated, chamfered, V-jointed, beaded, moulded, rounded or the like) along any of its edges, ends or faces, whether or not planed, sanded or end-jointed
- 4410 Particle board, oriented strand board and similar board (for example, waferboard) of wood or other ligneous materials, whether or not agglomerated with resins or other organic binding substances
- 4411 Fibreboard of wood or other ligneous materials, whether or not bonded with resins or other organic substances
- 4412 Plywood, veneered panels and similar laminated wood
- 4413 00 00 Densified wood, in blocks, plates, strips or profile shapes
- 4414 00 Wooden frames for paintings, photographs, mirrors or similar objects
- 4415 Packing cases, boxes, crates, drums and similar packings, of wood; cable-drums of wood; pallets, box pallets and other load boards, of wood; pallet collars of wood
- 4416 00 00 Casks, barrels, vats, tubs and other coopers' products and parts thereof, of wood, including staves
- 4418 Builders' joinery and carpentry of wood, including cellular wood panels, assembled flooring panels, shingles and shakes
- Pulp and paper of Chapters 47 and 48 of the Combined Nomenclature, with the exception of bamboo-based and recovered (waste and scrap) products
- 9403 30, 9403 40, 9403 50 00, 9403 60 and 9403 90 30 Wooden furniture
- 9406 00 20 Prefabricated buildings.

### 3.4.1.3 Status of timber and timber products covered by FLEGT and CITES

According to Article 3 of the EUTR, timber and timber products covered by FLEGT licences or CITES (Convention on International Trade in Endangered Species of Wild Fauna and Flora) certificates shall be considered to be compliant with the EUTR. With regard to FLEGT licenses, the rationale underpinning this provision is that legality verification controls would have been carried out in the timber-exporting country in accordance with the requirements of the Voluntary Partnership Agreements concluded between this country and the EU. Such timber can therefore be considered risk-free.<sup>132</sup> As far as CITES<sup>133</sup> permits are concerned, the licensing system involves an authorisation of the

<sup>132</sup> C(2016) 755 final, p.11.

<sup>133</sup> CITES is an inter-governmental agreement which came into force in 1975 aiming at ensuring that international trade in specimens of wild animals and plants does not threaten their survival. It subjects trade in specimens of selected species to certain controls. More than 35,000 species from unsustainable or illegal international trade benefit from varying degrees of



import and (re-)export of species covered by the Convention. Legality in this regard stems from the obligation for parties to CITES only to grant a CITES permit for export when a CITES-listed species has been harvested, *inter alia*, in compliance with national legislation in the exporting country.

In practice, this recognition alleviate the burden for operators to exercise due diligence, beyond their ability to demonstrate the validity of the relevant documentation. Similarly, CAs in Member States can consider CITES products as being legally harvested and compliant with the EUTR.

However there are some important differences between the legality required under CITES/EUWTR and legality as established by the exercise of due diligence obligations. Unlike CITES, the EUTR is not a border control measure, which means that compliance is not policed at the EU border, but rather established as a result of enforcement actions by relevant CAs. Moreover, whereas “CITES establishes a global licensing system for controlling trade in listed species, the EUTR focuses on reducing the risk of illegal products entering the supply chain rather than licensing legal ones.”<sup>134</sup> Besides, under CITES/EUWTR legality is defined for each shipment whereas according to EUTR, legality is specified by the operators for each supply chain. Operators are therefore obliged to ensure the legality of their supply chain. At the same time, with CITES/EUWTR, government officials are responsible for issuing permits that confirms the legality of each shipment.<sup>135</sup> Moreover, the scope of legality under the EUTR is much larger, covering ‘all applicable legislation’ in the country of harvest, including rights to harvest, payments for harvest rights, third parties’ legal rights and trade and customs. By contrast, CITES/EUWTR involves only laws ‘for the protection of fauna and flora’.<sup>136</sup>

The recognition of CITES certificates as proof of legality under the EUTR may pose some new challenges. While previously the incentive for CITES was to trade in listed species without a licence, the EUTR brings along commercial reason to trade as much as possible under a CITES export permit. This results in many risks that can lead to enforcement challenges for both CITES and EUTR implementing authorities, including: “an increase in fake or illegally acquired (e.g., through corruption) export permits; an increase in export quotas for the purpose of laundering of ‘like’ species; an increase in export permits and/or re-export certificates from processing countries for products listed in the annotations to species listings; the unilateral listing by high-risk countries of commercially traded timber species in CITES Appendix III; CITES permits or certificates being presented (as proof of legality) for the import of processed products that are currently outside the scope of ‘parts’ in the annotation to the species listing.”<sup>137</sup>

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protection under the CITES agreement. Currently, the CITES counts 183 Parties. In the EU, CITES is implemented through the EU Wildlife Trade Regulations (WTR).

<sup>134</sup> Saunders and Reeve 2014, p.14.

<sup>135</sup> Patel 2015, p.107.

<sup>136</sup> Patel 2015, p.108.

<sup>137</sup> Saunders and Reeve 2014, p.24.

#### 3.4.1.4 Scope rationae temporis

The requirements of the EUTR apply solely to timber and timber products that are placed on the market for the first time. Pursuant to Article 2(b), the supply on the internal market of timber products and products derived from timber that are already placed on the EU market are not encompassed by the concept of 'placing on the market', and are therefore excluded from the scope of the EUTR.

Furthermore, the EUTR has no retroactive effect and does not apply to products that were placed on the market before the entry into force of the regulation on 3 March 2013.<sup>138</sup> Operators must however be able to exhibit due diligence systems that have been operational since 3 March 2013. This means in practice that both operators and traders must be able to identify their supply before and after the date of entry into force.

#### 3.4.2 Obligation of due diligence for operators

When placing timber or timber products for the first time on the market, operators are required to exercise due diligence. The EUTR is the first legal instrument at the EU level that makes the exercise of due diligence mandatory. This obligation can be implemented through a due diligence system entailing three components inherent to risk management, namely risk information, risk assessment and risk mitigation. All three elements should concur to enable the minimization of the risk of placing illegally harvested timber, or timber products containing illegally harvested timber, on the EU market. The due diligence system shall also apply to "each specific type of timber or timber product supplied by a particular supplier within a period not exceeding 12 months, provided that the tree species, the country or countries of harvest or, where applicable, the sub-national region(s) and concession(s) of harvest remain unchanged".<sup>139</sup> It is worth mentioning that there is no *de minimis* and due diligence must be done on all timber.

*Access to information.* The due diligence system should contain measures and procedures providing specific information related to the timber or timber product itself such as a description, the country of harvest, the supplier and trader, and documentation showing compliance with applicable legislation. Moreover, the due diligence system must exhibit general information that provides the context for assessing the product. This includes specific information on the prevalence of illegal harvesting of specific tree species, the prevalence of illegal harvesting practices in the place of harvest, and the complexity of the supply chain.<sup>140</sup> The distinction between these two types of information is important in determining whether in the course of risk assessment, a risk could be qualified as negligible or whether special care would be required from the operator. When the general information reveals potential risks, special attention should be given to the gathering of product-specific information. It is important to underline that if the product is derived from several timber sources, the operator is required to gather information on each component or species.

*Risk assessment.* The due diligence system must include risk assessment procedures that enable the operator to analyse and evaluate the risk of illegality in his supply chain, taking into account the information gathered at the previous stage and relevant risk assessment criteria established by the

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<sup>138</sup> C(2016) 755 final, p.3.

<sup>139</sup> Regulation 607/2012, Article 2.

<sup>140</sup> Guidance document, p.4.



EUTR.<sup>141</sup> For products that are derived from several timber sources, a risk assessment shall be carried out for each component or species.

The level of risk can only be assessed on a case-by-case basis, especially because many factors are involved and regulatory regimes in various third countries may also vary significantly. However, since the relevant law of the country of origin is the yardstick to assess the reliability of the documentation that is collected, it is obvious that knowledge of this legislation is a prerequisite for ensuring compliance with the due diligence obligation under the EUTR. In this regard, operators may benefit from the assistance of Member States' Competent Authorities in collaboration with the European Commission. Operators also have the possibility to rely on the services of Monitoring Organisations (MOs) or the assistance of organisations with specialist knowledge of the forest sector in the country of harvest.<sup>142</sup>

Many avenues exist to help the operator make an informed decision with regard to the level of risk. For example, the prevalence of illegal logging could be ascertained using reports by international organizations and Secretariats (such as INTERPOL, CITES, UNODC, etc), government sources, scientific and technical reports from academia, research institutions, civil society and/or private sector (e.g. NGOs, Monitoring Organizations, etc.). In the same way, the operator could investigate the risk of corruption related to forestry sector in a given country using for instance the Corruption Perception Index. Additionally, operators must also take account of other criteria such as the likelihood of a document of being falsified or issued unlawfully. In this regard information on the quality of governance can be sought using for example the World Bank Worldwide Governance Indicators.

*Risk mitigation.* The operator must adopt adequate and proportionate risk mitigation procedures and measures to minimise effectively the risk identified at the second stage, except where this risk reveals to be negligible. The risk can be considered negligible when the full assessment of both general and product-specific information reveals no cause for concern.<sup>143</sup> Risk mitigation procedures may include, depending on the level of risk identified, requiring additional information or documents and/or requiring third party verification<sup>144</sup>, carrying out independent or self-conducted audits, or making use of timber tracking technologies. In cases where the operator cannot conclusively ascertain that the risk level is negligible, he should refrain from placing the timber or timber products on the EU market.

To perform their due diligence in a proper way, operators must consider all three elements of risk management as a holistic process. For instance, gathering documentation should not be seen as an independent requirement, but must be considered from the perspective of collecting information to serve the purpose of risk assessment.<sup>145</sup> The ability to evaluate the content and reliability of the documents that are collected is therefore essential, keeping in mind that the due diligence obligation ultimately aims at deterring operators from placing products on the market without having a reasonable assurance as regards their legality.<sup>146</sup>

<sup>141</sup> These criteria include the assurance of compliance with applicable legislation, which may include certification or other third-party-verified schemes which cover compliance with applicable legislation, the prevalence of illegal harvesting of specific tree species, the prevalence of illegal harvesting or practices in the country of harvest and/or sub-national region where the timber was harvested, including consideration of the prevalence of armed conflict, the sanctions imposed by the UN Security Council or the Council of the European Union on timber imports or exports and complexity of the supply chain of timber and timber products. See Article 6(b) EUTR.

<sup>142</sup> Commission Notice C(2016) 755 final, p.6.

<sup>143</sup> Commission Notice C(2016) 755 final, p.3.

<sup>144</sup> Article 6 of the EUTR.

<sup>145</sup> C(2016) 755 final, p.5.

<sup>146</sup> COM(2008) 644 final, p.9.

In case operators decide to use third party verification such as FSC or PEFC for risk assessment or mitigation, they must ensure that the system meets the established criteria and maintain records of how they have determined the system meets the relevant criteria.<sup>147</sup> Ultimately, operators remain the liable party, even when they make use of third party verification or a due diligence system of a monitoring organization.

### 3.4.3 EUTR Monitoring Organizations (MO)

The EUTR also provides room for operators to make use of due diligence systems developed by "Monitoring organisations" recognised by the European Commission, instead of using their own system. These monitoring organizations are private parties which develop, regularly evaluate operational due diligence systems, and grant operators the right to use them. The organizations also verify the proper use of their due diligence system by such operators and take appropriate action to address failures to comply, including notification of competent authorities in the event of significant or repeated failure by the operator.<sup>148</sup>

In the exercise of their functions, Monitoring Organizations must take the necessary measures to avoid conflicts of interest. This means that care should be taken to avoid situations "in which a person has a private or other secondary interest, which is such as to influence, or appear to influence, the impartial and objective performance of his or her duties".<sup>149</sup> Whether the conflict of interests is real, potential or apparent, the public official is responsible for ensuring that a private interest does not conflict with his or her public position.

To avoid conflict of interests, the MO should have, implement and regularly update written procedures to cope with relevant situations such as obligations of disclosure by its staff or substantiated concerns by a third party.

### 3.4.4 Enforcement by Member States

Member States are responsible for implementing and enforcing the EUTR. Each Member State is required to designate one or more Competent Authorities responsible for the application of the Regulation. Furthermore Member States must adopt effective, proportionate and dissuasive penalties for infringements, elaborate plans for checks, and conduct consistent checks on operators and monitoring organisations (MOs).<sup>150</sup>

#### 3.4.4.1 Adoption of penalties for infringements

The EUTR requires Member States to lay down the rules on penalties applicable to infringements of its provisions and requires them to take all measures necessary to ensure that these penalties are implemented.<sup>151</sup> Member States have the discretion to decide the form and severity of the penalties that apply within their territory as long as these penalties are effective, proportionate and dissuasive. Penalties may include interim measures depending on the level of seriousness of the breach. Penalties include fines, seizure of the timber and timber products, and immediate suspension of the authorisation to trade. Each Member State must decide whether the infringements require a particular

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<sup>147</sup> Regulation 607/2012, Article 4.

<sup>148</sup> Article 8(1) of the EUTR.

<sup>149</sup> Council of Europe Recommendation No. R (2000)10, Article 13.1.

<sup>150</sup> Article 7(1); 10(1) and 19 of the EUTR.

<sup>151</sup> Article 19(1) of the EUTR.

level of intent to warrant a penalty.<sup>152</sup> In determining the fines, account must be taken of “the value of the timber or timber products concerned and the tax losses and economic detriment resulting from the infringement”. The level of such fines should be calculated “in such way as to make sure that they effectively deprive those responsible of the economic benefits derived from their serious infringements, without prejudice to the legitimate right to exercise a profession, and gradually increasing the level of such fines for repeated serious infringements.”<sup>153</sup> The penalties may take into consideration the financial benefit of the law-breaking companies, as well as the financial loss to communities and governments in harvesting country.<sup>154</sup>

#### 3.4.4.2 Checks on operators and Monitoring Organizations

Checks on operators are an essential component to ensure compliance with the EUTR. CAs must carry out checks to verify conformity of operators with their obligations and assess the implementation of their due diligence systems, including documents and reports demonstrating the proper functioning of these systems, as well as spot checks, together with field audits.<sup>155</sup> These checks shall be conducted periodically following a risk-based approach or whenever a CA has relevant information, including on the basis of substantiated concerns provided by third parties that question compliance by an operator. In developing their risk-based plans for checks, Members take into consideration diverse risk criteria such as the country of harvest, product or species of the timber. When these checks reveal failure to comply, the Competent Authorities may issue a notice of actions to be taken by the operator. Depending on the nature of the shortcomings identified, interim measures may also apply including seizure and prohibition of marketing of timber and timber products.<sup>156</sup>

Just like operators, monitoring organizations are subject to CAs’ oversight and should be regularly monitored to ensure that they continue to meet the criteria and conditions that are necessary to fulfil this function. The CA can also carry a check on a monitoring organization when it has detected shortcomings in the implementation by operators of the due diligence system established by a monitoring organisation. Such checks can also be triggered by substantiated concerns from third parties. A substantiated concern could refer to “any relevant information regarding non-compliance with the EUTR– and supported by proof or evidence - that is brought to the attention of a EUTR Competent Authority”<sup>157</sup>. Such information may refer to information on specific shipments, suppliers, operators or Monitoring Organisations, as well as relevant information in timber-exporting third country or third-party-verification schemes.

The EUTR also provides for technical assistance and guidance to operators by the Member States, assisted by the Commission, and lays down requirements for exchange of information among relevant stakeholders.<sup>158</sup> As far as the latter requirement is concerned, Member States must also cooperate with each other, with the EU Commission and other governmental authorities in non-EU countries.

<sup>152</sup> Fishman and Obidzinski 2014, p.262.

<sup>153</sup> Article 19(2(a)) of the EUTR.

<sup>154</sup> Patel 2015, p.117.

<sup>155</sup> Articles 10 (1) –(3) of the EUTR,

<sup>156</sup> Article 10(5) of the EUTR.

<sup>157</sup> Expert Group on the EU Timber Regulation and the Forest Law Enforcement, Governance and Trade (FLEGT) Regulation Guidance document1 - Substantiated Concerns.

<sup>158</sup> Article 13 of the EUTR.

#### 3.4.4.3 Reporting obligations

Member States are required to submit to the Commission every second year a report on the application of the EUTR during the previous two years.<sup>159</sup> Based on these reports, the Commission will monitor progress on the implementation and enforcement of the EUTR and take necessary measures to stimulate greater compliance.

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<sup>159</sup> Article 20 of the EUTR.

## 4. ASSESSMENT OF THE EFFECTIVENESS OF THE EU TIMBER REGIME

### KEY FINDINGS

After eighteen years of VPA negotiations and implementation, only Indonesia has reached a satisfactory level to start issuing FLEGT licenses. VPAs have however contributed to major reforms in partner countries. Openness, transparency and public accountability would be key elements to confer legitimacy to VPAs in efforts to combat illegal logging.

Much progress has been made in terms of implementation and enforcement to achieve the goal of the EUTR. Enforcement actions under the EUTR mostly focused on the due diligence requirement.

Penalties are generally low and reflect neither the environmental damage, nor the value of the traded timber and timber products;

Disparities in legal and institutional frameworks of Member States led to trade diversion within the EU. Clear rules and procedures are important to ensure a consistency in approach across Member States;

Illegal logging in Romania has been increasing despite many initiatives to monitor forest loss such as satellite imagery. Effectiveness of these initiatives relies on the ability to keep the right balance between traditional and modern technologies' tools in order to foster mutual reinforcement between these two types of instruments and subsequently strengthen their ability to fight illegal logging;

Unlike the EUTR, the Lacey Act applies to 'any person' along the value chain and also has a wider scope, extending to 'any wood and wood product'. Lacey Act's penalties and sanctions are determined taking into account the severity of the offence, the value of the goods.

The EU adopted an innovative framework aiming at combining demand-and supply-side measures to address illegal logging and facilitate legitimate trade in timber products. Demand-side measures include the EU Timber Regulation, while supply-side measures include Voluntary Partnership

Agreements (VPAs) with timber-producing countries outside the EU. The FLEGT-licensing scheme links these two categories of measures.

The EUTR is a legislative instrument that is adopted to create a level playing field by setting equal legality requirements that apply to both domestically harvested timber and timber products imported from all countries.<sup>160</sup> A few years after its entry into force in 2013, much progress has been made in terms of implementation and enforcement. The third biennial report underlined that all countries comply with the formal requirements of the EUTR.<sup>161</sup>

This chapter intends to assess implementation and enforcement efforts of the timber regime. It first identifies good enforcement practices with regard to the EUTR (4.1). The due diligence obligation is subsequently analysed, including a few case studies to illustrate difficulties faced by operators and Competent Authorities (4.2).

#### 4.1 EUTR Enforcement good practices

Surveys carried out by WWF with EUTR (CAs) of 16 Member States between October 2018 and March 2019 enabled to identify a variety of good practices covering key categories of enforcement. The following table presents an overview of these practices that have contributed over the years to the enforcement successes of the EUTR.

**Table 3: Overview of good enforcement practices in MS (October 2018 - March 2019)**

Enforcement categories	Good practices
Penalties & sanctions	Provisions (or possibilities) for adjusting the size of a fine to the quantity or value of timber exist in 7 Member States.
Checks	<ul style="list-style-type: none"> <li>• Data on operators placing imported timber and timber products on the market is provided by customs to the CA on a weekly basis;</li> <li>• Obtaining and aggregating data to map out the main trends and identify the key business sectors and products types;</li> <li>• 7 out of the 16 CAs interviewed use lab testing methods to pursue concerns about illegality of timber (e.g. false declarations);</li> <li>• Having checks performed by two controllers to increase the chance of detecting violations and reduce room for subjective interpretations;</li> <li>• EUTR inspection grids/checklists are developed and updated regularly to reflect lessons learnt;</li> <li>• Random checks are being performed in addition to risk-based ones</li> </ul>

<sup>160</sup> European Commission 2016, p.6.

<sup>161</sup> COM(2020) 629 final, p.11.

Follow up of control results and prosecution	<ul style="list-style-type: none"> <li>• In all except one country, inspection results are reported back to the operator after the completion of a control.</li> <li>• Several people are systematically involved in the decision-making process after a control to reduce room for interpretation.</li> <li>• An agreement is signed and acknowledged by the operator to become compliant within 28 days after the issuance of a notice of remedial action;</li> <li>• Staff are specialized in evaluating audit reports.</li> <li>• The CA has an internal matrix defining the different infringements as a supporting document to decide which type of sanctions should be imposed.</li> </ul>
Resources and staff training	<ul style="list-style-type: none"> <li>• Controllers are forestry experts and/or have good knowledge of supply chains;</li> <li>• Trainings for CAs included external organizations, such as NGOs (WWF, Greenpeace, Forest Trends, Chatham House) as well as FSC, PEFC, and customs, NepCON or Interpol.</li> </ul>
Substantiated concerns by third parties	More than half of the third party substantiated concerns have led to checks.
Cooperation within countries and between countries	<ul style="list-style-type: none"> <li>• (Regular) exchanges with neighbouring Member States are taking place to harmonize control practices, partly in regional groups;</li> <li>• Joint inspections are taking place in some countries.</li> <li>• CAs collaborate with customs and police;</li> <li>• Publication of information in English which allows other Member States to use information for their controls.</li> </ul>
Transparency of Competent Authorities	Every six months publication of names and details of the timber/timber products where a notice of remedial action has been issued (including the name of the operator, product(s) checked, type of breach(es) and additional details).

Source: WWF Enforcement Review of the EU Timber Regulation (EUTR) · EU Synthesis Report 2019

Despite these achievements, the EUTR has been criticized for inadequate implementation and for harbouring legal loopholes<sup>162</sup>, thereby falling short of delivering on its ambitious policy objectives. Loopholes and weak implementation could result in a systematic “race to the bottom” in terms of quality because all MS fear that a more stringent implementation of the EUTR could push companies to relocate to neighbouring countries.<sup>163</sup>

<sup>162</sup> WWF, Lift it Up: How to make the EU Timber Regulation EUTR “fit for purpose”, 2021, available at [https://wwfeu.awsassets.panda.org/downloads/wwf\\_lift\\_it\\_up\\_eutr\\_april\\_2021.pdf](https://wwfeu.awsassets.panda.org/downloads/wwf_lift_it_up_eutr_april_2021.pdf).

<sup>163</sup> WWF 2021, p.11.

## 4.2 Assessment implementation and enforcement of due diligence

### 4.2.1 Due diligence implementation by operators

Due diligence is a major pillar in the implementation of the EUTR. The due diligence system includes measures and procedures which will enable operators to track the timber and timber products, to have access to information concerning compliance with the applicable legislation and to manage the risk of placing illegally harvested timber and timber products on the Community market. Exercising due diligence requires operators to ascertain to their best ability that the timber and timber products they place on the internal market were legally harvested. When considering options in the proposal that led to the adoption of the EUTR, basing operator's compliance on due diligence has been considered the best option to achieve the goal intended by the timber regime. The proposal emphasized that "due diligence is not just a moral duty to care but a legal requirement for a proactive behaviour. It obliges operators to show prudence, judgment and positive action in ascertaining the legality of the timber and timber products that enter their supply chain."<sup>164</sup> In its guidance document on Due Diligence for Responsible Business Conduct, the OECD underlines that due diligence is the process enterprises should carry out to identify, prevent, mitigate and account for how they address actual and potential adverse impacts in their own operations, their supply chain and other business relationships. Such adverse impacts relate to corporate governance, workers, human rights, the environment, bribery, and consumers.<sup>165</sup>

The EUTR is the first EU legislative instrument establishing due diligence obligations on the operators of a specific economic sector. It represents the first regulatory instrument that finally fosters a 'good governance model' of harvesting in third (timber-exporting) countries by establishing binding due diligence systems for the timber trading companies.<sup>166</sup>

Due diligence can sometimes be understood as a gradual approach involving continuous process of improvement, for example in the context of legislation on money laundering. Within the framework of the EUTR, it is a process that is undertaken before a decision is made, or a product is permitted to be placed on the market. This means that even if the product is legally harvested, failure to complete due diligence before placing it on the EU market is still an offense under the EUTR. This is because before a proper risk assessment is conducted, an operator cannot assume that a product has been – or not – legally harvested. Applied to forest risk commodities, due diligence would be designed to exclude products not meeting particular criteria – perhaps legality, or sustainability, or zero-deforestation – from the EU market rather than to encourage a gradual 'cleaning up' of supply chains.<sup>167</sup>

To comply with the EUTR, operators' due diligence systems should strike a balance between a fixed due diligence framework and a flexible approach.<sup>168</sup> This means that while operators are seeking to comply with the three components of due diligence, they must apply sufficient flexibility to take account of the particular circumstances that surround each timber shipment. Elements to be considered include the degree of the risks (e.g. prevalence of corruption), knowledge of specific risks in the supply chain

<sup>164</sup> COM(2008) 644 final, p.9.

<sup>165</sup> OECD 2018, p.15.

<sup>166</sup> Pontecorvo 2019, p.548.

<sup>167</sup> Brack and Ozinga 2020, p.8.

<sup>168</sup> Clientearth 2015, pp 3-4.



(e.g. concerns issued by environmental advocacy groups), the complexity of the product (e.g. products containing different timber species or involving different stages of processing), as well as, where applicable, the veracity and reliability of certification.<sup>169</sup> Private certification schemes can be used in risk assessment and mitigation, but they cannot provide proof of legality. This provision in the EUTR was taken mainly “to avoid outsourcing the responsibility for compliance to an external body, i.e. the certification scheme, which would potentially create a ‘liability loophole’ where the failure of an approved certification scheme, for example through fraud, would not result in any liability on the part of the company relying on it”.<sup>170</sup>

The implementation of due diligence can reveal challenging for operators due to the ambiguity in the EUTR as regards the definition of legality. The concept of ‘illegal timber’, which is the criteria against which due diligence is exercised, is defined in relation to the laws and regulations of the country of harvest, including legislation covering the right to harvest timber; payments for harvest rights and timber harvesting; environmental and forest legislation, including forest management and biodiversity conservation; third parties’ legal rights to land use and tenure; and relevant trade and customs legislation.<sup>171</sup> While relevant laws can be difficult to identify and access, the EUTR is however silent on the actual steps operators must take to meet these criteria. In practice, in their attempts to demonstrate compliance, most companies have accumulated large volumes of documents from their suppliers in the countries of origin, most of which was deemed irrelevant by Competent Authorities.<sup>172</sup> The lack of clarity as regards the due diligence obligation perpetuates the belief among operators that due diligence can be complied with through gathering sufficient documents likely to proof legal origin. However, this *modus operandi* translates into companies seeking only a “clean supply chain” through collection of documentary evidence, rather than a genuinely risk-free supply or supplier that would necessitate a broader-encompassing strategy covering all supplier inputs, outputs, and other activities.<sup>173</sup> Moreover, the absence of reconciliation of documents between companies leads to the risk that one document demonstrating legal production could be reused several times by an unscrupulous supplier to launder illegal products.<sup>174</sup>

In the practice, CAs’ non-compliance actions focused on the failure of companies to exercise due diligence for particular shipments or consignments, even though weaknesses in a company’s due diligence system (its risk assessment procedures, management systems, oversight, availability of training, etc) can also then be involved. Enforcement actions were most often measures against legislation relating to legal harvest, while other forms of legality, such as third-party legal rights concerning land tenure and biodiversity conservation, were less commonly used.<sup>175</sup>

A survey among CAs revealed that 54 per cent of the respondents asserted that the companies they check are not aware of the exact legal requirements that fall under the applicable legislation in their source countries / supply chain. The absence of data to demonstrate compliance with the legal requirements (46%) and the inability to demonstrate a clear relationship between the single product line which officials had the power to check and compliance with all applicable legislation (26%) were also referred to among the less actionable elements of law under the EUTR.<sup>176</sup>

<sup>169</sup> Clientearth 2015, p.4.

<sup>170</sup> Brack and Ozinga 2020, p.11.

<sup>171</sup> Brack and Ozinga 2020, p.12.

<sup>172</sup> *Idem.*

<sup>173</sup> Saunders 2020, p.5.

<sup>174</sup> Brack and Ozinga 2020, p.12.

<sup>175</sup> *Idem.*

<sup>176</sup> Brack and Ozinga 2020, p.13.

As far as enforcement is concerned, cooperation with producer country enforcement authorities is weak or non-existent, which makes obtaining evidence of failures of due diligence difficult. To circumvent this issue, competent authorities are increasingly using scientific analysis of products, for example through isotopic or DNA testing, to validate the information provided by companies on their products, since these tools can provide evidence that does not rely on cooperation with any agency in the countries of origin.<sup>177</sup> The following table shows the main areas of legality that are checked by enforcement authorities in the EU.

**Table 4: Survey Responses from European Enforcement Officials Showing Their Most-Enforced Areas of Legality Under the EUTR**

Answer choices	Responses
Rights to harvest timber	87.50%
Environmental legislation	62.50%
Requirements for a forest management plan	50.00%
Legal gazettement of boundaries to the area in which the harvest took place	37.50%
Duties related to timber harvesting	37.50%
Requirements of export, insofar as the timber sector is concerned	37.50%
Payments for harvest rights	25.00%
Third parties legal rights concerning use of forest resources that are affected by timber harvesting	25.00%
Third parties legal rights concerning land tenure that are affected by timber harvesting	12.50%
Biodiversity conservation where directly related to harvesting	12.50%

Source: Saunders (2020)

#### 4.2.2 Operators' challenges with due diligence implementation

Exercising due diligence can reveal challenging for operators. The following cases illustrate the difficulties that operators can encounter.

##### Case 1: Sweden, Almträ Nordic

Sweden's Forest Agency, the Competent Authority, prosecuted a trader, Almträ Nordic, after investigations revealed failures of the company to demonstrate the origin of the timber it placed on the EU market, and whether the relevant activities complied with Myanmar's forest legislation.<sup>178</sup> Almträ Nordic purchased the timber from Myanmar Timber Enterprise (MTE), a Burmese state-owned

<sup>177</sup> *Idem*.

<sup>178</sup> EIA 2016b: See also Saunders 2016b.

entity responsible for the harvest and sale of timber in Myanmar, which has often been pointed out for its lack of transparency and high risk of illegality in supplied wood cutting.<sup>179</sup>

On 15 November 2016, the Jönköping Administrative Court confirmed a ruling that the “green folder”<sup>180</sup>, a certificate issued by the Myanmar Forest Products Merchants’ Federation (MFPMF) could not be accepted as proof of legally cut and harvested timber as regards shipment of teak imported into Sweden. The Swedish importer was found failing to comply with the EUTR for insufficiently robust due diligence procedures on imports of teak from Myanmar via Singapore.<sup>181</sup> This verdict was considered a landmark ruling, establishing an obligation for operators to establish due diligence systems providing a complete genesis of the origin of timber, from the forest to the sawmill. As such, the ruling was expected to contribute to addressing illegality and transparency within timber supply chains.<sup>182</sup>

As regards timber products, another Swedish company, Retlog, was prohibited from placing on the EU market a Thai product containing Burmese Teak unless evidence is shown that the associated risk could be mitigated to a level deemed negligible.<sup>183</sup>

## The Netherlands

In the Netherlands, the cases examined showed that two companies were fined by the Dutch CA, for placing illegally harvested wood on the Dutch market.

### Case2: Fibois BV Purmerend

The Fibois case was one of the first public actions of Competent Authorities to enforce the EUTR. The Dutch Competent Authority, the Netherlands Food and Consumer Product Safety Authority (NVWA) issued an injunction notice to Fibois BV Purmerend, a wholesale timber company, for importing wood from Compagnie de Commerce et de Transport (CCT) Ltd, one of the biggest timber-exporting companies in Cameroon.<sup>184</sup> Following an inspection by the NVWA carried on 6 March 2015 on Fibois’ due diligence system, the company was warned in a letter dated May 29, 2015 that it had to take corrective measures within six months. On 12 November, another inspection took place in response to a request for enforcement made by Greenpeace. Once more, the findings revealed that Fibois failed to take sufficient care when placing timber - a batch of Azobé wood from Cameroon- on the EU market. Significant flaws were detected in the collection of information, undermining traceability and making it implausible to adequately implement risk assessment and hence risk mitigation.

<sup>179</sup> See for example EIA 2016b.

<sup>180</sup> The « green folder » should normally provide information on specifications, destinations invoices, legal certificates, country of origin statement as well as a customs declaration. In this case, the document lacked information on the subcontractors commissioned with carrying out the logging, the origin of the timber and information covering the whole supply chain.

<sup>181</sup> This verdict upheld a ruling on 7 October, according to which the Almtra Nordic was found in breach of the EUTR. The company was fined 17,000 Swedish kronor (≈ EUR1670) and an injunction was issued to prevent the company from putting timber from Myanmar on the EU market until adequate risk assessment and mitigation was performed.

<sup>182</sup> EIA 2016b.

<sup>183</sup> See in this regard UNEP-WCMC 2017a.

<sup>184</sup> ClientEarth 2018b. See also Douma 2017.

In January 2016, the CA put Fibois on notice, warning that the company could incur a fine if it continued to import timber from the Cameroonian CCT. In March 2016, the CA put in place measures whereby Fibois would forfeit a sum of money per cubic meter of timber equal to the sale price of the wood.<sup>185</sup> The case was a civil enforcement measure that could result in administrative sanctions. However it had also been presented to the National Prosecutors' Office, and could be brought before a judge for a potential criminal law sanction.<sup>186</sup> Fibois allegedly failed to take sufficient measures to mitigate the "risk of illegal harvesting" inherent in purchasing wood from Cameroon given the high level of corruption<sup>187</sup> in that country and the "political situation in the Congo Basin",<sup>188</sup> thereby failing to fully comply with the due diligence system as referred to in the EUTR. CCT had repeatedly been reported by both Cameroonian Independent Forest Monitor and Greenpeace for dealing in illegally harvested timber.<sup>189</sup>

In March 2017, the Dutch CA took the case to the Administrative Court and on 24 May 2017, the Court ruled in favour of the CA stressing that the operator is obliged to collect verifiable information covering all the steps in the supply chain from harvest to the placing on the EU market. The information should be gathered in such a way that based on it, it can be determined that the harvest was done in accordance with Cameroonian laws and regulations.<sup>190</sup> In this case, insufficient relevant data made it impossible to establish with certainty the origin of the wood, thereby resulting in the impossibility to ascertain that the timber was harvested in accordance with the applicable laws and regulations. Furthermore, while both Fibois and NVWA concur that the risk of corruption in Cameroon is significant and that there are suspicions that CCT was involved in processing illegally harvested wood, Fibois did not take sufficient account of that information in its risk mitigation, failing to comply with Article 6(1)(c) EUTR. The failure of Fibois to comply with Articles 6(1) and 4 EUTR constitutes a breach of the prohibition in article 2(1) of placing illegal timber on the EU market. The enforcement actions by the Competent Authority were therefore declared lawful.

### Case 3: Boogaerdt Hout

<sup>185</sup> Saunders 2017. Fibois BV Purmerend had to pay €1,800 per cubic meter of timber from Cameroon placed on the EU market until the company would be able to comply with the EUTR due diligence requirements (see Douma 2017).

<sup>186</sup> Jade Saunders, EU Timber Regulation Starts to Bite, Viewpoints, A Forest Trend Blog, 2016

<https://www.forest-trends.org/blog/eu-timber-regulation-starts-to-bite/>

<sup>187</sup> Cameroon was ranked as the world's 25th most corrupt country according to Transparency International, see Transparency International 2018.

<sup>188</sup> Netherlands Food and Consumer Product Safety Authority, 2016. The Dutch CA was of the opinion that the probability that the timber was illegally harvested was higher due to political instability in the Congo Basin and the high corruption rate in Cameroon.

<sup>189</sup> Saunders, J., Dutch Court Ruling Helps Curb Illegal Timber Trade, Viewpoints, A Forest Trend Blog, 2017, <https://www.forest-trends.org/blog/dutch-court-ruling-helps-curb-illegal-timber-trade/>

<sup>190</sup> B.V. X v de staatssecretaris van Economische Zaken, Rechtbank Noord-Holland, May 24, 2017, AWB - 16 5358, ECLI:NL:RBNHO:2017:4474. In this case, important documents that could attest to the conformity of the logs transported to the sawmill with the logs referred to in the logging permit were missing, making it impossible to identify the actual trees that were logged and verify their compliance. The allegations of the operator that an independent auditor had viewed and validated all documents, but not filed copies were found not compliant with the requirements of the EUTR, and rejected by the Court. The court also supported the conclusions of NVWA that the assessment and mitigation of risks that the actual timber imported had not been illegally harvested was inadequate. Fibois was unable to show any risk mitigation measures despite the concerns highlighted in the reports published by the Cameroonian Independent Forest Monitor and Greenpeace. (See Saunders 2017)

Boogaerdt Hout, another major Dutch timber company was also found by the Dutch Competent Authority to be in violation of the EUTR for placing illegal Burmese teak on the EU market.<sup>191</sup> The company was given two months to clear its supply chain from Burmese teak or would otherwise be fined 20,000 Euros per cubic meter of illegal timber.<sup>192</sup>

### Myanmar's illegally-sourced teak: a multi-country case

EIA conducted a two-month investigation as a result of which it filed in October 2016 legal complaints to authorities in five countries<sup>193</sup> regarding violations of the EUTR, especially violations of the due diligence obligation.<sup>194</sup> According to EIA, "due to the high risk of illegality associated with timber in Myanmar and structural refusal from the Government to allow access to information that might evidence compliance, no Burmese teak can legally be placed on the EU market"<sup>195</sup>

The significant risk of illegality associated with Myanmar timber has been repeatedly reported by government agencies, trade federations, and various other organizations.<sup>196</sup> These different sources raised concerns, among others, about bribery and corruption in the allocation of harvesting right, illicit logging practices, overharvesting, corruption throughout the supply chain, laundering of illegal timber and falsified documents. The shortcomings would allegedly make it virtually impossible to apply reliable due diligence systems to Burmese teak originating from Myanmar.<sup>197</sup>

The following cases involve import of the Myanmar allegedly illegally sourced teak.

#### Case 4: Sailing Yacht A

Concerns were raised by the London-based Environmental Investigation Agency (EIA) in October 2016 that the timber used in Germany for the construction of the luxury 'Sailing Yacht A' was logged illegally. In 2017, public prosecutor Axel Bieler found that the timber used by German shipyard Nobiskrug in the five-year construction was illegally sourced. An analysis of the composition and the ring structure of the timber samples showed that the timber were not harvested in a legal plantation, and would probably originate from forests in Myanmar. The EIA conducted a two-month investigation that revealed that Teak solution, the Spanish importer and eight other European suppliers "failed to identify or verify the source of the teak, a clear right to harvest or information that might mitigate the risks of

<sup>191</sup> Investigations by EIA in August 2016 revealed that "Gold Teak Holding, a Singaporean company failed to provide basic information about the origin of the timber it trades in, including who harvested the timber, where it was logged and whether the harvest complied with relevant laws. As a result, EIA filed a substantiated concern against the company in Netherlands for supplying a shipment of six tonnes of illicit Myanmar teak to a company in Rotterdam."

<sup>192</sup> Erickson-Davis 2017.

<sup>193</sup> The concerns referred to nine operators across Belgium, Denmark, Germany, Italy, and the Netherlands. Concerns were also later raised regarding UK. Following these concerns, many CA's started investigations and adopted appropriate measures. Denmark issued injunctions to all Danish operators importing teak from Myanmar. German prosecutors's office issued a search warrant for two shipyards and afterwards, also issued injunctions against 11 companies involved in timber imports from Myanmar, demanding proper information and adequate risk mitigation.

<sup>194</sup> Companies reported by EIA include: Antonini Legnami, Basso Legnami and Bellotti SPA in Italy; Boogaerdt Wood (owner of Royal Deck), World Wood and Gold Teak Holdings in The Netherlands; Crown Teak in Belgium; Keflico in Denmark; and Teak Solutions in Germany. (see EIA 2016b)

<sup>195</sup> EIA 2016a, p.2.

<sup>196</sup> These organizations include EUTR Monitoring Organisations, NGOs and industry experts, including the UN Office on Drugs & Crime, the EUTR Monitoring Organisation NEPCON, HAWA (a Vietnamese trade federation), WWF and even a 2016 report, under an EU-funded project managed by ALARM.

<sup>197</sup> See EIA 2016a, p.3.

harvesting in violation of relevant forestry provisions."<sup>198</sup> The Spanish operator imported the timber from Myanmar Timber Enterprise (MTE) which is a state-run wood trading company that was earlier sanctioned by Denmark because of doubts as to the origin of its teak.

### **Case 5: Myanmar Wood Imported into Sweden via Thailand**

The Swedish Forest Agency sent in March 2016 an injunction to company called Retlog Ltd. to mitigate the risk related to Burmese teak flooring which had been processed in Thailand using logs from Myanmar. Retlog was later, in January 2017, prohibited from placing the checked teak product from the specific Thai supplier on the EU market unless they can show that the risk for illegally logged Burmese teak is negligible.

This case is interesting in several respects. First, it highlights a key strength of the EUTR Due Diligence requirement considering that auditors of existing forest product control systems consider it extremely challenging to secure multi-country supply chains.<sup>199</sup> Secondly, the case could help improve scrutiny of Monitoring Organisation standards since they might reveal essential for compliance in the future, especially for smaller European countries.<sup>200</sup> In this instance, Retlog actually hired Bureau Veritas to visit MTE so as to clarify the origin of the imported teak. However the involvement of the Monitoring Organization was not sufficient to demonstrate that the timber was legally harvested because the visit did not provide any provide any additional information on the production process.<sup>201</sup> It is worth underlined that Bureau Veritas was in October 2016 suspended from issuing FSC chain of custody and forest management certificates due to its failure to resolve major non-conformities with FSC accreditation standards.<sup>202</sup>

### **Case 6: Danish Keflico**

In line with the evidence brought to light by the EIA, the Danish timber company Keflico was found to be in violation of the EUTR due diligence obligations as regards the teak from Myanmar it placed on the EU market. In the aftermath of this decision, Denmark's Environmental Protection Agency carried out audits at seven Danish companies that had imported teak from Myanmar in the last four years. These audits revealed that that "authorities in Myanmar had not provided adequate documentation of where the timber for any given purchase came from and whether or not it was legally harvested, thereby making it virtually impossible for Danish companies to avoid importing illegal wood."<sup>203</sup> As a result, Denmark placed an injunction on all Danish companies prohibiting them from selling teak imported from Myanmar on the EU market.

The German CA also carried out checks on companies importing teak from Myanmar. After the findings revealed that these companies failed to comply with the due diligence requirements, the CA issued injunctions requiring operators to take additional risk mitigation measures.

### **Follow-up measures in Myanmar**

<sup>198</sup> See *Superyacht built using illegal timber*, 2017, available at <https://www.dw.com/en/superyacht-built-using-illegal-timber/a-38316296>; see also UNEP-WCMC 2017b.

<sup>199</sup> Saunders 2016.

<sup>200</sup> Saunders 2016.

<sup>201</sup> Pontecorvo 2019, p.253. Saunders (2016) explains that Bureau Veritas considered shipments under 1,000 cubic metres—the equivalent of three shipping containers—to be of negligible risk. This assumption is hardly justifiable as neither the EUTR legislation nor any guidance provide for such a threshold.

<sup>202</sup> See Briefing Note on the implementation of the EU Timber Regulations, October 2016 - March 2017.

<sup>203</sup> Gaworecki 2017.



In reaction to this wave of injunctions and the Swedish Court ruling, Myanmar adopted a nationwide logging moratorium in August 2016 that lasted until the end of March 2017. With the increasing number and size of seizures of illegal timber since the beginning of 2017, the Myanmar Forestry Department also launched an internal investigation.<sup>204</sup>

The Burmese teak issue have had fairly positive repercussions in terms of improvement of legality assurance system in Myanmar. A Gap Analysis project workshop on the legality assurance issues was organized in Myanmar in February 2017, bringing together representatives of the country, EU authorities, companies, trade bodies (including European Timber Trade Federation (ETTF)), and the FAO-FLEGT Program (FFP).<sup>205</sup> Myanmar Minister of Natural Resources and Environmental Conservation (MONREC) also met EU timber trade representatives at a side-meeting in Yangon. The MONREC acknowledged deficiencies in its timber verification and tracking systems, stressing that Myanmar systems for tracing timber from forest to export may be complex for external parties to navigate and EU importers can therefore face challenges accessing chain of custody documents. Mixing of logs from multiple sources at various points in supply chains may further complicate tracing of timber supplies in exported products. MONREC subsequently announced measures to streamline, simplify and provide better communication on Myanmar Timber Legality Assurance System (MTLAS),<sup>206</sup> also as part of ongoing discussions on signing an EU FLEGT VPA. Within the framework of their cooperation, CAs in Belgium and Germany also issued advisory documents to the trade, identifying the information they need to verify to comply with legality requirements under the EUTR.<sup>207</sup>

### Case 7: Italian operators and authorities disregard the EUTR

Despite these developments, an EIA undercover investigation<sup>208</sup> that lasted 18 months from early 2020 identified 27 Italian timber operators importing teak timber products into the EU from Myanmar, in violation of the EUTR. The imports continued even after the military coup on 1 February 2021 and subsequent trade sanctions that have been put in place by Canada, the EU, UK, and USA on State-owned enterprises and individuals linked to the military junta, including MTE and MONREC. Italy's 2019 imports reached a new high of 4 million kg worth €25.1 million, accounting for 60% of all European 2019 imports by volume.<sup>209</sup> Similarly, Italian traders indeed imported between €1.3-1.5 million worth of wood products from Myanmar during March, April and May 2021.<sup>210</sup> In 2020, Italy imported nearly €24 million (\$27.4 million) of timber products from Myanmar, which represents nearly 66 per cent of

<sup>204</sup> Seizures include interception of containers at Yangon port and outside Yangon. The seized timber has an estimated value of US\$ 2 million. It is also reported that smugglers might have switched focus to transport via Yangon port since stricter controls on the China-Myanmar border. (see Briefing Note on the implementation of the EU Timber Regulations, October 2016 - March 2017). During the fiscal year 2016-2017, the Myanmar Forestry Department reportedly confiscated over 50.000 tons of illegal timber, including 14.000 tons of teak, and arrested over 8000 people that were allegedly involved in illegal timber harvesting and trade. (See Briefing Note for the Competent Authorities Implementing the EU Timber Regulation, April 2017-May-2017)

<sup>205</sup> It is worth noting that direct teak imports from Myanmar are rather small (around EUR 25 million annually). Most of Myanmar's exports (70%) go via China, India and other neighbouring countries).

<sup>206</sup> ETTF News 2017, p.1.

<sup>207</sup> The EETF urged other EU Member States to adopt the same approach to create a level legality assurance playing field EU-wide (See André de Boer interview, ETTF Secretary General in ETTF News 2017, p.3.)

<sup>208</sup> EIA 2021, p.5.

<sup>209</sup> Norman, M., How has the EU enforced the common position on teak imports from Myanmar?, Forest Trade and Finance Initiative Report, Forest Trends, 2020, available at <https://www.forest-trends.org/wp-content/uploads/2020/03/How-is-EU-enforcing-common-position.pdf>

<sup>210</sup> The investigation also found that one of the Italian, F LLI Budai, was importing Myanmar teak in contravention of the EUTR, while at the same time receiving development funding from the EU.

the total Myanmar timber imports into the EU for that year. In fact, 55 Italian companies were involved in importing, publicly advertising and selling of Myanmar teak.

While this case illustrates clear violations of the EUTR by Italian operators, it also questions the commitment of Italian authorities to properly enforce the EUTR. It is indeed not clear how so many companies could continue importing Myanmar teak into Italy after the Common Position adopted in 2017 by European CAs as regards this particular timber stating that it was not possible to import timber from Myanmar in compliance with the EUTR.

However, these failures are not typical relating to Italy as shown by the following summary made by Norman of the situation of the importation of timber after the adoption of the Common Position.

### **Box 2: Enforcement of the Common Position on Teak from Myanmar**

EU 2019 timber imports from Myanmar remained the same by volume as in 2017 when the common enforcement position was first developed. The value of these imports has increased 40%.

More than 17 million kilograms (kg) of timber from Myanmar, worth €95.8 million has been imported into the EU since September 2017. Imports surged in 2018, reaching an all-time high of 9 million kg but have since dropped to 2017 levels in 2019.

#### ***Shifting supply routes***

After the common enforcement position was first developed, entry points into the EU have shifted dramatically. By 2019, the Netherlands, Germany, Belgium, Finland, Slovenia, France, Denmark and the UK all reduced their annual volumes of timber imported from Myanmar. However, five EU Member States significantly increased imports during that time: Sweden, the Czech Republic, Italy, Croatia and Greece. In fact, imports into Greece, Croatia and the Czech Republic increased by more than 500% over the period. The increases by these countries directly offset the reductions in the Netherlands, Germany, Belgium, Finland and Slovenia, leaving total amounts imported into the EU common market virtually the same.

#### ***German, Belgian and Dutch imports dropped dramatically after strong enforcement activity in the Summer of 2018.***

Enforcement checks to verify compliance of the EUTR were completed on all companies importing from Myanmar in 2017 and 2018 with notices of remedial action issued. Following initial development of the common enforcement position in September 2017, Dutch authorities issued preventative measures against two companies in October 2017<sup>211</sup> and against an additional company in May 2018 which imposed a penalty of €20,000 for every cubic meter of teak and/or teak wood products that they continued to place on the European market. In 2018, German and Belgian authorities stepped up action on their operators continuing to import teak from Myanmar, issuing letters and a press release to clearly communicate the common enforcement position and the consequences of non-compliance. To prevent illegal timber being placed on the common market, both Belgian and German authorities have declared that any teak imported from Myanmar (also via another country such as India) will be temporarily seized and returned at the importers expense if legality cannot be verified within one month of seizure.

<sup>211</sup> Court of The Hague Ruling published 24-01-2020. Available at <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2020:473> (in Dutch)



**Deliberate circumvention**

Two shipments of Myanmar teak valued at over €100,000 imported into Germany from Singapore in September 2018 were later seized by the German authorities and ordered to be returned in August 2019 when the importer was unable to demonstrate negligible risk within one month of seizure.

Following robust enforcement action against Dutch companies in the Netherlands, the Czech enforcement authority registered imports from Myanmar from August 2018. Joint Dutch and Czech enforcement actions uncovered deliberate circumvention of the EUTR with regards to teak from Myanmar, leading to raids and seizures in December 2019 in both countries. Publicly available information suggests that the teak was imported into the Czech Republic but pre-sold to buyers in the Netherlands.

Source: Norman 2020<sup>212</sup>

As reported by NGOs and NepCon, there has been no conclusive evidence that the reforms to strengthen the timber legality verification system in Myanmar succeeded into bringing sufficient actual changes to overturn this earlier position. These reforms underway were halted with the coup on 1 February 2021.

In December 2020, Competent Authorities stated:

*"In view of the high level of corruption in Myanmar and due to the lack of access to laws, regulations and reliable factual information and truly independent verification, there are no measures at hand to adequately mitigate the high risk of illegally harvested timber entering the supply chain and being mixed indistinguishably with legally harvested timber. In this situation, and in combination with the lack of free access to the harvest areas and the extreme difficulty to ensure reliable secure and independently verifiable tracking throughout the supply chain, documentation and random physical verification by entities guided by government officials are not adequate measures to mitigate this risk, either."*

*"For all timber from Myanmar the risk that it was illegally harvested is non-negligible and operators cannot take adequate mitigation measures within the meaning of Article 6 (1) (c) of the EUTR with regard to all of the underlying risk factors, in particular due to the lack of factual traceability and the way the forest governance system under a State monopoly is set up, in combination with widespread corruption. As long as the situation as regards the proven problematic issues remains, the present conclusions on the impossibility of carrying out full DD<sup>213</sup> and taking adequate mitigation measures remain valid. Operators should therefore refrain from placing on the EU market for the first time all timber harvested in Myanmar and timber products derived therefrom."<sup>214</sup>*

<sup>212</sup> Norman, M., How has the EU enforced the common position on teak imports from Myanmar?, Forest Trade and Finance Initiative Report, Forest Trends, 2020, available at <https://www.forest-trends.org/wp-content/uploads/2020/03/How-is-EU-enforcing-common-position.pdf>

<sup>213</sup> Please read 'Due diligence'.

<sup>214</sup> Commission Expert Group/Multi-Stakeholder Platform on Protecting and Restoring the World's Forests, including the EU Timber Regulation and the FLEGT Regulation, Conclusions of the Competent Authorities for the implementation of the European Timber Regulation (EUTR) on the application of Articles 4(2) and 6 of the EUTR to timber imports from Myanmar, 9 December 2020.

CAs also emphasized their openness to assess new elements operators may bring forward before acquisition of timber for import to demonstrate that they could carry out full DD and come to a negligible risk.<sup>215</sup>

Authorities in Belgium and Germany followed the Common Position up with specific industry warnings, and enforcement actions were also taken in the UK, the Netherlands, Denmark, Spain and Sweden. For example, the EIA investigation reported that Dutch authorities raided in December 2019 six locations regarding import of approximately 500m<sup>3</sup> of Myanmar teak, roughly estimated to be worth \$3 million, into the Netherlands via Slovenia and the Czech Republic. Similarly, the "German CA reported that two shipments of teak from Myanmar imported via Singapore by a German operator in September 2018, have been denied entry to the internal market. The teak, valued at EUR >100 000, had been taken into custody after an onsite inspection determined that the operator's DDS could not reduce the risk of illegal harvest to a negligible level. The operator was subsequently unable to demonstrate negligible risk within one month following seizure, therefore the shipments were ordered to be returned to the country of origin."<sup>216</sup>

#### 4.2.2 Challenges with enforcement the due diligence obligation

Enforcement actions on operators' due diligence can also bring along challenging decision-making for competent authorities. In this regard, the Dutch CA, NVWA, was found failing to enforce the EUTR.

##### **Case 8: Dutch CA's failure to comply with the EUTR**

In the Netherlands, Greenpeace filed a complaint against eleven companies importing timber coming from the Brazilian Amazon region, claiming that the risk of illegality related to this timber was significantly high.<sup>217</sup> The Food and Consumer Product Safety Authority (FCPSA) was requested to investigate and, where applicable, to prosecute the said companies. After finding that some of these companies were in breach of their due diligence obligations,<sup>218</sup> the FCPSA decide not to prosecute, but rather to issue written warnings to these companies, providing them with the opportunities to take the necessary measures to improve their due diligence systems.<sup>219</sup> These warnings were motivated by the fact that the EUTR due diligence requirements were relatively new and the non-compliances identified could be rectified. The warnings did specify that the failure to take corrective actions would lead to immediate administrative and/or criminal procedures during the subsequent inspections. This decision was appealed by Greenpeace and the case went before the Amsterdam District Court.

The Court found that the Competent Authority may only decide not to enforce the law under special circumstances, for example when the imposition of a sanction is out of proportion in relation to the

<sup>215</sup> CAs may submit these elements to the other Competent Authorities, in compliance with the applicable data protection legislation, for a joint assessment, which may lead to an update of the conclusions reached at that meeting.

<sup>216</sup> UNEP/WCMC 2019, p.1.

<sup>217</sup> Greenpeace based his claims on his report "The Amazon's Silent Crisis" published in May 2014. See *Stichting Greenpeace Nederland v. de staatssecretaris van Economische Zaken*, para. 2.

<sup>218</sup> It appeared during checks performed by the Competent Authority that not all eleven companies were importing timber from Brazil. It is however noticeable that on the basis of these checks, the companies De Ru, Rodenhuis, Global Wood and Ultimate Wood stopped importing wood. Three other companies (Nailtra, Sneek and Felix Clercx) were found in breach of due diligence requirement under Articles 4 and 6 of the EUTR.

<sup>219</sup> *Stichting Greenpeace Nederland v. de staatssecretaris van Economische Zaken*, para. 6.

interests to be served by the enforcement measures.<sup>220</sup> Such circumstances were not present in this case and could not justify the CA's decision. With regard to the seriousness of the shortcomings identified, the Court underlined that a fact could be qualified 'minor' only when the fact can be easily and quickly rectified and is unrelated to legality issues.<sup>221</sup> Furthermore, the Court rejected the preparation period argument that was put forward by the CA. In the view of the Court, a reasonable period of time, and therefore ample opportunity, was given, both to economic operators and Competent Authorities, to prepare to comply with the requirements of the Regulation between the adoption of the EUTR on 20 October 2010 and its entry into force on 3 March 2013. The decision contested by Greenpeace was not sufficiently substantiated by the CA. On those grounds, the CA was required to make a new decision within six weeks, taking into account the ruling and concretely explaining the reasons leading to its conclusions as well as its decision to enforce or not.<sup>222</sup> The CA could also decide that the violations have ceased, but this decision must also be sufficiently substantiated.

Even though the CA was not taken to Court in the case of Myanmar timber imported to Italy (Case 7), it is rather noticeable that the Carabinieri (the division of the Italian military police responsible for enforcing the EUTR) confirmed it has approved shipments of Myanmar timber imported into Italy despite the EU-wide decision that due diligence on that timber could not be reliably carried out. In spite of a few companies that were sanctioned, after their checks on shipments of teak from Myanmar in 2020, Carabinieri and Customs found many other operators to be compliant according to EU and Italian law.<sup>223</sup>

### 4.3 Effectiveness of the timber regime: enforcement within Member States

The EUTR stipulates that CAs must carry out checks on operators to verify their compliance with its requirements. In practice, these checks are not applied systematically and are largely dependent on the means which are made available to the CAs. The allocated budget and other resources play a role as regards choices in terms of frequency of checks or follow-up on previous inspections.<sup>224</sup> In general, the budget allocated for the implementation of the EUTR is relatively low. WWF reported in 2019 that at least seven countries did not even dedicate any budget to implementation.<sup>225</sup>

In the Member States that were evaluated, the WWF report also revealed a generally low level of implementation, as well as significant discrepancies between the different Member States in terms of sanction regimes and resources.<sup>226</sup> The majority of Competent Authorities do not carry checks on both

<sup>220</sup> Stichting Greenpeace Nederland v. de staatssecretaris van Economische Zaken, para. 10.6.

<sup>221</sup> Stichting Greenpeace Nederland v. de staatssecretaris van Economische Zaken, para. 10.7.

<sup>222</sup> Stichting Greenpeace Nederland v. de staatssecretaris van Economische Zaken, para. 11.

<sup>223</sup> EIA 2021, p.20. In late 2018, Carabinieri seized a shipment of timber and initiated a prosecution. However, the prosecuting judge rejected the case and it did not proceed.

<sup>224</sup> The WWF reported that competent authorities are generally understaffed and often lack training. On average, "there is one full-time equivalent (FTE) staff member for several thousand operators (ranging from 1 FTE for 1,200 operators to 1 FTE for 5,000 operators)". WWF 2019, p.14.

<sup>225</sup> WWF 2019, p.14. In the evaluation of the first two years of implementation, the low budget allocation was explained by the fact that the EUTR was issued in a period of reduced public expenditure, (see SWD/2016/034 final)

<sup>226</sup> WWF 2021, p.10.

due diligence and legality of timber, which means that they only implement one of the two main provisions of the EUTR.<sup>227</sup>

Moreover, many countries do not have sufficiently detailed plans for checks in accordance with the EUTR. In 2018, Bulgaria had plans only to check domestic timber while Belgium, to cope with resource constraints, prioritized only checks after a complaint has been filed.<sup>228</sup> As a rule, checks must be scheduled following a risk-based approach, including the identification of risk factors and their influence on the frequency of checks. With the absence of clear guidelines, it is the responsibility of each MS to decide how particular provisions are to be implemented, understood or given political priority.<sup>229</sup> As a result, major discrepancies can appear in the approaches defined by Member States to implement the EUTR. Such discrepancies can be nuanced by the fact that legal frameworks and institutional structures vary across MS. However, these disparities must not be such as to result in a diversity of measures leading to entirely different results from one country to another, some of which deviating from the objective defined by the EUTR.

In its first two years, the general state of implementation of the EUTR revealed discrepancies across the EU, and in some MS, the progress was even quite moderate. Between March 2015 and February 2017, it is reported that 14 out of the 16 Member States checked only 0.33% to 3.1% of the operators importing timber.<sup>230</sup> Even if this rate increased to 34% for domestic timber in 2017, it is noticeable that the average of checks over 14 Member States is only 6%, with a total lack of checks in four countries.<sup>231</sup> Checks on traders remain low as well, varying from 0 to 229 in 2017.<sup>232</sup>

The last biennial report showed that “the number of checks on operators dealing with domestic timber varied significantly from one country to another, with some countries reporting thousands of checks and others reporting limited or no checks. In some countries, EUTR checks are integrated as part of the checks carried out by the authorities responsible for forest management. In these cases, countries reported differently on the numbers of checks (e.g. Germany did not report any plans or number of checks, but nonetheless reported a number of sanctions being applied). Belgium, Croatia, Denmark, Latvia, Malta, the Netherlands and the United Kingdom did not perform checks on operators for domestic timber, stating a number of reasons, including limited domestic production.”<sup>233</sup>

In eight Member States, only a bilateral dialogue with the Commission had the impetus to bring about the changes necessary for implementation. Despite this involvement, the Commission had nevertheless to start legal action for non-compliance in the course of 2015 against four countries that were still lagging behind, including Hungary, Romania, Greece and Spain.<sup>234</sup> Implementation issues in

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<sup>227</sup> *Idem*.

<sup>228</sup> COM/2018/668 final, p.6. As a result of this, the Commission issued a letter of formal notice in October 2017 to request compliance with the EUTR.

<sup>229</sup> Hoare 2015, p.43.

<sup>230</sup> WWF 2019, p11.

<sup>231</sup> *Idem*.

<sup>232</sup> *Id.*

<sup>233</sup> COM(2020) 629 final.

<sup>234</sup> COM/2016/074 final, p.4.

these countries resulted from the fact that they either had other policy priorities or a lack of political influence and/or capacities.<sup>235</sup>

It is also noticeable that controls of due diligence systems overshadow checks to verify compliance with the requirement not to place illegal timber products on the EU market. Issues of ineffectiveness were also raised because operators were often notified ahead of the checks and could conceal their non-compliances. Inconsistencies resulting from the lack of communication between various CAs in one single Member State are also a challenge for the implementation of the EUTR at the national level.<sup>236</sup>

As far as follow-up of controls and prosecution is concerned, the absence of a clear decision-making process contributed to lack of coordination with regard to actions by CAs. In 2019, 14 out of 16 CAs investigated by WWF had no benchmark to determine when to issue a notice of remedial action, or report operators to prosecutors for breaches of the due diligence and prohibition obligations. Similarly, most CAs failed to monitor whether operators actually apply remedial actions. Member States also do not use comparable criteria for applying sanctions. Moreover, there is no harmonized definition of what constitute a breach under the EUTR. As a result, penalties for infringements of the due diligence obligation may or may not be followed by penalties depending on the country.<sup>237</sup> Besides, MS seem to prefer issuing administrative sanctions rather than court rulings since the former only requires approval from the regional/administrative authorities and not a ruling by a judge.<sup>238</sup>

## 4.4 Effectiveness of the EUTR

### 4.4.1 'Trader-operator' problem

With regard to stakeholders and their obligations, the EUTR makes a distinction between operators and traders, putting most of the compliance burden on the former. Operators carry a major responsibility in terms of risk management, while traders are under a mere traceability obligation that can be fulfilled by keeping record of their suppliers and consumers. Practice has shown that this approach is unsuccessful and has drastically lowered the effectiveness of the EUTR.<sup>239</sup> This focus could certainly be explained by the ultimate forest governance objective underlying the FLEGT Action Plan. Operators can indeed be seen as the bridge between the loggers and timber processing entities and the EU market at large, including both traders and consumers. As such, their responsibility is obvious and undeniable and the law must indeed ensure their obligations reflect that liability.

However, this differentiated approach based on the quality of the stakeholder has many consequences. The "trader-operator problem" disregards the role that traders can play in illegal activities.<sup>240</sup> The checks carried by Competent Authorities target only the first supplier. This means that once timber has been placed on the EU market by the operator, the possibilities for filtering out illegally sourced wood later

<sup>235</sup> McDermott and Sotirof 2018, p.5.

<sup>236</sup> WWF 2019, p.11.

<sup>237</sup> WWF 2019, p.13.

<sup>238</sup> *Idem*.

<sup>239</sup> WWF 2021, p.10.

<sup>240</sup> *Idem*.

on in the Chain of Custody are very limited.<sup>241</sup> Since 'traders' are under no obligation to verify the origin and species of the wood and are only required to provide documentary evidence supplied by the 'operator', failures to provide evidence for traceability will unlikely lead to penalties. As a result, it becomes easier for traders to seek ingenious ways to circumvent the prohibition requirement under the EUTR. A report by WWF points out that "it is common practice for "traders" to source wood from "operators" engaged in fraudulent activities or to set up fake companies that exist only on paper in other MS."<sup>242</sup> The following case illustrates the intricacy of overseeing the ramifications of the trader-operator problem.

### **Box 3: Viator Pula: A case of changing supply routes**

EIA obtained documents from the Croatian Ministry of Agriculture that showed that "a group of European companies have been paying a Croatian company to land teak from Myanmar in Croatia in an attempt to avoid the EUTR" despite warnings as regards illegal sourcing practices of wood in Myanmar.<sup>243</sup> This attempt to circumvent followed EUTR enforcement rulings in many other EU Member States as a result of which direct teak trade has been halted. While teak imports from Myanmar decreased in these EU countries due to warnings and import bans, imports of the same teaks increased in other EU Member States, especially Croatia, Greece and Italy.<sup>244</sup>

The Croatian importer Viator Pula would have supplied 144 tonnes of Myanmar teak, worth nearly \$1 million, to many traders in Slovenia, Belgium, Italy, Germany and the Netherlands. Some of these operators were previously found to be in breach with their due diligence obligations with regard to imports of Myanmar teak (Crown, Boogaerdt Hout, Vandecasteele).

The shipments arrived at the Port of Rijeka in Croatia from 2017 to 2019. A check carried out in February 2020 revealed the inadequacy of Viator Pula's due diligence system. Croatian Ministry of Agriculture issued an order to Viator to come into compliance with the EUTR due diligence requirement, or the company would otherwise face penalties.

Case 7 is also an example of how 'diluting' traders' obligations may potentially contribute to non-compliant timber circulating freely on the EU internal market. The EIA reported that according to trade data, Myanmar timber imported to Italy was subsequently shipped to other EU countries, including France, Germany, Austria, Slovenia, Netherlands, Czech Republic, Poland, Spain, Denmark, and Belgium.

This pattern of changing EUTR supply routes suggests that European teak traders "rather than stop trading in high risk timber or improve their due diligence systems, were exploiting loopholes in EUTR

<sup>241</sup> EIA 2018, p.10; WWF 2021, p.10.

<sup>242</sup> WWF 2021, p.10.

<sup>243</sup> EIA 2020, p.2.

<sup>244</sup> EIA 2020, p.5. In August 2018, the month after a warning was issued in Germany, and the same month as a warning in Belgium, 65.2 tonnes of timber were imported in Croatia, which is more than in the entirety of 2017 and triple the amount imported in July 2018.



enforcement to continue profiting from the trade in high-risk Myanmar teak".<sup>245</sup> In a similar logic, companies contemplating practices that are not fully compliant can decide to relocate in a less strict jurisdiction.

The 'trade-operator problem' seems therefore to provide a loophole that enables timber importers to seek a Member State with weak EUTR enforcement, where an operator with inadequate due diligence might still continue its imports unimpeded.<sup>246</sup> While the Croatian CA took necessary enforcement steps in carrying out a check and warning Viator Pula, it is worth underlining that the Croatian legislation implementing the EUTR does not provide provisions to fines infringement of the due diligence obligation.<sup>247</sup>

The emphasis in the EUTR on operators can also create a loophole when specific traders make it a habit to buy their timber only from small-scale operators who are rarely checked. These small-scale operators are often not aware of their obligations under the EUTR. WWF reported that "in some cases, practice even blurs the boundaries between operators and traders when, for example, a large trader in Romania gives loans and machinery to a one-person operation for the purpose of cutting wood and supplying it to the trader."<sup>248</sup> With regard to this issue, it might be relevant to examine whether a trader is not a de facto operator and should be treated as an "operator" as defined by the EUTR.<sup>249</sup> For instance in Germany, court cases have determined that the person who is considered an operator (in a generic, not EUTR-specific sense) and who is bound by legal obligations under environmental and regulatory law must not be determined "solely according to formal legal aspects, but taking into account the legal, economic and factual circumstances of the individual case."<sup>250</sup> Following this logic, an operator in the sense of the EUTR can be extended to include any entity which, "by virtue of its economic or other influence, exerts control over logging or import processes."<sup>251</sup>

#### 4.4.2 Penalties

Penalties applying to infringements of the EUTR are set and enforced at national level according to the specificities of each Member State's legal system. By 2016, most Member States had adopted a national penalty regime. The nature of these penalties varies widely across the EU. Some Member States have chosen a penalty regime relying mainly on administrative penalties, while others rely mostly on criminal penalties for key EUTR obligations. Some Member States have also adopted a combination of the two systems. EUTR penalties in Member States include notices of remedial actions that allow operators to adjust their due diligence systems before another check. The notices of remedial action

<sup>245</sup> EIA 2020, p.5. Other instances show that timber was imported through Trieste (Italy) and later supplied to Belgium and Germany. This resulted in 2018 in one shipment seizure and a prosecution. In late 2019, Dutch authorities also seized large quantities of timber that was directed through the Czech Republic on the way to the Netherlands.

<sup>246</sup> EIA 2020, p.6.

<sup>247</sup> EIA 2020, p.13.

<sup>248</sup> WWF 2021, p.13.

<sup>249</sup> *Idem*.

<sup>250</sup> The Bundesverwaltungsgericht (German Federal Administrative Court), for example, ruled in a decision of 22 July 2010 (7 B 12/10) on waste law (margin no. 15): "The question of who is the operator in an individual case [is] not to be assessed solely according to formal legal aspects, but taking into account the legal, economic and factual circumstances of the individual case." According to the court, this definition of operator (of a landfill) is not limited to waste law but extends to other areas of environmental law., cited by WWF 2021, p.13.

<sup>251</sup> WWF 2021, p.13.

can be cumulated with interim measures such as seizure of timber, suspensions of authorisations to trade, fines and imprisonment.

There are important discrepancies between Member States concerning the level of fines provided for under national law. In the first implementation years, fines ranged from as little as EUR 14 to unlimited fines, with the largest ones relating to the prohibition requirement.<sup>252</sup> In 2020, administrative fines could go up to EUR 1.600.000 in Belgium for breaches to the prohibition, due diligence and traceability obligations, while the maximum penalty is EUR 1.00.000 in Spain. In Italy, infringements to the due diligence obligation could also be sanctioned by a fine up to EUR 1.000.000.<sup>253</sup> While many countries have absolutely no criminal fines, Belgium did set criminal fines up to EUR 32.000.000. Estonia established maximum criminal fines EUR 16.000.000 for prohibition and due diligence obligations. Countries such as Latvia and Italy only established criminal fines for the prohibition obligation. In some countries (France, Ireland, Luxemburg, Netherlands), breaches of the reporting obligation by monitoring organizations could also be sanctioned by a criminal fine. Other countries defined fines proportionately to the quantity and value of the timber that is found to be illegal. In the Netherlands, for example, companies incur criminal fines up to EUR 870.000, based on the value of the goods.<sup>254</sup> The following tables present examples of some sanctions in MS legislations.

#### Box 4: Examples of administrative fines in MS (2017-2019)

For **breaches of prohibition**, 5 countries reported defined maximum administrative fines in excess of EUR 100.000: Belgium (EUR 1.200.000), Czech Republic (EUR 193.585), Poland (EUR 116.335), Slovakia (EUR 200.000) and Spain (EUR 1.000.000, or equivalent to the value of the timber or double of the cost of reposition of the damage caused, if higher).

For **breaches of due diligence obligations**, 6 countries reported maximum administrative fines in excess of EUR 100.000: Belgium (EUR 1.200.000), Czech Republic (EUR 193.585), Italy (EUR 1.000.000), Poland (EUR 116.335), Slovenia (EUR 300.000) and Spain (EUR 1.000.000).

For **breaches of traceability**, 3 countries reported maximum administrative fines in excess of EUR 100.000: Belgium (EUR 1.200.000), Slovenia (EUR 300.000) and Spain (EUR 1.000.000)

Source: WWF Enforcement Review of the EU Timber Regulation (EUTR) · EU Synthesis Report, 2019, p.14.

Despite these high amounts of applicable penalties, many other countries adopted very low fines, starting as low as EUR 50. Countries such as Romania, Bulgaria, Greece, and Croatia are among the one with relatively low applicable administrative penalties.

<sup>252</sup> COM(2018) 668 final, p.5.

<sup>253</sup> European Commission 2021, p.6.

<sup>254</sup> *Idem*.



**Box 5: Examples of criminal fines in MS (2017-2019)**

For **breaches of prohibition**: Seven (7) countries reported maximum criminal fines in excess of EUR 100.000 Belgium (EUR 24.000.000), Estonia (EUR 16.000.000), Finland (EUR 850.000 for corporate fines), France (EUR 500.000), Ireland (EUR 250.000), Latvia (EUR 760.000 plus damages) and Luxembourg (EUR 250.000)

For **breaches of due diligence obligations**, 6 countries reported maximum criminal fines in excess of EUR 100.000: Belgium (EUR 24.000.000), Estonia (EUR 16.000.000), Finland (EUR 850.000 for corporate fines), France (EUR 500.000), Ireland and Luxembourg (each EUR 250.000).

For **breaches of traceability**, 4 countries reported fines in excess of 100.000 EUR: Belgium (EUR 1.200.000), Finland (EUR 850.000 for corporate fines), France (EUR 500.000) and Luxembourg (EUR 250.000).

Source: WWF Enforcement Review of the EU Timber Regulation (EUTR) · EU Synthesis Report, 2019, p.14.

**Box 6: Overview of countries having no upper ceiling for penalties****For breaches of prohibition**

- Finland, Norway and Sweden for either type of fine;
- For criminal fines: Denmark, Germany and the United Kingdom.

**For breaches of due diligence obligations**

- Finland and Norway for either type of fine;
- For administrative fines: Sweden
- For criminal fines: Denmark and the United Kingdom

**For breaches of traceability**

- Norway for either type of fine;
- For administrative fines: Sweden
- For criminal fines: Finland and Denmark.

*In Finland and Sweden, penalty payments are based on operators' revenues.*

Source: WWF Enforcement Review of the EU Timber Regulation (EUTR) · EU Synthesis Report, 2019, p.14.

**Box 7: Examples of imprisonment sentences in MS (2017-2019)**

The highest imprisonment sentence for breaches of prohibition can be imposed by Greece (12 years) and for breaches of due diligence obligations and traceability, by the Netherlands (6 years). Seventeen (17) countries can remove the authority to trade, either temporarily or permanently.

Source: *WWF Enforcement Review of the EU Timber Regulation (EUTR) · EU Synthesis Report, 2019, p.14.*

**Box 8: Other penalties in national laws of MS (2017-2019)**

Countries also included details on penalties or measures other than the above, which can be leveraged in the case of infringements:

- Austria, Germany and Hungary and Ireland can order the return of the illegal timber to its place of origin/a third country. Hungary noted that this must be done at the cost of the importer;
- Hungary can prohibit the offender from advertising and order the withdrawal of timber and timber products which have already entered the market, confiscate income or publish enforcement decisions on the Competent Authority's website;
- Hungary and the Netherlands can publish sentences;
- In Romania, timber transport prohibitions can be issued;
- Sweden and Hungary can combine penalties, the latter depending on risk and seriousness of the offence;
- Community service was reported as a penalty by Latvia;
- Penalties in Portugal included the loss of grants and other public financial support;
- In Ireland, the Competent Authority can restrict or prohibit entry to a vehicle or vessel; and
- Belgium confirmed that other penalties are possible, as enforcement of the EUTR uses a general law on product standards which provides for a number of sanctions in addition to the abovementioned ones (e.g. publication of judgements, withdrawal of timber products which already have entered the market).

Source: *WWF Enforcement Review of the EU Timber Regulation (EUTR) · EU Synthesis Report, 2019, p.18.*

A survey carried out by WWF revealed that sanctions were infrequent and low, often applied only in cases of repeated shortcomings and warnings, calling into question their effectiveness as dissuasive means to breaches of EUTR obligations and effective tools to level the playing field.<sup>255</sup> Companies operating in Member States with a stricter enforcement regime are at a disadvantage compared to

<sup>255</sup> WWF 2019, p9. The survey revealed the absence of criminal sanctions for infringements in many national legislations. Moreover, in many instances, operators are notified of their non-compliances but are not subject to any penalties or sanctions. In other cases, companies benefit from "grace periods" to implement corrective measures after an infringement is discovered.

companies in Member States with less stringent standards.<sup>256</sup> Operators targeting a laxer timber regime might then find an incentive to place risky products on the market of a MS with a weaker enforcement regime, which may subsequently reach other Member State or international markets.<sup>257</sup>

Given all these discrepancies, it appears useful to examine to what extent a penalty could be considered adequate within the framework of the EUTR.

#### 4.4.3 Assessing effectiveness, proportionality and dissuasiveness

Pursuant to Article 19 of the EUTR, Member States have a duty to provide in their national laws effective, proportionate and dissuasive penalties to sanction infringements to the obligations under the EUTR. This implies the freedom for Member States to determine the most appropriate penalties as regards nature and severity, taking into account the specificities of their national legal system. However, this freedom cannot be exercised to the detriment of the effective implementation of the regulations. First, Members must “exercise that power in accordance with EU law and its general principles and, consequently, in accordance with the principle of proportionality”.<sup>258</sup> Secondly, when the choice of penalties remains within their discretion, Members are to ensure that “that infringements of Community law are penalised under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and deterrent”.<sup>259</sup>

Within the context of the EUTR, assessing effectiveness, proportionality and dissuasiveness of national penalties as intended by EU law would amount to answering two essential questions. On the one hand, one must ascertain whether the penalty is coherent with other penalty regimes for similar offences under national law.<sup>260</sup> On the other hand, one must determine “whether the penalty is appropriate to meet the objectives of the EUTR – that is, to prevent illegally harvested timber from being placed on the EU market”.<sup>261</sup> Effectiveness, dissuasiveness and proportionality are closely inter-related concepts as they all deal with the relationship between the seriousness of the offence and the type and severity of the penalty.<sup>262</sup> Seeking guidance in the CJEU’s case law, it is possible to get a clearer idea to analyze the genuinely dissuasive nature of the EUTR penalty regime.

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<sup>256</sup> Clientearth 2018, p.2.

<sup>257</sup> Clientearth 2018, p.2.

<sup>258</sup> Judgment of the Court (Fifth Chamber) of 7 October 2010., *Stils Met SIA v Valsts ieņēmumu dienests*, Reference for a preliminary ruling: Augstākās tiesas Senāts - Latvia., Common Customs Tariff - Tariff classification - Combined Nomenclature - Chapter 73 - Steel strands, ropes and cables - Heading 7312 - TARIC code - Error in the tariff classification - Release of goods for free circulation - Regulation (EC) No 384/96 - Anti-dumping duties - Fine of an amount equal to the total anti-dumping duties., Case C-382/09., ECLI:EU:C:2010:596, para. 45.

<sup>259</sup> Judgment of the Court (First Chamber) of 8 September 2005., *Criminal proceedings against Syuichi Yonemoto*, Reference for a preliminary ruling: *Korkein oikeus - Finland*, Approximation of laws - Machines - Directive 98/37/EC - Compatibility of national law requiring the importer to verify that machinery accompanied by an EC declaration of conformity is safe., Case C-40/04. *European Court Reports 2005 I-07755*; ECLI identifier: ECLI:EU:C:2005:519, para. 59; see also Judgment of the Court of 8 June 1994. *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland. Safeguarding of employees rights in the event of transfers of undertakings*, Case C-382/92. *European Court Reports 1994 I-02435* ECLI identifier: ECLI:EU:C:1994:233, para: 55.

<sup>260</sup> Clientearth 2018, p4.

<sup>261</sup> Clientearth 2018, p4.

<sup>262</sup> Clientearth 2018, p.3.

An effective penalty should provide adequate incentive for complying with regulatory obligations.<sup>263</sup> It ensures that the goal set by the legislator is reached, despite the infringement, and intends to prevent future harm from happening.<sup>264</sup> At the same time, a dissuasive penalty would at least deprive the offender of any economic benefit accruing from the transgression. This means that the penalty must "generate sufficient pressure to make non-compliance economically unattractive."<sup>265</sup> Lastly, a penalty is proportionate when it is appropriate for the purpose of contributing to the attainment of the objectives set by the legislation and does not go beyond what is necessary in order to attain that objective.<sup>266</sup>

Assessing whether a penalty is effective, proportionate and dissuasive in a specific situation will depend on the specific circumstances of the facts and the national normative environment, which justifies that these decisions are often left to national courts.<sup>267</sup> Be that as it may, "the severity of the sanctions must be commensurate to the seriousness of the breaches for which they are imposed, in particular by ensuring a genuinely dissuasive effect while respecting the general principle of proportionality."<sup>268</sup> Within the context of the EUTR, a combination of financial penalties and suspension of a company's ability to trade as well as prohibitions against placing certain products on the market are examples of penalties that could qualify a penalty regime as effective.<sup>269</sup>

In the case of Myanmar teak import to Italy, both the CA and operators have referred to small fines being applied to shipments of Myanmar teak which do not meet the due diligence requirements of the EUTR. One company, CF Wood, was fined on two occasions for imports of Myanmar timber, once paying a fine of €5.675 and another time paying a fine of €3.000. For these shipments, the declared value of teak imported by CF Wood in data viewed by EIA was between €40.000-80.000 respectively, and in total the company imported €680.931 worth of teak in the two-year period for which EIA had data. This means that represented roughly one per cent of the value of the teak imported by CF Wood in that timeframe. It would be difficult to argue that such fines can genuinely dissuade operators from continuing importing Myanmar teak, considering the trade volumes involved and the probable associated benefit. The Italian implementing-legislation for the EUTR provides for criminal penalties for the "prohibition" requirement, but only provides for weaker administrative penalties for violations of the due diligence requirements of the EUTR. These administrative penalties go as high as €5, per 100kg of timber, up to €1 million. Based on the quantities traded by the companies, as reported by EIA, these €1 million fines would have been possible and could have had a deterring effect, like expected by the EUTR. Italian authorities claim that such high fines can only be imposed when specific conditions are met, including that a company must repeatedly break the law in a short space of time. According to data from EIA, the companies are importing Myanmar teak frequently, making these fines a possibility.<sup>270</sup>

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<sup>263</sup> Milieu Ltd 2010.

<sup>264</sup> Clientearth 2018, p.3.

<sup>265</sup> Judgment of 12 July 2005, Commission / France, C-304/02, Opinion of Advocate General Geelhoed of 29 April 2004 in Commission / France para. 39.

<sup>266</sup> Judgment of 13 July 2017, Túrkevei Tejtermelő Kft., C-129/16, EU:C:2017:547, para. 66.

<sup>267</sup> Clientearth 2018, p.3.

<sup>268</sup> Judgment of 12 July 2005, Commission / France, C-304/02, para 38.

<sup>269</sup> Clientearth 2018, p.5.

<sup>270</sup> EIA 2021, p.21.

To better appraise the penalty regime, guidance can also be sought in another regime with similar wording. For this purpose, the Registration, Evaluation, Authorization and Restriction of Chemicals (REACH) can be considered, as it provides in its Article 126 that “Member States shall lay down the provisions on penalties applicable for the infringement of the provisions of this Regulation and shall take all measures necessary to ensure they are implemented. The penalties provided for must be *effective, proportionate and dissuasive* (...)”

In the context of the REACH, there are clear differences among the MS. Penalties are based on the different national cultures of enforcement and the overall level of harmonisation of the sanctions for infringement of REACH is quite low.<sup>271</sup> Most MS have chosen penalties that are more lenient, while other preferred measures that are more stringent.<sup>272</sup> For example, the maximum fine is below EUR 5.000 in Latvia and Lithuania whereas in most other countries fines vary between EUR 50.000 and 1.000.000 maximum for the first infringement. At the same time, the fine can go up to EUR 55.000.000 in Belgium. With these significant discrepancies, the purpose of the REACH Regulation to protect human health and the environment may be undermined, especially when producers of ‘Substances of Very High Concern’ (SVHCs) will be able to avoid ‘effective, proportionate and dissuasive’ punishment.<sup>273</sup>

The same concern holds true for the EUTR. The failure to introduce a criminalization paragraph for serious timber-related offences weakens the EUTR because the Member States will probably not incorporate criminal penalties for grave timber offences into their legal systems on their own initiative.<sup>274</sup>

The General Data Protection Regulation (GDPR) also provides in its Article 83(1) that MS must lay down penalties that are effective, proportionate and dissuasive. Article 83(2) provides a wide range of criteria that must be considered to decide the level of penalty.

#### **Box 9: Criteria to be considered when deciding a penalty (Article 83(2) GDPR)**

Administrative fines shall, depending on the circumstances of each individual case, be imposed in addition to, or instead of, measures referred to in points (a) to (h) and (j) of Article 58(2). When deciding whether to impose an administrative fine and deciding on the amount of the administrative fine in *each individual case* due regard shall be given to the following:

- (a) the nature, gravity and duration of the infringement taking into account the nature scope or purpose of the processing concerned as well as the number of data subjects affected and the level of damage suffered by them;
- (b) the intentional or negligent character of the infringement;
- (c) any action taken by the controller or processor to mitigate the damage suffered by data subjects;
- (d) the degree of responsibility of the controller or processor taking into account technical and organisational measures implemented by them pursuant to Articles 25 and 32;
- (e) any relevant previous infringements by the controller or processor;

<sup>271</sup> Milieu Ltd 2010.

<sup>272</sup> Levashova 2011, p.297.

<sup>273</sup> Levashova 2011, p.297.

<sup>274</sup> *Idem*.

- (f) the degree of cooperation with the supervisory authority, in order to remedy the infringement and mitigate the possible adverse effects of the infringement;
- (g) the categories of personal data affected by the infringement;
- (h) the manner in which the infringement became known to the supervisory authority, in particular whether, and if so to what extent, the controller or processor notified the infringement;
- (i) where measures referred to in Article 58(2) have previously been ordered against the controller or processor concerned with regard to the same subject-matter, compliance with those measures;
- (j) adherence to approved codes of conduct pursuant to Article 40 or approved certification mechanisms pursuant to Article 42; and
- (k) any other aggravating or mitigating factor applicable to the circumstances of the case, such as financial benefits gained, or losses avoided, directly or indirectly, from the infringement.

The EUTR does not provide this amount of details, nor does it include, like the Lacey Act, criteria such as the intentional or negligent character of the infringement. Article 83(6) provides "Non-compliance with an order by the supervisory authority as referred to in Article 58(2) shall, in accordance with paragraph 2 of this Article, be subject to administrative fines up to 20 000 000 EUR, or in the case of an undertaking, up to 4 % of the total worldwide annual turnover of the preceding financial year, whichever is higher." Clear indications such as the one in this article will be quite beneficial for a consistent approach in the Member States.

**Transparency:** Member States are required to report to the Commission on the implementation and enforcement of the EUTR. However there is no provision that defines clear rules to inform the public about such results, making information about species and origin publicly available so as to help consumers make informed choices. Moreover, making such a disclosure mandatory would reinforce Member States obligation and lead to more clarity with regard to non-compliances, the adequacy of measures that have consequently been taken, and the follow-ups of checks. The lack of transparency also hinders comparability across Member States and limits public pressure.<sup>275</sup>

While the public could benefit from more transparency, less transparency with regard to operators could be beneficial. Member States often inform operators of checks ahead of time. Such an approach is likely to decrease the effectiveness of checks. Random and unannounced checks combined with a risk-based approach could foster EUTR's effectiveness.

The institutional structures, legal powers and status of the designated authorities vary between countries, reflecting the differences in their legal and institutional frameworks.<sup>276</sup> Experiences in implementation have shown how those disparities led to trade diversion within the EU, with traders trying to continue imports from potentially illegal Myanmar teak through countries with weaker enforcement level. Clear rules and procedures are therefore important to ensure a consistency in approach across Member States.

<sup>275</sup> WWF 2021, p.11.

<sup>276</sup> COM/2020/629 final, p.2.

## 4.5 Analysing FLEGT Voluntary Partnership Agreements

The rationale for VPAs is that they create market incentives for legal timber.<sup>277</sup> The system was designed to bring about positive changes in timber producing countries in order to lay the foundations for a trading system that is free of illegally sourced wood. The reforms envisaged in VPA partner countries place particular emphasis on an inclusive approach that brings together all concerned stakeholders not only to raise awareness, but also and above all to take into account the needs and challenges at various levels of the supply chain. This approach would in turn contribute to facilitate the implementation of and compliance to the requirements of resulting laws and policies.

After a few years of implementation, many studies warn of the insufficient involvement of local communities in the negotiation process and their lack of awareness of legality verification.<sup>278</sup> At the same time, experiences in some of the VPA countries revealed that VPA processes have given rise to several positive outcomes, especially in terms of promoting greater inclusion and national debate. In many instances, the VPAs contributed to open up political space for positive reforms, or injected new impetus into civil society advocacy and reforms already underway.<sup>279</sup> In Cameroon, for instance, it is reported that prior to the VPA signature, the civil society organisations were not recognised by the government as legitimate partners entitled to express concerns on issues related to the management of forest resources.<sup>280</sup> Thanks to the VPA processes, acceptance of local and international NGOs as legitimate partners gave them the possibility to influence forestry policy in the country at various levels, resulting in a positive impact on the transparency and accountability of the entire sector.<sup>281</sup> Besides, significant progress is noticeable as regards institutional mechanisms for auditing, monitoring and reviewing national timber legality assurance regimes.<sup>282</sup> Improved governance reforms in VPA partners will also result in positive spillovers in term of increased tax revenues for the government and better market access for timber traders, not only to the EU market, but also markets of other countries with strict timber regulations such as the USA or Australia. Furthermore, these reforms can help enhance the international reputation of VPA partners by shedding light on their commitment for addressing illegality and environmental sustainability.<sup>283</sup>

Despite these advantages, it is certain that not all countries will have the same enthusiasm for negotiating a VPA. On the one hand, VPAs are voluntary in essence and countries which do not export substantial quantities of timber to the EU will not see the added value of undertaking radical and costly reforms of their systems. It is within this logic that the EU itself has directed its efforts towards certain producer countries that have a significant share in the timber trade with the EU. The Commission has also made efforts to enter into bilateral cooperation mechanisms with countries like China which are very involved in timber processing and potentially constitute important transit points for illegal timber. On the other hand, there are no additional regulatory burdens on countries that decline to enter into VPA. As a result, the benefits associated with VPAs are counterbalanced by the disadvantage that they generate compliance costs for companies in VPA countries and might affect their

<sup>277</sup> VPA Unpacked, p.102.

<sup>278</sup> Jonsson et al. 2015, p.23.

<sup>279</sup> Perram 2016, p.20.

<sup>280</sup> European Court of Auditors 2015, p.19.

<sup>281</sup> European Court of Auditors 2015, p.19. Some of these countries were not the most relevant ones for tackling illegal logging or were most unlikely to reach the required level of governance in a foreseeable future.

<sup>282</sup> Jonsson et al. 2015, p.23.

<sup>283</sup> Fishman and Obidzinski 2014, p.260.



competitiveness.<sup>284</sup> Governance priorities may also play a role in receptivity to VPA contracts. In countries like Brazil, in spite of the persistent deforestation issues, illegal logging may be seen as a lesser issue than land conversion, making illegal logging a less pressing concern.<sup>285</sup>

Even though VPAs have been praised for their unique inclusive approach, small-scale operators or forest communities might still lack understanding about legality, as understood within the framework of VPAs. Small-scale producers may moreover experience VPAs as market barriers, which would maintain them in the informal sector due to the technical verification requirements and the costs of compliance to VPAs provisions that apply uniformly to large and small producers.<sup>286</sup> In Indonesia, for example, companies must pay between Rp 60 million (~US\$6,120) and Rp 100 million (~US\$10,200) to obtain legality certification and comply with the VPA, as well as complete a complex administrative process that exceeds the management capacity of most small timber enterprises.<sup>287</sup> Quite interestingly, Indonesia undertook to develop a simplified procedure for disadvantaged producers.<sup>288</sup>

#### 4.6 Illegal logging in Romania: Value of satellite imagery

Illegal logging in Romania is putting the last virgin forests in Europe under threat, fuelled by foreign corporate money and driven by corruption and organized crime. The money that supports both corruption and illegal practices in the forest sector originates from the biggest European wood processors and buyers, the most important of which is the Austrian Holzindustrie Schweighofer.<sup>289</sup> In general, forest ecosystems are being threatened by diverse disturbances, whose frequency and intensity are believed to increase in the near future as a result of the ongoing climate change.<sup>290</sup> Within this context, monitoring systems such as satellite-based Earth Observation (EO) are increasingly being used to quantify forest loss. At the international level, a few initiatives were developed, which can show any type of forest removal from natural or anthropogenic causes. These initiatives include Global Forest Watch launched by the World Resources Institute (WRI), which provides since 2000 a yearly global map of forest gain and loss. Another country-scale initiative, named Forest Atlas, was also developed by the World Resources Institute in collaboration with countries forestry agencies and establishes an online platform which is operational for six countries of the Congo Basin, as well as Georgia. These tools can still be valuable assets to detect deforestation as they can detect logging roads and monitor activities

<sup>284</sup> To obtain legality certification and comply with the Indonesian VPA, for example, Indonesian companies must pay between Rp 60 million (~US\$6,120) and Rp 100 million (~US\$10,200) and complete a complex administrative process that exceeds the management capacity of most small timber enterprises. (see Fishman and Obidzinski 2014, p.260)

<sup>285</sup> Brown et al., p. 11.

<sup>286</sup> Jonsson et al. 2016, p.13.

<sup>287</sup> *Idem*.

<sup>288</sup> Fishman and Obidzinski, 2014, p.260.

<sup>289</sup> EIA, Stealing the last forest: Austria's largest timber company, lands rights and corruption in Romania, 2015, available at [https://wwfint.awsassets.panda.org/downloads/eia\\_2015\\_report\\_final\\_web\\_v2.pdf](https://wwfint.awsassets.panda.org/downloads/eia_2015_report_final_web_v2.pdf). Subsequent to a 2015 report by EIA on Holzindustrie Schweighofer's alleged purchase and trade of illegally harvested timber and FSC's own investigations, the FSC placed the Schweighofer Group on probation in December 2016 and disassociated from the Group in February 2017. On 20 December 2017, FSC released the conditions set for Holzindustrie Schweighofer to meet before the current FSC disassociation status is reviewed; these include enforcing a traceability system of roundwood back to the forest stand. However, these conditions were not found satisfactory by EIA, as they would allegedly not be sufficient to address the issue of illegally sourced timber present in Holzindustrie Schweighofer's supply chain. By requiring traceability of legal ownership, the framework of conditions equates to ownership papers, rather than solely tracing wood back to the forest. See UNEP-WCMC, Briefing Note for the Competent Authorities implementing the EU Timber Regulation November 2017 - January 2018, available at [https://ec.europa.eu/environment/forests/pdf/Briefing\\_note\\_November\\_17-January\\_18.pdf](https://ec.europa.eu/environment/forests/pdf/Briefing_note_November_17-January_18.pdf)

<sup>290</sup> Atzberger et al, Study on Monitoring of Forests through Remote Sensing, Final Report, 2020, available at [https://ec.europa.eu/environment/forests/pdf/report\\_monitoring\\_forests\\_through\\_remote\\_sensing.pdf](https://ec.europa.eu/environment/forests/pdf/report_monitoring_forests_through_remote_sensing.pdf)



in protected areas or national parks. Moreover they can help indirectly infer illegal logging through the presence of roads outside the permit areas.<sup>291</sup>

The EU has already been relying through EU SatCen on satellite imagery and geospatial information to retrieve data on forests and thereby attempt to track illegal logging. Since 2014, the Romanian government has started to lay the groundwork to take advantage of satellite images to fight illegal cutting and curb losses. The government first instituted a mandatory digital tracking system for trucks transporting wood. The system enables to assign a number to each logging operation, track every step from how many trees are being cut, to their pickup and delivery locations, as well as the registration of truck drivers.<sup>292</sup> However, the GPS data records proved insufficient to curtail legislation breaches because truck drivers would use fake GPS loading points. An investigation carried out by EIA in 2015 revealed that about half of logging trucks delivering timber to Schweighofer's mills registered fake GPS coordinates of the official loading sites. This practice is aimed at bypassing the requirement in Romanian law for trucks to register the GPS coordinates of the location in the forest where logs are first loaded onto the truck.<sup>293</sup> Following EIA's investigation, Romania's Ministry of the Environment conducted its own investigation in May 2015 and found documentation of over 100,000 cubic meters of stolen logs in just one of Schweighofer's mills. The case was further investigated by Romania's anti-organized crime prosecutors. This finding also led to an investigation into Schweighofer for violations of the FSC's Policy of Association, which was launched by FSC International in early 2016 and resulted in the certification body dissociating itself from the company.<sup>294</sup>

To face these drivers' practices, the Ministry turned to TerraSigna, a GIS service provider, and a team of volunteering IT specialists to create in July 2016 "Inspectorul Padurii" (Forest Inspector) in order to add an additional control. "The Forest Inspector" is a geographic information system that can ingest radar and high resolution satellite images from Sentinel 1 & 2, Landsat, OpenStreet and Google Maps. The software then scans successive images of the same areas to identify changes in the forest cover that indicate where logging has taken place. The data is refreshed every two to seven days (depending on the satellite crossing), which enables authorities to become aware of any illegal logging in almost real-time.<sup>295</sup> The platform has a multi-level access feature that enables both police and individuals to see who is doing the cuts, what type of wood is being cut, where and when, thereby bringing together citizen activism, technology and authorities in the fight against illegal deforestation.<sup>296</sup>

Forest Inspector also uses the SUMAL database which was developed with the support of WWF. SUMAL is a best-practice system for tracing wood supply that includes a central database and a hotline people can call to report or verify the legality of wood shipments.<sup>297</sup> The system can significantly reduce the risk to falsify legality documents, and it enables the registration of every legal document in the database, including volume estimation documents on standing stock, harvesting authorization, delivery documents for timber. The use of SUMAL is mandatory for forest administrators and for all

<sup>291</sup> Atzberger et al. 2020.

<sup>292</sup> Eurisy, Romania turns to satellites to crackdown on illegal deforestation, 2017, available at [https://www.eurisy.eu/stories/romania-turns-to-satellites-to-crackdown-on-illegal-deforestation\\_211/?\\_GP\\_URL=&romania-turns-to-satellites-to-crackdown-on-illegal-deforestation\\_211](https://www.eurisy.eu/stories/romania-turns-to-satellites-to-crackdown-on-illegal-deforestation_211/?_GP_URL=&romania-turns-to-satellites-to-crackdown-on-illegal-deforestation_211)

<sup>293</sup> EIA, The Ghost Trucks: Schweighofer's continued sourcing of illegal timber exposed in new EIA video, EIA Press Releases, 2016, <https://eia-global.org/press-releases/the-ghost-trucks-release>.

<sup>294</sup> EIA 2016.

<sup>295</sup> Eurisy 2017.

<sup>296</sup> *Idem*.

<sup>297</sup> WWF, EU Forest Crime Initiative. Gap Analysis: Romania, 2020, p.16, available at <https://www.wwf.de/fileadmin/fm-wwf/Publikationen-PDF/EU-Forest-Crime-Initiative-Romania-GAP-Analysis.pdf>

operators and traders who harvest, store, process, market or carry out import-export operations with wood or wood materials. SUMAL covers every part of the process, from wood as a forest to wood as products.<sup>298</sup>

Despite these tools, illegal logging in Romania is said to have increased significantly in the last years, bringing into question the appropriateness of these instruments. In fact, these initiatives are not necessarily focused on illegal logging and are not all suited to detect forest change in every landscape, especially when very small degradation are involved. Moreover, annual assessment of forest loss may be too infrequent to monitor illegal activities as they occur.<sup>299</sup> While forest logging can be detected through satellite imaging, it remains a challenge to distinguish between legal and illegal logging. The effectiveness of the satellite-based resources for curbing illegal logging depends on the ability of authorities to keep information from non- Earth Observation sources, for instance about forest concession and protection status of a given forest patch. WWF reported that the IWoodTracking system (one component of the SUMAL, only to be used by competent authorities) is not systematically and consistently used by controllers.<sup>300</sup> Such inconsistencies can contribute to undermine the value of these instruments. It is essential to keep the right balance between traditional and modern technologies' tools in order to foster mutual reinforcement between these two types of instruments and subsequently strengthen their ability to fight illegal logging.

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<sup>298</sup> WWF, EU Forest Crime Initiative. Gap Analysis: Romania, 2020, available at <https://www.wwf.de/fileadmin/fm-wwf/Publikationen-PDF/EU-Forest-Crime-Initiative-Romania-GAP-Analysis.pdf>

<sup>299</sup> Atzberger et al. 2020.

<sup>300</sup> *Idem*

## 4.7 Insights from the international regime

### 4.7.1 US Lacey Act

The Lacey Act was adopted in 1900 in the United States and aimed to preserve wild birds and endangered species by making it a federal offense to poach game in one state and sell it in another state.<sup>301</sup> Originally the law served three main purposes: to authorize the introduction and preservation of game, song, and insectivorous wild birds; to prevent the "unwise" introduction of foreign birds and animals; and to supplement state laws for the protection of game and birds.<sup>302</sup> Over the years the Lacey Act has been amended several times and its scope has gradually been expanded.<sup>303</sup> In 2008, the Act was amended through the Food, Conservation and Energy Act to include plants and plant products such as timber and paper, and prohibit different types of trade related to plants. The Lacey Act is considered a landmark legislation because it is the world's first legislation to ban trade in illegally sourced wood products.

Under the Lacey Act, it is unlawful for "any person to import, export, transport, sell, receive, acquire, or purchase in interstate or foreign commerce any plant taken, possessed, transported, or sold in violation of any law or regulation of any State, or any foreign law, that protects plants or that regulates (I) the theft of plants; (II) the taking of plants from a park, forest reserve, or other officially protected area; (III) the taking of plants from an officially designated area; or (IV) the taking of plants without, or contrary to, required authorization".<sup>304</sup>

To establish a violation of the Lacey Act's 2008 amendment concerning plants, two components are required: 1) a plant being taken, harvested, possessed, transported, sold, or exported in violation of United States law or the law of a foreign country, and 2) a person or company importing, exporting, transporting, selling, receiving, acquiring, or purchasing this illegally sourced plant in United States interstate or foreign commerce.<sup>305</sup> These two components apply cumulatively as neither component on its own constitutes a violation of the Lacey Act.<sup>306</sup> In other words, "making a case under the Lacey Act requires a violation of an underlying law as well as a violation of the Act itself".<sup>307</sup>

A product is considered illegally sourced when a violation is established as regards six specific types of laws covering forestry, taxes and export, including: 1. Theft of plants; 2. Taking plants from an officially protected area such as a park or reserve; 3. Taking plants from other types of "officially designated areas"

<sup>301</sup> Frank et al. 2013, p.2.

<sup>302</sup> Anderson, 1995.

<sup>303</sup> The first amendment was made to the Lacey Act in 1935 to include expanding illegal wildlife shipment liability to include individuals and companies. This amendment also gave the U.S. Department of Agriculture (USDA) the responsibility for enforcing the Act, including making arrests and executing warrants. Subsequent amendments were made to the Act in 1949 (provision to ensure animals were imported under humane and healthy conditions), 1969 (scope expanded to include amphibians, reptiles, mollusks, and crustaceans), 1981 (scope expanded to fish; permission granted to USDA wildlife agents to carry firearms; proof standard reduced from "willfully" to "knowingly" to aid enforcement), 1988 (word 'sale' expanded to include purchasing services for the purpose of obtaining illegal wildlife; authority given to wildlife agents to make arrests for federal crimes committed under the Act). The last amendment was made in 2008. (See Frank et al. 2013, pp.2-3).

<sup>304</sup> §3372 (a) (1) of the Lacey Act.

<sup>305</sup> Shelley 2012, p.552.

<sup>306</sup> Shelley 2012, p.553.

<sup>307</sup> Alexander 2014, p.1. According to jurisprudence, "Courts must determine the validity of both the predicate violation and the action that triggers the Lacey Act charge. Where the predicate violation is one of foreign law or regulation, the federal Courts have the authority to determine whether a foreign law has been violated. Federal courts also have jurisdiction when the underlying violation is one of tribal law." (See Alexander 2014, p.4.)

recognised by a country's laws and regulations, such as a designated community forest; 4. Taking plants without, or contrary to, required authorisation, including cutting without permits for the area or species harvested; 5. Failing to pay appropriate royalties, taxes, or fees associated with the harvest, transport, or commerce of plants, including not paying stumpage fees or paying appropriate taxes; 6. Violating laws concerning export or trans-shipment, such as exporting logs from a country with a log-export ban.<sup>308</sup>

The Lacey Act applies to any person, including individuals, corporations, government officials, and government agencies.<sup>309</sup>

#### 4.7.1.1 Product scope

The Lacey Act applies to "plant" defined as "any wild member of the plant kingdom, including roots, seeds, parts or products thereof, and including trees from either natural or planted forest stands".<sup>310</sup> This definition excludes certain species, namely: "(a) common cultivars, except trees, and common food crops (including roots, seeds, parts, or products thereof); (b) a scientific specimen of plant genetic material (including roots, seeds, germplasm, parts, or products thereof) that is to be used only for laboratory or field research; and (c) any plant that is to remain planted or to be planted or replanted"<sup>311</sup> However, these exclusions do not apply if the plant is listed "(A) in an appendix to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (...); (B) as an endangered or threatened species under the Endangered Species Act of 1973 (...); or (C) pursuant to any State law that provides for the conservation of species that are indigenous to the State and are threatened with extinction"<sup>312</sup>.

#### 4.7.1.2 Penalties and sanctions

The Lacey Act provides for civil and criminal penalties, including jail time, as well as forfeiture of the protected item. The severity of the penalty depends on the level of knowledge of the violator about the product. This means that higher penalties apply to the person, individual or company, who knew they were trading in illegally harvested products. If the infringement was done unknowingly, penalties will depend on whether the person did everything they could to determine that the product was legal, i.e. to exercise due care.

Civil penalties, which can be up to \$10,000, may be assessed "against a party who in the exercise of due care should have known of the illegal nature of the plant ... or who knowingly commits a false labeling offense or knowingly violates the declaration requirements."<sup>313</sup>

Criminal penalties range from misdemeanor to felony charges. On the one hand, a criminal misdemeanor is imposed to someone who "knowingly engages in conduct prohibited by" the Lacey Act and should have known in the exercise of due care that the plant was

<sup>308</sup>308 European Forest Institute 2013, p.6.

<sup>309</sup> More extensively, the term "person" includes any individual, partnership, association, corporation, trust, or any officer, employee, agent, department, or instrumentality of the Federal Government or of any State or political subdivision thereof, or any other entity subject to the jurisdiction of the United States. See §3371 (e) of the Lacey Act.

<sup>310</sup> §3371 (f) of the Lacey Act

<sup>311</sup> §3371 (f) of the Lacey Act.

<sup>312</sup> §3371 (f) of the Lacey Act.

<sup>313</sup> Lacey Act Amendment: Complete List of Questions and Answers, Animal & Plant Health Inspection Serv., U.S Dept. Of Agric., Question 3 (Feb. 16, 2012), Question 41; 16 U.S.C. § 3373(a)(1)(Supp. II 2008), cited by Eberhardt 2013, p.404.

illegal.<sup>314</sup> The action that triggers the Lacey Act violation must be knowingly done, which means that the person must know he is doing the action rather than have the knowledge that the action is wrong.<sup>315</sup> A misdemeanor is sanctioned with a fine of up to \$100,000 for individuals and \$200,000 for organizations, or up to one year in prison, or both for each violation. A felony, on the other hand, occurs when the defendant, knowing the timber involved is illegally acquired, then "knowingly imports or exports" in violation of the Lacey Act or "knowingly engag[es]" in conduct that involves (a) the sale or purchase of, (b) the offer of sale or purchase of, or (c) the intent to sell or purchase plants with a market value in excess of \$350.<sup>316</sup> The felony involves a higher standard of culpability, wherein beyond knowing that he or she is committed in the action that triggers the violation, the actor also engages in one of two things: import or export; or commercial conduct and a value of over \$350.<sup>317</sup> Felony charges are fined up to \$250,000 for individuals and \$500,000 for organizations or twice the gross gain or loss, and up to five years in prison, or both per violation.<sup>318</sup>

Lastly, illegal items may be subject to forfeiture, which means the confiscation by the government of an item involved in crime. Under the Lacey Act, forfeiture applies "notwithstanding any culpability requirements for civil penalty assessment or criminal prosecution."<sup>319</sup>

The choice of the appropriate sanction is left to the prosecutors at the Department of Justice. The government is responsible for proving violators guilty.

#### 4.7.1.3 Due care

The Lacey Act was designed to be simple and flexible to take account of the specific needs of individual businesses. While importers are required to act to the best of their ability to avoid trading illegally sourced timber, there are no predefined steps that must be followed to demonstrate that due care has been exercised. A reasonable standard of due care implies that an importer must give the importing process the amount of attention that a reasonable person would use in the same circumstances.<sup>320</sup> The Lacey Act provides that importers are the only liable party and they must be aware of every step of the sourcing process and supply chain when bringing a product into the U.S.<sup>321</sup> The Act covers the entire supply chain, and illegal activity at any point means that the product may not be legally traded in the United States. Moreover, liability for ensuring legality applies equally to all parties and not just the first placer into the U.S market.<sup>322</sup>

The Lacey Act is fact-based, rather than document-based.<sup>323</sup> In practice, this means that only actual legality is important. No third-party certification or verification schemes, documents, stamps, licenses, or marks are accepted as final proof of legality. Similarly, while forest certification programs, such as FSC or PEFC, can help address concerns about legality, they are not sufficient in and of themselves for demonstrating compliance with the Lacey Act requirements.<sup>324</sup>

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<sup>314</sup> Eberhardt 2013, p. 404.

<sup>315</sup> Frank et al. 2013, p.10. Such an action could be transporting the item or buying a wildlife or plant product.

<sup>316</sup> Eberhardt 2013, p.404.

<sup>317</sup> Frank et al. 2013, p.10.

<sup>318</sup> Eberhardt 2013, p.405.

<sup>319</sup> §3374 (a) (1) of the Lacey Act.

<sup>320</sup> Alexander 204, p.10.

<sup>321</sup> Frank 2013, p.6.

<sup>322</sup> European Forest Institute 2013, p.4.

<sup>323</sup> European Forest Institute 2013, p.5.

<sup>324</sup> Frank et al. 2013, p.9.

Each individual U.S. buyer may determine the best way to exercise due care and avoid illegal timber in the market, according to its own risk profile and level of comfort with its suppliers.<sup>325</sup> In spite of this apparent subjective yardstick, it is to be expected that a proper risk management cannot be carried out without following some steps that would closely resemble due diligence procedures under the EUTR.<sup>326</sup>

To ensure compliance with the Lacey Act, all plant and timber products must however be declared when entering or exiting the U.S. Each declaration must include the scientific name of every plant type in the product, value of the item, quantity, and country of origin.

Whether due care has been adequately conducted will be assessed on a case by case basis, taking into account the knowledge and experience of the buyer, as well as the context of the transaction. According to the Department of Justice, some "common sense red flags" would serve as criteria to make the assessment, including "(1) offers to sell timber products at prices considerably below the going market rate; (2) offers to sell timber products for cash or offers of a discount for products lacking required paperwork; (3) facially invalid paperwork; and (4) evasive answers to questions regarding a product's origins."<sup>327</sup>

#### 4.7.1.4 First major enforcement cases

The first major enforcement case resulting from the Lacey Act's 2008 amendment referred to Gibson Guitar Corp. The company failed to exercise due care and refrained from discontinuing its import of Madagascar and Indian ebony and rosewood even after it had knowledge that the wood might have been illegally logged. After many years of investigations, the case was resolved in August 2012. The company agreed on a settlement with the U.S. Department of Justice by paying US \$300,000 in penalties, donating \$50,000 to the National Fish and Wildlife Foundation and forfeiting over \$250,000 in seized Madagascar ebony. Gibson Guitar Corp also acknowledged that it had continued to buy certain wood products from Madagascar even after there were warnings about probable illegality. Gibson was also required to implement a compliance program to help ensure that its future transactions would only involve legally sourced wood.

The first criminal charges due to an infringement of the Lacey Act followed a multi-year investigation carried out by EIA about Lumber Liquidators, a flooring retailer. In 2013, EIA investigated illegal timber harvesting and trade in the Russian Far East and traced the wood through China to a company that admitted to illegal logging and paying bribes.<sup>328</sup> The report revealed that Lumber Liquidators was the single biggest trading partner of this Chinese company. A two-year investigation by the DOJ subsequently revealed that Lumber Liquidators committed systemic fraud and sourced illegal timber not only from the Russian Far East but also from Burma. In 2015, Lumber Liquidator pleaded guilty to smuggling illegal wood, including one criminal felony of entry of goods by means of false statements and four misdemeanor counts of violating the Lacey Act.<sup>329</sup> The penalties for these crimes include \$7.8 million in criminal fines, \$1.23 million Community Service payments, \$969,175 in forfeited proceeds, and more than \$3.15 million in cash through a related civil forfeiture. Moreover, Lumber Liquidators

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<sup>325</sup> European Forest Institute 2013, p.5.

<sup>326</sup> European Forest Institute 2013, p.5.

<sup>327</sup> Ellinor Colbourn, U.S. Dep't of Justice, Lacey Act Amendments of 2008 (May 2009), cited by Waite 2012, p.317.

<sup>328</sup> Dewane 2016.

<sup>329</sup> Idem.

agreed to a five-year term of organizational probation and environmental compliance plan, as well as the implementation of government-approved audits. Under the compliance plan, all wood imports need to be verified back to the source of harvesting.

#### 4.7.2 Australian Illegal Logging Prohibition Act

Australia has not remained on the sidelines of international development to fight against illegal logging. The Australia's Illegal Logging Prohibition Act<sup>330</sup> came into force on 28 November 2012 with the view of restricting the import of illegally logged timber into Australia. Just like the EUTR and the Lacey Act, the Australian Framework promotes trade in legally sourced wood by restricting the importation of illegal timber and timber products into Australia. The Australia's Illegal Logging Prohibition Act applies both to domestic and imported timber. The Act stipulates that in relation to timber, illegally logged "means harvested in contravention of laws in force in the place (whether or not in Australia) where the timber was harvested."<sup>331</sup> As such, timber that has been harvested in accordance with the legislative regime of the relevant country is deemed to be legally logged. The Australian framework provides that a person commits an offence if the following conditions apply simultaneously: (a) the person imports a thing; (b) the thing is a regulated timber product; and (c) the person does not comply with the due diligence requirements for importing the product.<sup>332</sup> In this regard, Australian importers and processors of raw logs are required to perform due diligence to reduce the risk of illegally logged timber being present in their supply chains. The due diligence requirement applies to persons and corporations importing and processing wood with an intent to sell, or otherwise subsequently transfer ownership, of an illegally logged raw or processed product. These stakeholders must exercise and be able to prove due diligence by gathering information related to the timber product and its area of harvest, including any applicable legality frameworks, as well as documentary evidence of the harvesting license showing that necessary payments or taxes have been paid at the point of the harvest. In order to prosecute an offender, it must be proven that an Australian importer or processor knowingly, intentionally or recklessly imported or processed illegally logged timber. The penalty regime includes imprisonment and fines up to AUD\$85000 for an individual or AUD\$425000 for a corporation.

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<sup>330</sup> Australian Government, Illegal Logging Prohibition Act 2012 No. 166, 2012.

<sup>331</sup> Australian Illegal Logging Prohibition Act 2012, Section 7.

<sup>332</sup> Australian Illegal Logging Prohibition Act 2012, Section 12, Division 2 Importers' due diligence.



### 4.7.3 Summary and analysis

The timber regime in the EU and the Lacey Act are two major frameworks on the international scene to tackle the issues related to illegal logging. Thanks to a few high-profile prosecutions, the Lacey Act have had a deterrent effect on other American wood importing businesses and created incentives for companies to set up legality assurance systems and demonstrate due care.<sup>333</sup> It has also contributed to spur discussions and stimulating training in other destination or source countries, including China.<sup>334</sup> Moreover, in accordance with its expectations, the Lacey Act would have contributed to a "global 22 percent decline in illegal logging and is considered one of the world's most successful forest conservation laws."<sup>335</sup> Both the Lacey Act and the EU VPAs were beneficial for reducing "rates of illegal logging and exports of illegally harvested timber products across many major producers" such as Brazil, Cameroon, Ghana, Indonesia, and Malaysia.<sup>336</sup>

One of the major differences between the EUTR and the Lacey Act is based on the quality of the stakeholder who is subject to the prohibition requirement. The limitation placed on first placers in the EUTR is absent from the Lacey. Whereas the Lacey Act provides that it is unlawful to place any illegal timber or related products on the American market at *any* time, under the EUTR, the prohibition applied only to operators who place the timber on the market for the *first* time. Furthermore, the Lacey Act has a wider scope than the EUTR. Not only, the Lacey Act applies to "any person" along the value chain, it also covers "any wood and wood product". The Lacey Act indeed states that it is unlawful to import, export, sell, receive, require, acquire and purchase timber or timber products in violation of American or relevant foreign laws. The EUTR embraces a more modest approach by providing that "the placing on the market of illegally harvested timber and timber products derived from such timber shall be prohibited". There are also differences in the penalty regimes of the Lacey Act and the EUTR. In the US, penalties and sanctions are determined taking into account the severity of the offence, the value of the goods, as well as the type of operators. This means that the larger the corporations will face the highest fines.<sup>337</sup> In the EU, while the value of the timber and other criteria are considered, the economic importance of the offender does not seem to play much role in determining the penalty. Similarly an offender in the US incurs a potentially higher risk since measures also include imprisonment, unlike the EUTR.<sup>338</sup>

However, contrary to the EUTR and FLEGT, the Lacey did not arise from a participatory process seeking to engage local forest communities and other domestic stakeholders in the definition of illegal logging. Rather, "it takes foreign laws as they stand, without seeking to reconcile ambiguous and contradictory legislation or fill gaps in existing regulations"<sup>339</sup>. This approach leaves officials, prosecutors, and judges with the challenging task of "assessing the current state of foreign laws in order to determine whether a given timber shipment has been harvested illegally".<sup>340</sup> These foreign laws are challenging to navigate as they can be unclear, contradictory and numerous.<sup>341</sup>

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<sup>333</sup> EIA 2018, p. 6.

<sup>334</sup> Jonsson et al, p.11.

<sup>335</sup> EIA 2012

<sup>336</sup> Jonsson et al, p11.

<sup>337</sup> Jonsson et al, p.10.

<sup>338</sup> *Idem*.

<sup>339</sup> Overdest and Zeitling 2012, p.40.

<sup>340</sup> *Idem*.

<sup>341</sup> Shelly 2012, p.564.

Looking at the obligations for importers to exercise due diligence in the EU versus due care in the US, it becomes evident that the formulation of the obligation in each of these jurisdictions leads to differences which may influence effectiveness. With regard to the principle of 'due care', the US legislation does not provide any guidance on what due care actually entails and what would constitute a failure to conduct due care.<sup>342</sup> Giving the "importing process the amount of attention that a reasonable person would use in the same circumstances" can mean different things for different people. The principle of due care carries therefore an element of subjectivity as importers and enforcement agents can all have their own interpretations according to their knowledge and the circumstances at hand.<sup>343</sup> By providing precise details about the steps of due diligence, the EUTR offers a more predictable principle, which could lead to better implementation by European operators. It is also worth underlining that the burden of proof imposed on US prosecutors is higher since proving that due care has not been exercised is more complex.<sup>344</sup>

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<sup>342</sup> EIA 2018, p.6.

<sup>343</sup> Tanczos 2011, p.568.

<sup>344</sup> EIA 2018; p.6.

## 5. LEGALITY AND VERIFICATION IN FLEGT VOLUNTARY PARTNERSHIP AGREEMENT

### KEY FINDINGS

- Legality verification has emerged as a response to the limitations of private certification for its ability to address governance issues;
- While due diligence lies at the heart of the EUTR, the legality assurance system is the cornerstone for the implementation of the FLEGT AP;
- Defining legality and designing a legality verification system is complex and context-dependent; each VPA has its own definition of legality and Legality assurance system;
- After 18 years, and despite extensive interest in VPAs, Indonesia is the only country to have achieved a satisfactory level of compliance to begin issuing FLEGT licenses; many issues remain to be addressed in the implementation/enforcement of this VPA.

Transnational forest governance has evolved considerably in recent years. While certification schemes emerged in the 1990s to compensate for the failure of an intergovernmental agreement on forest, legality verification has emerged as a response to the limitations of private certification, especially when governance reforms are involved. In fact, certification thrives where governance issues have already been addressed, but it has not proven a very strong tool for addressing those problems itself.<sup>345</sup>

Defining legality and designing a legality verification system can be very challenging as is demonstrated by the diverse experiences in FLEGT VPAs. Major reforms may be necessary, both legally and institutionally, to reach a level that is sufficiently satisfactory to offer adequate assurance of legality. Eighteen years after the adoption of the FLEGT AP, and despite extensive interest in VPAs, Indonesia is the only country to have achieved a satisfactory level of compliance to begin issuing FLEGT licenses. Yet, the EU allocated an estimated EUR 300 million to 35 countries for FLEGT-related support over the period 2003-2013 to bolster capacity building and reforms in VPA partners.<sup>346</sup>

While drawing inspiration from the literature, this chapter intends to take a critical look at the notion of legality and legality verification as envisaged by the FLEGT VPA schemes. The chapter first examines the features of a Legality Assurance System (5.1). It then examines how FLEGT VPAs work in practice, based on the experience of Indonesia (5.2). The third section provides a short overview of the results of the assessment made by the European Court of Auditors' of VPA implementation (5.3). The last section provides some concluding remarks (5.4).

<sup>345</sup> Brown et al. 2008, p.20

<sup>346</sup> European Court of Auditors 2015, p.11. The fund was allocated through the European Development Fund (EDF) and the general budget.

## 5.1 Legality Assurance System (LAS)

The FLEGT licensing scheme is built around the timber Legality Assurance System. This system establishes the key provisions that enable to certify compliance of timber and timber products with relevant national laws. The LAS provides a definition of legal timber as well as the criteria to verify this legality. The scheme further establishes the requirements for the control of timber and timber products supply chain from forests to ports, the issuing of FLEGT licences for legal products, as well as the rules for independent auditing for the system in its entirety.

In Indonesia, for example, a Timber Legality Assurance System (TLAS) called SVLK was in place before VPA negotiations began. Since then, Indonesia has refined the SVLK through the VPA process. Other countries have incorporated existing private certification schemes used by national companies into their VPA LAS in order to reduce the burden of compliance on the private sector.

The VPA LAS relies on five core components that are the legality definition, supply chain control, verification of compliance, FLEGT licensing and independent audit. Thanks to this system, it is assumed that products will comply with a broad range of laws and regulations in the VPA country, including instruments on management, environmental aspects, labour rights, community benefits, import and export procedures, and payments of fees and taxes.<sup>347</sup> Taking these different components into account aims to provide an all-encompassing definition that contributes to provide a certain degree of certainty as regards timber legality, but it can also lead to complexity and impede effectiveness.

Despite these detailed guidelines, one of the major challenges of the VPA is the absence of a clear definition of the concept of 'legality'. The EUTR, which was adopted later than the FLEGT Regulation, also provides no definition of illegal logging. What is legal should therefore be ascertained from the perspective of eliminating practices that are recognized illegal and reinforcing other practices that can contribute to legality. Exporting countries have the latitude to define legality and design a legality verification system that would ensure that timber is legally harvested. This definition is subsequently audited by an independent third-Party and approved by the EU.

### 5.1.1 Defining Timber legality

There is no VPA blueprint, nor a manual or checklist to elaborate a VPA, nor is there a universally accepted definition of legality from the EU.<sup>348</sup> Instead each VPA takes account of the priority areas and issues in each country and leaves it to stakeholders to agree jointly on a country-specific definition of what constitutes legal timber. Many factors will help determine the content of the VPA, including the size of the country, the structure and complexity of the forestry sector, the institutional framework, the complexity of the supply chains, the volume of the timber trade, the capacity of different stakeholders (including the government) and the historical background.

The LAS is the main tool for guaranteeing the legality of the timber and timber products covered by the VPA. It is based on three pillars: (1) a timber tracing system to ensure that only timber verified as legal will be exported or sold; (2) the verification of legal compliance; and (3) the FLEGT licence, which is issued for timber verified as legal, and which allows it to be exported to the EU. The legality definition will sketch out the set of laws that will be enforced and monitored in the context of the VPA agreement. 'Legality' is defined taking into account the laws and procedures of the timber producing country and

<sup>347</sup> VPA Unpacked, p.67.

<sup>348</sup> Bolen and Ozinga 2013, p.17.

must address social, environmental and economic issues as well as be in compliance with the international laws that are ratified by the VPA partner country. One of the major features of a VPA is that the legality definition is developed through an inclusive participative process involving all stakeholders in the timber sector. As a result, VPAs are context-specific and legality definition may vary across VPA countries. For example, whereas other VPAs are consignment-based, the Indonesian VPA is operator-based. In the African VPA countries, implementation is ensured by government and related ministries, while implementation in Indonesia it is outsourced to independent private verification bodies, called the Conformity Assessment Bodies, which have been accredited by the National Accreditation Body, and are appointed by the Ministry of Forestry to verify and assess the Legality Assurance System.<sup>349</sup>

Moreover VPAs attempt to build on or improve existing systems in their definition of legality. For example, Ghana is building on its long-term political stability and democracy which has led to a strong civil society. "By contrast, in the Central African Republic the concept of civil society is relatively new and thus competences and skills are less well developed. In Liberia several forestry reforms and community rights programmes had already been put in place to prevent another natural resource-driven civil war, and the VPA process was able to build on these foundations."<sup>350</sup> While a country like Indonesia has over 4000 timber exporters, the Central African Republic count less than 20 exporting timber companies, and this must obviously has an impact on the design and complexity of the traceability systems in both countries.

The VPAs have instigated a large number of legal reform processes, including the adoption of the Indigenous Peoples Law in the Republic of Congo, the signing of ILO Convention in the Central African Republic, and a pit-sawing regulation in Liberia.<sup>351</sup>

### 5.1.2 Legality verification

After legality is defined in the VPA Agreement, the ability of the system to carry out proper verification is of paramount importance to guarantee that licensed timber at the end of the process are effectively originating from an illegality-free supply chain. Verification refers to activities undertaken by a variety of agencies (public sector, NGO and private sector, often in combination) on behalf of the state, to review and assess official processes of resource utilisation and assessment.<sup>352</sup> Verifications schemes include mandatory state-based regulations that seek to remove illegally sourced timber and timber products from global supply chains.<sup>353</sup>

When inconsistencies arise, they are evidence that the system is flawed and cannot provide positive assurance of legally harvested and/or processed timber. This is all the more essential because illegal practices can enter the supply chain at any stage after the harvest such as manufacturing or transport. In Cameroon for example, inconsistency was determined between the standards required for legality and the verification procedures as the general description of legality (including the reference to human rights) was not retrieved in the Timber Legality Guarantee System (SGLB).<sup>354</sup>

<sup>349</sup> Bolen and Ozinga 2013, p.19.

<sup>350</sup> Bolen and Ozinga 2013, p.17.

<sup>351</sup> Bolen and Ozinga 2013, p.30.

<sup>352</sup> Brown et al. 2008, p.20.

<sup>353</sup> Dieguez and Sotirov 2021, p.1.

<sup>354</sup> Perram 2016, p26.

Drawing on the extra-sectoral literature, Brown et al.<sup>355</sup> identify some of the principles that lead to effective verification. These principles are not specific to the timber sector and not all the principles are likely to be complied with an equal measure in every verification context. Where these principles are weak or lacking, effective verification will be more difficult, thereby increasing the need for compensatory measures.

<b>Table 5: Ten general principles for effective verification</b>	
Principle 1	Reciprocity.
Principle 2	The ability to prevent migration to non-parties.
Principle 3	A clear definition of the problems that the verification system is intended to address.
Principle 4	Adoption of a systems' approach and a focus on the distribution and balance of powers.
Principle 5	Broad participation in the processes leading up to the verification decision.
Principle 6	Clarity of assessment standards.
Principle 7	The provision of incentives to report and to comply.
Principle 8	Independent oversight.
Principle 9	Inclusion of all stages in the chain of custody and special efforts to secure the most vulnerable stages.
Principle 10	Incorporation of pro-poor approaches into the design of verification systems.

Source: Brown et al. 2008, p.29.

In the timber sector, the primary aims of legality verification are a mix of at least three elements, including building market confidence, establishing environmental controls and promoting good governance.<sup>356</sup>

Legality verification, as advocated in the VPAs is likely to receive support as it involves a multi-stakeholders participatory approach to compliance. Developing country's governments are indeed more likely to support legality verification when the standards are viewed as reinforcing, rather than detracting from, national sovereignty.<sup>357</sup> VPA schemes are helping these governments to reinforce their own domestic concerns and developing a legality definition fitting to the specific circumstances of their supply chains. Experiences in other sectors, such as food safety law, have shown that transplanted legislations or legislations that are adopted with the sole purpose of accessing markets in the Global North are inadequate and often face implementation and enforcement challenges.

Support for legality verification may also arise when standards focus on activities that developing countries have a pre-existing self-interest to pursue.<sup>358</sup> In this regard, most VPA countries were already involved in timber trade with the EU and are keen on seeing the relevance of undertaking reforms to eliminate illegal activities from their supply chains. Moreover, improving legality verification in the timber sector will also positively benefit these governments because it helps address some of the

<sup>355</sup> Brown et al. 2008, p.29.

<sup>356</sup> Brown et al. 2008, p.26.

<sup>357</sup> Cashore and Stone 2012, p.19.

<sup>358</sup> Cashore and Stone 2012, p.20.

adverse effects of illegal logging. In this respect, legality contributes to improvement in forest management practices, thereby serving the strategic self-interest of most developing governments, including: requiring a level of cut that allows harvests “in perpetuity,” the development of associated management plans that encourage reforestation, and elimination of theft and promoting payment of taxes.<sup>359</sup>

One of the largest potential of legality verification schemes is to promote widespread tracking of forest products along global supply chains, because the implementation of tracking systems of global forest products serves to create necessary preconditions for both eco-certification and domestic good forest governance.<sup>360</sup> Legality verification could also provide long-term incentives for good forest governance as a result of the development of economic incentives.

It is worth underlining that the ultimate goal of any verification scheme is to ensure legitimacy, in the sense of a reassurance that the control and other functions that are being scrutinised are in fact operating satisfactorily – or at least satisfactorily enough to reassure their detractors.<sup>361</sup> This legitimacy could stem from elements such as institutional fora that can accommodate multiple actors and interests and diverse sources of information, as well as a definition of legality that is acceptable to all of them.<sup>362</sup> In the context of VPAs, dialogues between actors at domestic levels are also validated by dialogues between EU VPAs governmental authorities to ensure that both parties to the Agreement are satisfied by the legality definition and the verification mechanisms.

Legality verification schemes are undergoing major reforms in VPA countries. Openness, transparency and public accountability would be key elements to confer legitimacy to VPAs in efforts to combat illegal logging. Besides, “the separation of decision-making levels between the political and technical, and between compliance assessment and enforcement mechanisms at the operational level, would help to depoliticise elements of negotiation which need to be kept outside the political process.”<sup>363</sup>

## 5.2 FLEGT VPA in practice: the Indonesian experience

A recent study published by Greenpeace made an assessment of the Indonesian TLAS, which revealed that in spite of the readiness of the verification system, challenges may still arise in the implementation process. The following box presents the results of that study.

### Box 10: The Indonesian Timber Legality Assurance System (SVLK)

The SVLK scheme was initiated in response to the recommendations of the 2001 Bali Declaration on tackling illegal logging, with input from government, NGOs and the private sector. While civil society organisations continue to play a role as independent monitors, there is concern that their inputs to government consultation on the reform of the scheme were ignored.

<sup>359</sup> *Idem.*

<sup>360</sup> *Ibidem.*

<sup>361</sup> Brown et al. 2008, p.19.

<sup>362</sup> Brown et al. 2008, p.47.

<sup>363</sup> Brown et al. 2008, p.47.



Timber legality assurance systems commonly rely on government agents to verify the legal origin of each timber shipment through a traceability control system, but Indonesia's SVLK outsources this task to accredited independent private verification bodies. In the SVLK all operators throughout the supply chain are audited to ensure compliance, and a legality license is issued at the point of export.

The SVLK was launched in 2009, with a Ministry of Forestry Regulation stating that it was mandatory for all timber producers and timber processors to obtain a certificate of sustainable production forest management (S-PHPL) or timber legality certificate (S-LK) to ensure that all timber harvested, processed, transported and traded in Indonesia was legal. The VPA FLEGT was signed in 2013, and in 2014 Indonesia ratified the agreement through Presidential Regulation No.21/2014. This opened the possibility for Indonesian timber and timber products to enter the EU market as FLEGT-licensed timber, which is automatically considered legal under the terms of the EUTR.

In November 2016 Indonesia became the first country in the world eligible to issue FLEGT licenses for exports to the EU. A FLEGT licence effectively means operators in the EU do not need to exercise due diligence on imports of timber products covered by the license – in other words, a licence issued on the basis of SVLK verification is considered evidence of compliance with EU law.

But how effective is that verification at ensuring the legality and sustainability of Indonesian timber?

After four years of FLEGT licensing and a decade of SVLK implementation, the evidence suggests that while the scheme has contributed to improving the administration of Indonesian forests and the beginnings of a traceability system, it has had limited impact on tackling illegal logging. A December 2018 Tempo report titled 'Illicit Timber Laundering Machine' provided evidence of the manipulation of the timber verification process in Papua. According to the investigation, the 'laundering' of illegal timber is possible because the origins of timber are not verified in the field. Recent research by the Anti Mafia Forest Coalition/Koalisi Anti Mafia Hutan and other NGOs confirms that the verification system cannot guarantee the legality of forest products, let alone their sustainability – their 2020 report 'Sustaining Deforestation' documents evidence of recent natural forest conversion inside a concession in East Kalimantan owned by a company that holds a PHPL certificate.

The Independent Forest Monitoring Network (JPIK) has also found evidence of a number of failures, and several companies whose concessions burned between 2015 and 2019 are certified under the SVLK scheme. In addition to the SVLK's weaknesses in legality verification, there are failures in illegal logging law enforcement, with only a handful of prosecutions out of over 50 identified cases in 2018–2020 of companies trading in illegal timber. In one shocking case, Indonesia's Supreme Court even returned \$1.6 million worth of illegally acquired timber to a trader who had been convicted and issued with a fine and a jail sentence. In summary, largely as a result of weak governance, requirements and enforcement, the SVLK is not yet up to the task of ensuring legal compliance and stopping deforestation. For the government, it appears that the system is more about trade diplomacy than real improvements in forest governance in Indonesia.

*Source: Greenpeace International 2021, pp.90-91.*

### 5.3 The European Court of Auditors' analysis of VPA implementation

The European Court of Auditors reported that the “Commission correctly identified the main elements which might require support from donors for effective implementation of a VPA”,<sup>364</sup> but failed to elaborate a proper work plan containing specific operational objectives with corresponding indicators, a timetable with concrete milestones and explicit monitoring framework that would provide a basis for measuring the progress and achievements.<sup>365</sup> The Commission did not allocate its resources, both human and financial, according to a set of well-defined and interrelated criteria such as the extent of illegal logging, the importance of trade with the EU, the commitment and potential of the countries in question and their development needs. This led to a poor prioritisation of the use of resources, spreading the limited financial and technical support over a large number of countries, and diluting the support and the impact of support programs.<sup>366</sup>

Another reason for the mixed success achieved so far could be over-ambitious objectives of the VPA contracts. In Cameroon, for instance, while the projects contributed to strengthen the position of civil society, two out of four audited projects implemented by NGOs did not deliver all the expected outputs because the goals were too high.<sup>367</sup> This misalignment might also be an indication that the existing systems were weighed down with too many issues and challenges to be able to achieve a fast radical shift. Be that as it may, improper monitoring could also limit the results achieved so far. A periodic review process, followed by adequate readjustments is an essential element for the realization of projects of the scale of VPAs. In this case, the monitoring process was unsatisfactory and the Commission did not comply with its reporting obligation on the progress of the FLEGT AP, pursuant to Article 9 of the FLEGT Regulation.<sup>368</sup> This compliance would have enabled every two years to measure the progress of VPA implementation against set milestones, and describe the achievements and the difficulties encountered in order to undertake corrective actions where applicable.

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<sup>364</sup> European Court of Auditors 2015, p.14. These elements include forest and environmental policy reform, the development of monitoring, tracking and licensing systems, and capacity building in various sectors.

<sup>365</sup> European Court of Auditors 2015, p.14. The FLEGT AP provided the guidelines for a long-term process and was supposed to be later accompanied by specific objectives and a roadmap.

<sup>366</sup> European Court of Auditors 2015, p.16. For example, Liberia and the Central African Republic were allocated significant amounts of financial support while their exports amount to very limited volumes of wood products and they are plagued with serious governance issues. By contrast, Côte d'Ivoire, which has exported significantly higher volumes of wood products to the EU than these countries, did not receive any financial assistance to prepare it for a VPA. In its reply to the Court of Auditors report, the Commission disagreed with this finding and stated that “the innovative nature of the FLEGT Action Plan, the diversity of policy, regulatory and development cooperation measures and the multiplicity of actors and partners are difficult to frame in a single work plan with clear milestones and deadlines and a dedicated budget. Nevertheless, many of the FLEGT measures, such as the VPAs or the projects have their own detailed implementation plan.” (See p.34).

<sup>367</sup> European Court of Auditors 2015, p.19.

<sup>368</sup> European Court of Auditors 2015, p.22.

## 6- THE IMPORTANCE OF PRIVATE GOVERNANCE IN ADVANCING THE TIMBER REGIME

### KEY FINDINGS

Transnational private governance emerged as a response to the intergovernmental failure to sign a global forest convention, the increased scrutiny and concerns by environmental groups and other actors;

Forest certifications are valuable tools for sustainable forest management;

Main certifications bodies (FSC- PEFC) helped improve responsible practices in forest areas, but their credibility and integrity is increasingly questioned due to weak governance and implementation;

FSC, PEFC certifications as well as other third-party verified schemes contribute significantly to meeting the EUTR due diligence, but are not proof of legality;

Transparency and implementation of forest certifications should be strengthen and provide better measures to eliminate fraud and corruption in timber supply chains.

The failure of forest governance to effectively address global forest loss and degradation has fuelled a sense of urgency for policy change, as well as the creation of new private, market-based institutions, such as forest certification, that attempt to set higher international bars of performance.<sup>369</sup> Domestic and transnational private governance systems have emerged in several sectors, including forestry, deriving their policy-making authority not from the state, but from the manipulation of global markets and attention to customer preferences.<sup>370</sup> The use of voluntary commitments represent a shift from traditional regulatory mechanisms that ensure the control of environmental issues focussing on the use of regulatory mechanisms that impose requirements or restrictions on industries.<sup>371</sup>

Private certification gained momentum with the increased scrutiny and concerns by environmental groups and other actors as well as the intergovernmental failure to sign a global forest convention at

<sup>369</sup> McDermott et al. 2009, p.217.

<sup>370</sup> Cashore 2002, p.504.

<sup>371</sup> European Commission 2021, p.191.

the 1992 Rio conference, spurring environmental NGOs initiatives to develop their own private regulation scheme.<sup>372</sup> The first transnational efforts focused on addressing global forest issues through the development of non-state, market-driven regulation embracing sustainable forest certification schemes that rely on third-party audits and market demand for sustainable and legal timber products.<sup>373</sup> Under the aegis of the World-Wide Fund for Nature (WWF), these efforts led to the development of an international Forest Stewardship Council (FSC) program aimed at influencing the market through the certification of forest landowners and forest companies who practiced “sustainable forestry” following FSC rules.<sup>374</sup> The features of the FSC address “the impasse at Rio by establishing a deliberative, multi-stakeholder process for setting and revising broad, principles-based standards for sustainable forest management, adapting them to local conditions, certifying their voluntary application by firms, independently verifying the results, and requiring corrective action where needed.”<sup>375</sup> Forest certification also provides consumers with a credible assurance that product originates from environmentally responsible, socially beneficial and economically viable sustainably managed forest.<sup>376</sup>

This chapter intends to first sketch out the most important private forest certification schemes (5.1). It then analysed the impact of private certification (5.2) and assesses their adequacy for proving legality in the forest sector (5.3). Afterwards, the chapter examines the importance of certification schemes as regards compliance with the EUTR (5.4).

## 6.1 Main private forest certifications

To tackle illegal logging, transnational governance involves hybrid arrangements at the intersection of public and private regulation.<sup>377</sup> Governmental bodies can indeed be represented in a voluntary certification scheme, but they are usually not the only decision-making actors within that scheme. Moreover, voluntary certification schemes may be backed, supported or encouraged by governmental bodies or public institutions (for instance India's Timber Legality Assessment and Verification Scheme - VRIKSH or China's Timber Legality Verification System - CTLVS), but there is usually a formal split between the legal entity running the scheme and public bodies.<sup>378</sup> Certification schemes can also have an international reach and apply to several countries without any formal association with sovereign states.

In the forest sector, certification is implemented through two separate but linked processes. First, forest management certification enables to assess whether forests are being managed according to a specified set of sustainable and/or legal standards, including the evaluation of socio-economic and environmental impacts of forestry operations. Secondly, product certification, also referred to as chain of custody certification (CoC certification), verifies that certified material is identified or kept separate from non-certified or non-controlled material through the production process, from the forest to the final consumer. Product certification covers different stages of the timber supply chain including transportation, storage, processing and distribution. Certification schemes can be broadly categorized

<sup>372</sup> Cashore 2002, p.507.

<sup>373</sup> Cashore 2002, p.508.

<sup>374</sup> Cashore 2002, p.507.

<sup>375</sup> Overdest and Zeitlin 2012, p.29.

<sup>376</sup> Perera and Vlosky 2006, p.2.

<sup>377</sup> Quack 2013, p.654.

<sup>378</sup> European Commission 2021, p.191.

into two groups, namely performance based and process based schemes. Performance based standards define specific performance levels for various aspects of forest management while process based schemes entail a systematic approach to developing, implementing, monitoring and evaluating environmental policies.<sup>379</sup> Over the years, the scope of forest certification extended beyond tropical forests to include temperate and boreal forests.<sup>380</sup>

In practice, the process involves an “independent third party (the “certifier”), which assesses the quality of forest management and production against a set of requirements (“standards”) predetermined by a public or private certification organization.”<sup>381</sup> This third-party certifier is an organization other than the forest manager, manufacturer or trader, or the customer requiring certification.

The two globally leading private forest certification schemes are the Forest Stewardship Council (FSC) and the Programme for the Endorsement of Forest Certification (PEFC).<sup>382</sup> These two repositories offer voluntary systems that forest administrators, timber processors and traders can use within the framework of forest management and the certification of timber supply chains. They are also increasingly used in the context of public procurements and state-owned forests.<sup>383</sup>

### 6.1.1 The Forest Stewardship Council (FSC)

The (FSC) is an international, independent non-profit organization founded in 1993 to establish a global system for responsible forest management. It is internationally recognized as a benchmark for the promotion of environmentally appropriate, socially beneficial, and economically viable management of the world's forests.<sup>384</sup> In order to overcome the mistrust and resentments that blocked agreement at Rio, the FSC endeavoured to balance the influence of environmental, business, and social organizations, as well as southern and northern interests, in its central standard setting and revision body.<sup>385</sup> The FSC's principles include respect for labor and indigenous people's rights, as well as biodiversity, ecological sustainability, and environmental management requirements. The FSC scheme includes a forestry performance audit and a chain of custody audit. Compliance with its principles and standards is verified by accredited qualified independent third-party monitoring organizations known as certification bodies, which carry out on-the-ground inspection and issue certificate for each separate stage of production. The scheme is designed to ensure transparency and independence. It has been praised for not only “its multi-stakeholder governance structure and deliberative decision-making procedures, but also its broad, principles-based standards, adapted to local conditions by national or regional chapters; continuous monitoring, independent verification, and revision of individual forest management plans; and full traceability of certified wood from initial harvest to final point of sale.”<sup>386</sup> Moreover, the scheme promotes accountability of both certified forests and monitors by requiring

<sup>379</sup> Perera and Vlosky 2006, p.3.

<sup>380</sup> *Idem*.

<sup>381</sup> European Timber Trade Federation, available at <https://www.timbertradeportal.com/page/76/certification/>

<sup>382</sup> Previously called the Pan European Forest Certification.

<sup>383</sup> Overdevest 2010, p.49.

<sup>384</sup> [www.fsc.org](http://www.fsc.org).

<sup>385</sup> Overdevest and Zeitling 2012, p.31.

<sup>386</sup> Overdevest and Zeitlin 2012, p.28.

accredited auditors to publish public summaries of the audit reports on their websites.<sup>387</sup> These audit summaries have in turn contributed to enable watchdog groups and activists to monitor the functioning of the FSC and its accountability to the broader forest governance community.<sup>388</sup> In 2019, FSC has certified over 199.000.000 hectares of forests and issued over 37.000 CoC certificates.

### 6.1.2 The Program for the Endorsement of Forest Certification (PEFC)

The PEFC<sup>389</sup> is an international, non-governmental organization which recognizes national PEFC certification schemes operating to promote sustainable forest management. Following the emergence of the FSC, landowner groups in several European countries, the USA and Canada, launched alternative industry schemes from 1999 onwards, the culmination of which led to an international organization called PEFC.<sup>390</sup> Small landowners' associations in countries dominated by fragmented, small-scale ownership, but generally quite strong environmental regulations, like Finland, Sweden, and Germany, created the PEFC in order to combat pressure to join the FSC, because they considered FSC's model of regular annual audits economically impractical and were concerned that the FSC was dominated by environmental advocacy organizations.<sup>391</sup>

To date, over 330 million hectares of forest area are managed in compliance with PEFC's internationally accepted Sustainability Benchmarks, and 75% of all certified forests globally are certified to PEFC.<sup>392</sup> National forest certification systems become PEFC members once their conformance with PEFC international requirements Sustainability Benchmarks has been demonstrated and approved by the PEFC General Assembly. These national forest certification systems are assessed by third-parties against PEFC's Sustainability Benchmarks. Currently, 55 national members,<sup>393</sup> with 49 endorsed national certification systems,<sup>394</sup> have joined forces under the PEFC umbrella. Similarly, more than 20.000 companies and organizations have achieved PEFC chain of custody certification, representing one-third of all chains of custody globally. These companies and organizations are spread across more than 70 countries.<sup>395</sup>

While the FSC is a vertical diffusion of private regimes along supply chains, PEFC represent their horizontal diffusion within industry associations.<sup>396</sup> It was originally a European organization but developed into a global umbrella organization<sup>397</sup> for the assessment and mutual recognition of

<sup>387</sup> These reports include descriptions of the forest (location, management objectives, size of holding, types of sites) and documentation of the audit findings, covering major and minor non-conformances, summaries of field and office assessments, and stakeholder interviews. See Overdevest and Zeitling 2012, p.31.

<sup>388</sup> Overdevest and Zeitling 2012, p.31.

<sup>389</sup> Previously called the Pan European Forest Certification.

<sup>390</sup> Overdevest 2010, p.55.

<sup>391</sup> Overdevest and Zeitlin 2012, p.32.

<sup>392</sup> <http://www.pefc.org/discover-pefc/facts-and-figures>.

<sup>393</sup> It is important to underline that not all members have developed a certification system. In some cases, these systems may not yet be endorsed by PEFC International.

<sup>394</sup> These national entities often operate under their own name. For example, Certflor in Brazil or Sustainable Forestry Initiative (SFI) in the USA and Canada.

<sup>395</sup> <http://pefc.org/discover-pefc/facts-and-figures>.

<sup>396</sup> Overdevest and Zeitlin 2012, p.28.

<sup>397</sup> 55 national members, with 49 endorsed national certification systems, have joined forces under the PEFC umbrella to collaboratively promote sustainable forest management. See <http://www.pefc.org/discover-pefc/facts-and-figures>.

industry-sponsored national forest certification standards after 2003 when it expanded to other continents.<sup>398</sup>

FSC, PEFC certifications as well as other third-party verified schemes can be used as tools in due diligence systems, when they are considered sufficiently credible by operators. However, they do not constitute proof of legality and do not exempt operators from the obligation to assess and mitigate risk to a negligible level. When considering whether to use certification schemes to fulfil due diligence obligations, operators must take account of the differences in their setup and approach in conformity with their intended overarching purpose. These differences depend on whether the scheme aims (1) to ensure conformance with the applicable legislation in a given sector; (2) to ensure sustainable management practices; or (3) to ensure adherence to a given quality standard within a sector.<sup>399</sup> It is also important to weigh the credibility of the scheme on the decision-making process. This credibility is determined by the quality of forest management and chain of custody assessment, the absence of conflicts of interests, the acceptability of key elements of the certification scheme to all the main stakeholders, and the positive impact of the scheme in improving forest management.<sup>400</sup>

## 6.2 Analysing the impact of private certification schemes

Forest certification has gained wide acceptance as a tool to promote sustainable forest management. Despite its promising role as a market based mechanism in this regard, efforts have been mixed.

Considerable support is given to third party certification among most commercial forestry operations in North America and Europe.<sup>401</sup> By May 2014 the major global certification schemes – FSC and PEFC – reported a total gross area of 440.3 million hectares under their individual endorsed certification standards.<sup>402</sup> In spite of the spread and almost exponential increase of certified forest area, it is noticeable that about 90% of the globally certified area is located in the northern hemisphere, potentially indicating the success of forest management certification in northern regions such as Europe or North America. However, the same trend is not observed in the Southern Hemisphere even though these regions are home to abundant tropical and sub-tropical forest areas that are especially exposed to threats of deforestation and degradation.<sup>403</sup> These disparities may be explained by many underlying issues. First, developing countries might have different certification needs and possibilities, and, unlike developed countries, their resources for certification might be limited. Tropical timber producers are often more concerned about economic aspects of certification such as the expected increase in production costs and uncertainties over market benefits as well as difficulties they face in achieving certification status. These producers often consider certification a market requirement imposed by importers which is difficult to comply, and a trade barrier rather than an aid for promoting their exports.<sup>404</sup> While certification can contribute to increased market access and improve firm's reputation, enduring challenges such as the inflexibility of certification standards, failure to recognize the broader local land-use issues, conflicts and incompatibility between legal settings and certification standard are key factors for developing countries' lack of interest in certification. In addition, there are

<sup>398</sup> Overdevest 2010, p.55. The Finnish Forest Certification scheme, the Living Standards and Norwegian Forest Certification Scheme, and the Swedish PEFC certification scheme were the first schemes to be endorsed by PEFC in year 2000.

<sup>399</sup> European Commission 2021, p.191.

<sup>400</sup> Bass and Simula, 1999, cited by Perera and Vlosky 2006, p.4.

<sup>401</sup> Cashore and Stone 2012.

<sup>402</sup> Kraxner et al. 2015.

<sup>403</sup> *Idem*.

<sup>404</sup> Perera and Vlosky 2006, p.9.



rather limited economic incentives from the EU and the US compared to the costs involved in implementing certification.<sup>405</sup> Costs can prove to be prohibitively high, especially for industries in developing countries and smallholders, as they cover a wide range of areas, including changes to forest management, separate inventories of certified and non-certified products (which increases the material handling cost), the costs of tracking the certified product throughout the supply chain, and the costs associated with becoming and remaining certified.<sup>406</sup>

Global uptake with regard to certification is also confronted with “FSC competing” programs under the PEFC umbrella that are developed by domestic, government/industry/landowner as a more flexible and “business friendly” alternative to the NGO supported FSC, because they gave more discretion to the forest sector and firms in implementing policy goals.<sup>407</sup>

Although certification schemes have a significant contribution in ensuring timber legality, these voluntary schemes are probably not the most appropriate and comprehensive solutions to the illegal logging issue. This is because the voluntary certification systems are mostly designed as ‘quality assurance’ tool and are not intended as mandatory law enforcement instrument.<sup>408</sup> This may also explain why although the EUTR or the Lacey Act confer legitimacy to certification schemes as valuable tools for compliance with due diligence/due care requirements, both legislations do not consider these schemes sufficient on their own to ensure compliance. Voluntary certification systems are moreover not based on regular and unannounced audits and on continuous sampling, and they rely on paper-based chain-of-custody systems that are sensitive to fraud. As such, certification schemes do not provide the level of confidence to demonstrate legal origin and can mostly serve as tool for responsible forest management.<sup>409</sup>

Yet, there are also concerns that voluntary certification schemes may also fall short as sustainable forest management tool. Assessing the impact of certification schemes is indeed often challenging. For example, because public and private policies on forest management co-exist and interact in a given territory, it is difficult to establish a clear causal path as to what impacts are attributable to a specific process.<sup>410</sup> Moreover, even though the policy instruments have different sets of incentives, sanctions, and institutions, they have largely the same aims.<sup>411</sup> Nevertheless, many scholars have attempted to carry out studies to evaluate the effectiveness of private certifications schemes as tools for sustainable forest management. According to a study in Mexico, a country with both considerable FSC certification and deforestation, the comparison between FSC certified forests and non-certified forests offered no evidence that FSC certification affects deforestation.<sup>412</sup>

Using data from 2000–2008 in Kalimantan/Indonesia, another study found that FSC certification significantly reduced deforestation by 5 percentage points and air pollution by 31% compared to the

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<sup>405</sup> See Kraxner et al. 2015; Perera and Vlosky 2006, p.9.

<sup>406</sup> Perera and Vlosky 2006, p.10-11.

<sup>407</sup> Kraxner et al. 2015.

<sup>408</sup> SGS Global Trade Solutions, p.2.

<sup>409</sup> *Idem*.

<sup>410</sup> Savilaakso 2017, p.117.

<sup>411</sup> *Idem*.

<sup>412</sup> Mexico has had one of the highest deforestation rates in the world, and it has 70 FSC-certified forests, the third-highest number in the developing world. See Blackman et al. 2015, pp.307 and 321.

matched control villages in non-certified logging concessions. Compared to villages in uncertified logging concessions, FSC certification also reduced the incidence of air pollution, impacted household well-being, reduced fuelwood dependence, the incidence of acute respiratory illness (ARI) and of malnutrition in 2008, and increased funding from private sources. However, the study emphasized the paucity of causal evidence of the performance of FSC certification and similar programs and called for structural changes that are likely to improve data collection as an integral part of the program implementation. This would facilitate evaluation of their effectiveness and long-term impacts, and, thus, improve conservation outcomes.<sup>413</sup>

Another study in the Congo Basin in Africa (Gabon, Cameroon, and the Republic of the Congo) revealed positive social outcomes as the result of the fact that certification led companies to maintain a permanent channel of communication with the local population, in order to avoid unexpected disruptions or social conflicts that might interfere with normal operations and increase a company's reputational risk.<sup>414</sup> This, remarkably, is in line with the participatory approach in decision-making and defining legality as advocated by the FLEGT VPA. Although these positive outcomes do not necessarily guarantee legality within the framework of the EUTR, these results might eventually have positive spillovers on logging practices. It is also important to underline that the progress toward sustainable forest management revealed by the study were more driven by certification than by existing laws in the countries considered. This also means that certification is helping to correct negative governance externalities, such as nonexistent or weak law enforcement, and even pushing certified companies to adopt stricter measures than required by domestic laws, so as to meet the markets demands of their customers in importing countries.<sup>415</sup>

Evidence of a study conducted in Cameroon, Indonesia and Peru showed that FSC certification has improved environmental management and social performance of the certified companies, but it has had limited effectiveness in reducing deforestation and forest degradation, which were the original concerns that certification was aimed at tackling.<sup>416</sup> Interestingly, the requirements of FSC certification exceed the legal requirements in all the study countries, owing partly to the constant introduction of new concepts to improve sustainable forest management. As such, once more, certification has become a substitute for ineffective public policies due to ineffective implementation of government regulations. However, it has shown its limits in steadily contributing to effectiveness in the forest sector. Consequently, there is an increased shift towards other instruments and legality verification has emerged as the new leading policy instrument to combat illegal logging and forest degradation.<sup>417</sup>

### 6.3 Assessing adequacy of main certification schemes

A recent study carried out by Greenpeace makes an analysis of the performance of many major certification schemes including FSC and PEFC. Based on five key areas - governance and decision-making, standards, traceability and transparency, audits, and implementation and effectiveness- the study points out many shortcomings with the certification schemes themselves. The following boxes present the results of the study as regards FSC and PEFC.

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<sup>413</sup> Miteva et al. 2015, pp. 10-14.

<sup>414</sup> Cerrutti et al. 2016, pp. 44-50.

<sup>415</sup> *Idem*.

<sup>416</sup> Savilaakso 2017, p.129.

<sup>417</sup> *Idem*.

**Box 11: Performance analysis of the Forest Stewardship Council (FSC)**

The FSC has a number of strengths, including its multi-stakeholder governance structure and strong forest management standards that include respect for Indigenous Peoples' and workers' rights, an early cut-off date on natural forest conversion, and a prohibition on GMOs.

It is also the most credible and effective forestry certification scheme, and as one of the first schemes, it has served as a model for certification more generally. However, the FSC still has a number of serious and even fundamental weaknesses. These include the lack of consistent protection for IFLs, insufficient transparency (maps of certified and conserved areas are not required to be made publicly available), a heavy reliance on mixing non-certified sources into labeled products (coupled with weak and inconsistent safeguards against controversial sources), failure to consistently disassociate from companies associated with deforestation and human rights abuses, and insufficient product traceability. Concerns have also been raised about the objectivity and independence of audits due to the conflict of interest caused by companies contracting directly with certification bodies, leading to weak implementation of the standards.

*Implementation and effectiveness*

In some regions, when implemented effectively, FSC full forest management (resulting in 'FSC 100%' or 'Pure' products) provides stronger forest and rights protection than weaker schemes such as the PEFC and SFI. However, over the past decade investigations by Greenpeace and other NGOs have revealed inconsistent implementation of FSC principles and criteria globally, and serious cases of FSC certified companies being linked to illegal logging, destruction of IFLs, violations of community rights, high-level corruption and human rights abuses. This has particularly been the case in high-risk regions where democratic and civil society institutions are weak, corruption is prevalent, and HCVs are not formally protected. For example, a Greenpeace Africa analysis from 2017, confirmed by subsequent independent research, showed that loss of IFLs in the Congo Basin was higher inside FSC certified concessions than in uncertified concessions.

A Greenpeace Russia investigation found the FSC was contributing to IFL degradation and loss in parts of the country through labelling and marketing destructive wood.

EarthSight also uncovered evidence of the scheme certifying illegal wood in Ukraine. FSC certification has even failed to protect HCVs and other values in some countries with strong institutions and governance, such as Finland.

The FSC's lack of full traceability and transparency makes it difficult for buyers and the public to assess the claims of the certificate holder. Currently, it is all too easy for illegal and unsustainable timber to find its way into FSC certified supply chains, especially for FSC 'Mix' products.

Greenpeace International was a founding member of FSC International in 1994 but terminated its membership in 2018, largely because the FSC's integrity and credibility had been compromised by weak governance and implementation, in particular with regard to controlled wood and the FSC Mix label. However Greenpeace Canada, China, New Zealand, UK and USA are still members.

The FSC has also proven weak on sanctioning companies responsible for rights abuses and deforestation outside of certified forests, despite a policy intended to curb their association with the FSC brand. It has also done little to stem the global tide of deforestation. Given the pace of

deforestation and the strength of its drivers, certifying more forests is unlikely to have a significant impact, and additional solutions are desperately needed.

The FSC is an imperfect and inconsistent tool to protect forests and people's rights, and thus additional due diligence is required to provide an assurance of responsibly sourced wood products.

*Source Greenpeace International 2021, pp-84-87.*

It is worth underlining that timber supply chain investigations carried out by ENGOs revealed cases of illegally sourced wood products entering the consumer markets in the UK and the broader EU, bearing (FSC and other) certified global supply chains. These finds shed doubts on the credibility and reputation of the FSC, showing their vulnerability to corruption and fraud, as expressed by some of the interviewees.<sup>418</sup>

### **Box 12: Performance analysis of the Program for the Endorsement of Forest Certification (PEFC)**

PEFC describes itself as a 'global alliance of national forest certification systems', in part created to address 'the specific requirements of small- and family forest owners'. It is dominated by governments and economic interests, and the governance structures of PEFC-endorsed schemes do not have full and balanced representation of economic, environmental, social and indigenous interests. It is considered a weak and industry-dominated certification scheme, especially in comparison to the FSC.

While they have shown some gradual improvement, the PEFC's international standards, to which endorsed schemes are meant to conform, remain weak and insufficient in crucial areas. For example, they still do not address IFLs, do not recognize and protect most other HCVs, do not sufficiently prohibit conversion of forests to plantations, do not consistently recognize and protect Indigenous Peoples' rights and do not address certified companies' controversial practices outside of certified forests.

Some important PEFC endorsed national schemes even fall short of the PEFC's international expectations. For example, the standards of the PEFC scheme for North America, the Sustainable Forestry Initiative (SFI), have no meaningful prohibitions against forest conversion, do not require FPIC for operations affecting Indigenous Peoples' lands and rights and do not meaningfully recognize and protect HCVs, rare and endangered species (including Canada's iconic woodland caribou), old growth and other environmental values.

The certification of highly controversial forestry practices has also been an ongoing concern with a number of PEFC-endorsed schemes around the globe, such as the Indonesian Forestry Certification Cooperation (IFCC).

*Source Greenpeace International 2021, p.89.*

The following box presents the example of IKEA that enables to illustrate some of the shortcomings of FSC.

### **Box 13: Alleged greenwashing of illegal timber from Ukraine for IKEA**

In 2014, furniture giant IKEA committed to source 100% of its wood from 'more sustainable sources' – defined as 'wood from FSC forests and recycled wood' – by August 2020. The company later extended this deadline to the end of 2020, and claims to have met it by reaching 98% compliance.

<sup>418</sup> Guierrez and Sotirov 2021, p.5.

First and foremost, this commitment to responsible sourcing must be weighed against the company's relentless push for growth. Its consumption of wood has reportedly doubled in the past decade, and according to NGO Earthsight's calculations, to sustain its growth each year it must consume 1.8–2.5 million more trees than it did the year before.

Moreover, a recent investigation by Earthsight raises concerns that relying on FSC certification does not appear to provide strong guarantees of sustainability or even legality. The investigation reports that IKEA is selling tens of thousands of chairs in countries such as the UK, US and Germany made from wood that was illegally felled by the Velyky Bychkiv state forestry enterprise (SFE) in the Ukrainian Carpathians, home to endangered lynx and bear populations. The report alleges that the SFE illegally licensed 'sanitary' felling on more than a hundred sites in April–June 2018, 2019 and 2020. According to Earthsight, illegal logging was carried out by local furniture and timber company VGSM – one of the largest Ukrainian suppliers to IKEA – and Ukrainian state-owned firms that sold to VGSM. Wood panel producer Egger – another important supplier to IKEA – reportedly also imported almost \$2 million worth of wood during 2019 from suppliers in Ukraine that have been the repeated subjects of criminal proceedings regarding illegal logging and illegal timber trading.

The illegalities and corruption risks in IKEA's Ukrainian supply chains are not unique. Findings show that in all SFE regions state-sanctioned illegal logging is a business-as-usual practice, with reports of corruption running from the local to the provincial level, and even to a former head of state. Earthsight reports that while President Viktor Yanukovich was in power in Ukraine from 2011 to 2014 overseas companies paid millions of dollars in bribes into the offshore accounts of his friends in the forest agency in order to access timber, and that wood for which such bribes had been paid is highly likely to subsequently have made its way into IKEA products.

FSC audits of these problematic suppliers reportedly failed to detect any problems. As the Earthsight investigation reveals, there are many reported cases of FSC certified companies or their subsidiaries engaging in illegal logging, degradation of IFLs and human rights abuses, with the FSC failing to take action unless NGOs step in. The report argues that instead of following a precautionary approach, the FSC repeatedly gives companies that show indications of engaging in illegal practices the benefit of the doubt, even in highly corrupt countries, and sets the bar for disassociation onerously high. Part of the problem is that the FSC has a fundamentally flawed audit system due to the financial link between the company seeking certification and the CB auditing the company against the FSC standards.

The Earthsight investigation reports that the FSC has even lobbied the Ukrainian government to roll back some of the environmental regulations that were found to be being systematically flouted in certified forests. The FSC responded to Earthsight's allegations in vague terms, claiming to be supporting government action against fraudulent activities, investigating reported illicit acts and working with other stakeholders 'to address the root of the problems threatening the Ukrainian forests.'

Truly addressing those problems, however – and not just in Ukraine – will require the FSC to shift its focus away from certifying as much forest as possible. To address concerns of greenwashing, it must instead concentrate on rigorous enforcement of its standards and strengthening what it can do to protect forests and fight the global climate emergency and biodiversity crisis.

*Source: Greenpeace International 2021, p.46.*

## 6.4 Certification schemes and compliance with the timber regime

The EUTR gives a prominent position to certification or other third party verified schemes. Such systems can serve to recognise good practice in the forestry sector,<sup>419</sup> and can contribute to the assurance of compliance with applicable legislation, as part of risk assessment or risk mitigation procedures.<sup>420</sup> Although certification provides evidence of legal origin, certification alone is not necessarily sufficient to ensure legality under the EUTR, since it is possible to incur illegality at any stage of the supply chain after initial forest certification takes place.<sup>421</sup> Certification and verification schemes are also acknowledged for their role in supporting sustainability in timber supply chain when stakeholders strive for high standards.<sup>422</sup>

Within the context of the EUTR, certification or other third-party verified schemes must comply with several criteria to qualify as valuable tools in risk assessment and risk mitigation procedures. These criteria include (a) a system of requirements established and made available for third-party use, including all relevant requirements of the applicable legislation; (b) appropriate checks, including field-visits, carried out at least once a year by a third party to verify compliance with the applicable legislation; (c) means, verified by a third party, to trace timber and timber products at any point in the supply chain before such products are placed on the market; (d) controls, verified by a third party, to ensure that timber or timber products of unknown origin, or which have not been harvested in accordance with applicable legislation, do not enter the supply chain.<sup>423</sup>

Certification can provide significant support to operators in their efforts to meet their due diligence obligations under the EUTR. Forest products certification indeed provides both assessment and assurance of most aspects of legality and also allegedly provides systems to control and manage fraud and corruption.<sup>424</sup> Moreover, the application of chain of custody systems on certified material claims support the ability to access information and control the flow of material through the supply chain.<sup>425</sup>

Operators must adopt a cautious approach when choosing and including certification schemes into their due diligence systems. The standards of most schemes have gaps in their legality definitions that pose risks in relation to them fully meeting the definition of applicable legislation as set out in the EUTR.<sup>426</sup> Legal requirements applied by certification schemes may be limited in scope or ambiguous in nature. For example, while the EUTR has its own definition of applicable legislation in the context of five specific areas, schemes may develop their own and/or may adapt the definition differently to include or exclude different elements of applicable legislation. Similarly, ambiguities may appear in relation to how schemes integrate legal requirements, or there might be contradictions between legal requirements at different administrative levels within a jurisdiction. Some schemes incorporate

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<sup>419</sup> EUTR, recital 19.

<sup>420</sup> EUTR, Article 6(1)(b) and 6(1)(c).

<sup>421</sup> Jonsson et al 2015, p.9.

<sup>422</sup> COM(2019) 352 final, p.8.

<sup>423</sup> Commission Implementing Regulation 607/2012, Article 4.

<sup>424</sup> European Commission 2021, p.5.

<sup>425</sup> European Commission 2021, p.5.

<sup>426</sup> European Commission 2021, p205.

requirements on legal conformance of trade and transport operations within the supply chain, while other schemes would not or would only do so partially.<sup>427</sup> Because they traditionally focused on sustainable forest management, even the FSC and PEFC only recently incorporated requirements in relation to the legality of trade and transport of wood-products along the supply chain.<sup>428</sup>

Certifications schemes are also vulnerable to manipulation and fraud. Owing to their traditional model of chain of custody systems, they do provide a systematic approach to transferring claims throughout the supply chain, for the most part, but do not include the systematic ability to verify – in real time or otherwise – transactions of volumes, species, and qualities between entities. Yet, corruption and fraud are key risks in many timber supply chains. However, even though most schemes have requirements related to detection of corruption, these are often insufficient. Certification schemes lack an adequate framework to cope with the clandestine nature of corruption and the illegalities that stem from it. In the same way, the risk of fraud in supply chains is generally poorly covered because they do not provide an approach to enable auditors to detect and act on fraudulent practices by forest managers or in the supply chain.<sup>429</sup>

Despite their inability to serve as proof of legality within a DDS, private certificates are increasingly being given importance within the framework of public procurement. The UK, Dutch and Danish governments are accepting private certificates as evidence of legality and sustainability when purchasing timber products.<sup>430</sup> In the context of FLEGT licensing, Cameroon also decided to recognize FSC-certified timber as compliant with EU's FLEGT Action Plan requirements.<sup>431</sup>

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<sup>427</sup> European Commission 2021, p.206.

<sup>428</sup> *Idem*.

<sup>429</sup> *Id.*

<sup>430</sup> Overdest 2010, p.49.

<sup>431</sup> Cerruti et al. 2016, p.49.



## 7. EXTERNAL DIMENSION OF THE EU TIMBER REGIME: ASSESSING COMPLIANCE WITH THE WTO

### KEY FINDINGS

The WTO trade liberalization scheme aims at providing predictability, transparency and fair competition to ensure non-discrimination in international trade;

Even though the FLEGT VPA scheme and the EUTR do not rely on substantive EU requirements for compliance, but rather on legality definition in foreign laws, there are concerns that their restrictions on illegally sourced wood might violate GATT and TBT Agreement provisions;

Trade negotiations within the framework of VPAs, seeking bilateral exchanges, mutually beneficial schemes, and providing a framework for capacity building would most probably not lead to infringement of WTO provisions;

From a design standpoint, the EUTR does not seem to discriminate between foreign and domestic (like) products. It does also not prohibit the import of illegal wood, but rather prohibits the 'first' placing on the internal market.

Implementation and enforcement of the timber regime would play a decisive role in its ability to remain non-discriminatory and withstand a WTO challenge.

The European Union has long positioned itself as one of the main promoters of agreements designed to facilitate free trade and hence international trade. In many areas, the EU has distinguished itself in the implementation of development cooperation, capacity building and even trade agreements. In a context of continued weakening of the WTO, these European initiatives may prove beneficial in alleviating the effects of the multilateralism crisis. However, on the sidelines of the current difficulties of the WTO dispute resolution mechanism, it is important to embrace a lasting vision and ensure that European laws continue to be in line with the perspective of trade liberalization as advocated by the WTO. From this standpoint, this chapter intends to examine the compatibility of the EU timber regime with the main principles of the WTO multilateral trading system.

The FLEGT AP is the EU policy instrument to combat the illegal logging in the world's forests through the promotion of mutually agreed licensing system under the FLEGT VPA, and the EUTR is the key instrument to address the problem from the demand side.<sup>432</sup> Both instruments establish restriction on illegally sourced wood based on violations of the law of the country of harvest. Even though compliance does not rely on substantive requirements from EU law but rather on legality definition in foreign laws, there are concerns that the illegal logging framework put some restriction on trade in timber and timber products and might, as such, be in violation of the provisions of the General Agreement on Tariff and Trade (GATT) and the Agreement on Technical Barriers (TBT Agreement), both governed by the World Trade Organization (WTO). Since 1994, the GATT seeks to liberalize international trade through the removal of trade barriers between member countries. The trade liberalization scheme aims at providing predictability, transparency and fair competition to enable international trade to flourish on sound and non-discriminatory bases.

This chapter will first present the main principles of the GATT and the TBT Agreement that are of importance in analysing the ability of the EU timber regime to withstand a WTO challenge (7.1). The chapter will then assess compliance with the GATT and TBT Agreement (7.2), before exploring compliance with exceptions provided by GATT Article XX (7.3). The last section concludes (7.4).

## 7.1 Main GATT and TBT Agreements principles

The GATT advocates the elimination of quantitative restrictions, (GATT Article XI), by prohibiting most types of trade restrictions other than duties, taxes or other charges.<sup>433</sup> Effective trade liberalization relies on two main principles: the principle of non-discrimination or most favored nation (Article I, GATT)<sup>434</sup> and the principle of national treatment (Article III, GATT)<sup>435</sup>. The most-favoured nation' principle prohibits discrimination between imports from different countries, whereas the principle of national treatment bans discrimination between domestic and foreign like products.

The dispute settlement mechanism of the WTO ensures the resolution of trade disputes arising under the GATT or any other associated trade agreements, directing complainants to dispute panels and, if necessary, to the WTO Appellate Body.<sup>436</sup> The ability of the EU timber regime to withstand a WTO challenge is important because contrary to adjudication before traditional international tribunals, dispute-resolution mechanisms under the WTO are compulsory.<sup>437</sup> The WTO provides a specific mechanism to authorise the winning party to impose otherwise-impermissible trade sanctions on the party who violated the WTO provisions and failed to comply with the decision of the dispute settlement body, provided that the amount of these sanctions does not exceed the harm that has been caused by the violation.<sup>438</sup>

However, the trade liberalization system also admits some exceptions to the basic principles, mostly based on Article XX of the GATT. In this regard, if a violation of one of the core prohibitions is established, a review of Article XX is carried out to assess whether the trade restriction is justified by

<sup>432</sup> COM/2016/074 final, p.2.

<sup>433</sup> General Agreement on Tariffs and Trade 1994 (Marrakesh, 15 April 1994; in force 1 January 1995) ('GATT'), Article XI.

<sup>434</sup> Article I §1 GATT.

<sup>435</sup> Article III §4 GATT.

<sup>436</sup> Fishman and Obidzinski 2014, p.264.

<sup>437</sup> Born 2012, p.852.

<sup>438</sup> Fishman and Obidzinski 2014, p.265. These sanctions only up to a specified amount equal to the harm to the complainant state caused by the violation.

any of the exceptions it provided. With regard to the environment, the GATT authorizes Contracting Parties to take derogatory measures aimed at protecting human, animal or plant life or health (XX(b) of the GATT), as well as protective measures to ensure the conservation of exhaustible natural resources (XX(g) of the GATT).

When a violation of the core principles is justified on the grounds of one of the exceptions laid down in Article XX, the last step in assessing a violation of the GATT would consist in determining whether the country imposing the trade restriction equally complied with the requirements of the chapeau of article XX. This means that an examination is made to determine whether these non-trade measures are applied in such a way as not to constitute either a means of arbitrary or unjustifiable discrimination between countries where the same conditions exist, or a disguised restriction on international trade. In addition, measures to protect life or health of people or animals or to preserve plants must be “necessary”, that is to say, that it is not enough that they are desirable or globally beneficial, but that they are adopted to meet a need that cannot be satisfied otherwise, or they represent the least trade restrictive of several options.<sup>439</sup> Measures relating to the conservation of exhaustible natural resources must, in turn, be accompanied by restrictions on production or domestic consumption, because a prohibition on import of these scarce resources cannot be substantiated while their domestic consumption or production is stimulated.<sup>440</sup>

The TBT Agreement underlines in its preamble that “no country should be prevented from taking measures necessary to ensure ... the protection of human, animal or plant life or health [or] of the environment, ... at the levels it considers appropriate” provided that such measures do not constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade. Similarly, Article 2.2 of the TBT Agreement provides that legitimate objectives such as the protection of human health or safety, animal or plant life or health, or the environment can justify the adoption of technical regulations as long as the latter are not more trade-restrictive than necessary to fulfil the intended objective.

In adjudicating a claim under Article 2.2 of the TBT Agreement, the WTO Appellate Body (AB) asserted that a panel must assess what a Member seeks to achieve by means of a technical regulation (taking into account the texts of statutes, legislative history, and other evidence regarding the structure and operation of the measure) and whether a particular objective is legitimate, pursuant to these parameters.<sup>441</sup> The AB further clarified that “the question of whether a technical regulation “fulfils” an objective is concerned with the degree of contribution that the technical regulation makes toward the achievement of the legitimate objective”.<sup>442</sup> The Panel must therefore “seek to ascertain to what degree, or if at all, the challenged technical regulation, as written and applied, actually contributes to the legitimate objective pursued by the Member”; taking into account the design, structure, and operation of the technical regulation, as well as evidence relating to the application of the measure.<sup>443</sup>

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<sup>439</sup> Klabbers 2000, p.14.

<sup>440</sup> *Idem*.

<sup>441</sup> US – Tuna II (Mexico)(ABR), para. 314.

<sup>442</sup> US – Tuna II (Mexico)(ABR), para. 315.

<sup>443</sup> US – Tuna II (Mexico)(ABR), para. 317; (in other situations, such as when determining the contribution of a measure to the achievement of a particular objective in the context of Article XX of the GATT 1994, a panel must assess the contribution to the legitimate objective actually achieved by the measure at issue).

## 7.2 Assessing compliance with the GATT and TBT Agreements

In view of the above rules, it becomes therefore important to evaluate whether the EUTR privileges products depending on their origin and whether it accords illegally harvested timber less favorable treatment than it applies to domestic timber.<sup>444</sup> This amounts to exploring whether a stricter due diligence is required as regards foreign timber, resulting in a differentiation between domestic and imported timber. Besides, one could also ascertain whether a differentiation is made between timber-exporting countries, for example by putting some additional hurdles for countries where the prevalence of illegality is high. An analysis by Fishman and Obidzinski suggests that the EUTR seems to be exposed to claims of violations of any one of the core prohibitions.

The general prohibition of trade restriction would seem to cover the EUTR's ban on illegal timber for three reasons. First, "neither a categorical ban on the import of particular products nor documentary requirements of the type that would be needed to prove legality under the EUTR are among the three listed exclusions. Second, a dispute panel held that regulations which penalize the import of particular products fall under the prohibition, and the EUTR makes clear that penalties apply to breaches of the import ban. Third, the *de facto* effect of restricting trade, which would result from importers choosing to avoid timber from high-risk areas, may constitute a distinct form of prohibited trade restriction."<sup>445</sup>

Experiences with the implementation of the EUTR have shown that timber from some countries is now being excluded because of persistent systemic flaws, which make it virtually impossible for EU operators to apply due diligence systems that are able to actually result in negligible risk of importing illegal logged timber. Countries like Myanmar and Cameroon have repeatedly been pointed out by ENGOs and have themselves resolved to tackle illegality issues in their supply chains and their verification systems. The EUTR might be found discriminatory if on the basis on these concerns and/or evidence, the EU decided to routinely demand extensive documentary evidence for all products originating from these countries and not others, having no regard to the companies or the area of production involved.<sup>446</sup> In the case of Myanmar, for example, enforcement measures have not targeted all timber from Myanmar, but were specifically focused on teak due to the irregularities in the supply chain of this product, making the measures less vulnerable to attack under the WTO.

Moreover, due diligence requirements under the EU timber regime are carefully designed to include information not only of the country of origin and its degree of illegal logging, but also to take account of area-specific prevalence of illegal logging in the sub-national region and concession of origin. Similarly, the EUTR was cautiously designed not to include any obligation for documentary proof of legality for every product entering the EU, but it rather established a due diligence obligation for operators to ensure they do not trade in illegal timber.<sup>447</sup> Operators are equally encouraged to use existing schemes that demonstrate legality, such as the forest certification or legality verification schemes. The use of certifications presents a lower risk of violation of WTO rules because, *a priori*, they are voluntary in nature. However, any intervention by public authorities, however small it may be, could contribute to creating vulnerability.

<sup>444</sup> Geraets and Natens 2013, p.11.

<sup>445</sup> Fishman and Obidzinski 2014, p.266.

<sup>446</sup> Brack 2013, p.13.

<sup>447</sup> *Idem*.

The distinction under the EUTR coverage is made between legally and illegally harvested timber and does not result in any discrimination between 'like products' at the domestic level.<sup>448</sup> This means that the trade restrictive effect would apply indistinctly to both domestic timber and timber that is imported from third countries. In fact, the EUTR does not explicitly prohibit the importation of illegally harvested timber, but its prohibition requirement rather applies to the 'placing on the market' of such timber. This implies that domestic timber that was harvested illegally may also not be placed onto the EU market. The prohibition on the placing of illegal timber on the EU market is not a trade measure requiring border controls and operators or traders are not required to provide proof of legality at the point of import or sale.<sup>449</sup>

However, if from a design standpoint, this provision does not seem to discriminate between domestic and foreign like products, its application could reveal challenging to the 'national treatment' principle for several reasons. First, the due diligence requirements might be applied less strictly to domestically harvested timber, while imported timber products, will be under strict scrutiny, especially when they originate from countries with high risk of illegal logging.<sup>450</sup> Secondly, a bias in favour of domestic goods could emerge among regulators, who might also find it easier to introduce implementing regulations on border controls rather than measures to control the entry to the market of domestic timber at scattered locations.<sup>451</sup> Moreover, a distinction in treatment between most timber and timber originating from countries with high prevalence of illegality could reduce the timber's marketability of the latter, resulting in a de facto discrimination and violation of the GATT most favoured-nation' provision.<sup>452</sup>

It is also important to shed some more light on a potential violation by the EUTR of the prohibition under the GATT national treatment and the TBT Agreement to differentiate between foreign and domestic 'like' products. First, should the debate on this distinction be based on identical or almost identical products which serve different purposes? In this regard for example, in 1992, the special group on malt-based beverages made a distinction between beers according to their alcohol content, arguing that the different regulations applied to strong beers were not intended to differentiate imported and local beers. In this case, the group concluded that it is imperative that the determination of likeness of products in the context of Article III avoids unnecessary encroachment on the regulatory authority and the possibilities of national action of the contracting parties. It appears therefore appropriate to strike the right balance between the national treatment provision and the internal policy objectives.<sup>453</sup>

A second question is whether different products, which can still serve the same purposes, can be considered "like" products in the sense of competing or substitutable products? The answer to this question involves the consideration of different parameters and a rather intricate analysis which can only be done on a case-by-case basis. For example, in the context of forest certification, when assuming that certified timber does not compete with uncertified timber, Article III of the GATT would not apply and would therefore not be infringed. Conversely, if special conditions are granted to certified timber, there could be a case of violation of GATT Article III.

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<sup>448</sup> Geraets and Natens 2013, p.25.

<sup>449</sup> Brack 2013, p.10.

<sup>450</sup> Fishman and Obidzinski 2014, p.266.

<sup>451</sup> *Idem*.

<sup>452</sup> *Id.*

<sup>453</sup> Klabbers 2000, p.27.

In any case, 'likeness' is customarily assessed based on criteria such as physical properties, end-uses, customs classification, or even manufacturing processes.<sup>454</sup> In the *US Shrimp case*, where the US prohibited import of shrimp and shrimp products fished with methods that killed endangered sea turtles, the Appellate Body found that although the US measure in dispute serves an environmental objective that is recognized as legitimate under paragraph (g) of Article XX of the GATT 1994, the said measure as applied by the US constitutes an arbitrary and unjustifiable discrimination between WTO Members, contrary to the requirements of the chapeau of Article XX.<sup>455</sup> The interest of this ruling for the analysis of the EUTR is that the Appellate Body considers that such shrimps caught without the use of a mechanism for excluding sea turtle by-catch could rightly be categorized as being *unlike* shrimp caught in manner that protects turtles.<sup>456</sup>

As such, the Appellate Body's decision in this case set a legal precedent paving the way for the possibility of basing trade restrictive measures on the process used to produce a product.<sup>457</sup>

### 7.3 Analysing compliance with GATT Article XX exceptions

It can easily be argued that the prohibition of placing illegally harvested timber on the EU market is justified for the protection of plant life and to some extent the lives of forest-dependent people. However, it is less obvious to claim that this prohibition constitutes the least trade-restrictive measure to achieve the objective set by the EUTR. In fact, the prohibition requirement could be said to impose an additional documentary requirement for proof of legality on the entire timber and timber products sector. Considering that the majority of the products of the timber sector are legal, this additional burden could result in "an unnecessary degree of disruption to trade, raising timber prices, reducing demand for timber and encouraging consumption of timber substitutes."<sup>458</sup> However, proving legality varies from one country to the other and does not always involve high costs, especially when national and international legality verification schemes or voluntary certification schemes are used.<sup>459</sup>

It is worth mentioning that in the *US Shrimp case*, the US failed to comply with minimum standards for transparency and procedural fairness in the administration of trade regulations as provided in GATT Article X:3.<sup>460</sup> Indeed, the certification procedures, or where appropriate, the refusal of certification were entirely at the discretion of the American authorities, offering no formal legal procedure for review of, or appeal from, a denial of an application.

The EU food law imposed measures aimed at ensuring a high level of protection of the health and life of consumers within the EU. Through this scheme, exporting countries must be able to demonstrate that their legal and institutional frameworks are able to offer the same level of protection as offered by EU law. Failure to comply results in a prohibition to export food and food products to the EU. When the exporting country's Competent Authority has received approval from the EU after an inspection of the Food and Veterinary Office, prohibition to export to the EU could still apply to specific companies in that exporting country. Although the EU has offered capacity building to various exporting developing

<sup>454</sup> Klabbers 2000, p.26.

<sup>455</sup> WTO AB 6 November 1998, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/RM ('*US Shrimp*'), para. 186.

<sup>456</sup> Fishman and Obidzinski 2014, p.267.

<sup>457</sup> Fishman and Obidzinski 2014, p.267.

<sup>458</sup> Brack 2013, p.5.

<sup>459</sup> *Idem*.

<sup>460</sup> *US Shrimp*, para. 183.

countries, the EU food regulation has had devastating effects on international food trade, with many countries having been banned from exporting for shorter or longer periods, while some companies in these countries have gone downright bankrupt. Unlike the EU food safety regulatory regime, the EU timber regime does not require third countries to comply with EU law. By contrast, third countries are required to ensure legality based on their own regulatory regimes. Within the context of VPAs, putting in place a legality assurance system has nevertheless revealed challenging for partner countries due to the drastic reforms that such a system requires in order to demonstrate legality. Even though FLEGT licensing schemes are voluntary in nature, operational systems bring along legal constraints for VPA partners as unlicensed timber and timber products will be denied access to the EU market.

## 7.4 Summary and analysis

The purpose of the WTO is not to prevent its Members from taking legitimate measures, even though these measures might have an impact on international trade. The aim of the WTO is to prevent such measures from having an impact on trade liberalization to an extent that is not necessary to achieve the goal pursued by adopting the measure. This means that (1) the more a measure restricts trade or diverges from the core WTO principle of non-discrimination, the more vulnerable such a measure will be to a challenge under the WTO; (2) the more trade-disruptive the measure is, the more vulnerable it could be to a challenge under the WTO.<sup>461</sup> In practice, trade negotiations within the framework of VPAs, seeking bilateral exchanges, mutually beneficial schemes, and providing a framework for capacity building would most probably not lead to infringement of WTO provisions. The WTO itself encourages country seeking to adopt a trade measure to negotiate in good faith with its trading partners in order to conclude a multilateral agreement. In the *Shrimp Turtle* case, the US was found to have not sufficiently tried to engage in negotiations with the complainants. However, the Appellate Body later clarified that unilateral environmental measures that restrict trade may still be lawful even in the absence of bilateral or multilateral agreements. In the context of VPAs, mutually agreed trade agreement would most probably not lead to a WTO challenge, especially not a challenge brought by one of the Party to the agreement. As far as the EUTR is concerned, the stakeholders' requirements and their indiscriminate application to domestic and foreign products suggest a cautious approach that is designed to elicit the support of third countries and withstand WTO challenges. It is however important that implementation and enforcement remain consistent across jurisdictions to take up the challenge of non-discrimination.

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<sup>461</sup> Brack et al. 2012, p.6.



## 8 CONCLUDING REMARKS

The G8 action programme on forests which was launched in May 1998 was the catalyst for international action against illegal logging. Despite various negotiations that followed across the world, including in Africa, East Asia and Europe, success in tackling the illegal logging issues and trade in illegal timber remain mixed. The movement has certainly made significant progress with the adoption of innovative legislations by major consumer countries such as the EU and the US. These regulatory frameworks were intended to curb the trade in illegally harvested wood by instituting measures that rely on the laws of the country of harvest so as to ultimately reduce the adverse effects of illegal logging. There is indeed increasing awareness of the negative environmental, economic and social consequences of the phenomenon. The role of corruption and fraud in the scale of illegal logging has also become undeniable. Violations of human rights, violence against whistleblowers and journalists, and even murder cases only accentuate the issue, and are a definite call for improved cooperation among trading partners and better regulation of logging activities.

The EU took regulatory steps aimed at transnational forest governance that combines demand and supply-side measures in order to address illegal logging issues and prevent trade in illegally harvested timber and timber products. The FLEGT Action Plan was adopted in 2003 to define EU's policy to combat illegal logging and associated trade. The FLEGT AP gave rise to the Forest Law Enforcement, Governance and Trade (FLEGT) Regulation and the European Union Timber Regulation (EUTR).

Increasingly relevant laws in the country of harvest are given a prominent position in defining timber legality. The FLEGT Regulation focuses on this approach and adopts supply-side measures, including Voluntary Partnership Agreements (VPAs) with timber-producing countries outside the EU. In VPAs, a legality assurance system has been promoted to establish the procedures according to which a timber exporting country intends to reconcile diverse legal sources and processes that would enable to define legality. The legality definition ensures that forest law requirements are applicable, consistent, understandable and enforceable.<sup>462</sup> As such, timber legality is context-dependent as it takes account of the specific legal system of the producer country, particular challenges and features in the supply chain, as well as the partner country's social, economic and environmental objectives.

But often, laws and regulations of exporting countries are complex. In that regard, many resources are emerging that can help importers comply with voluntary and mandatory legality requirements in the global marketplace, including certification and verification systems, and supply chain management resources.<sup>463</sup> Legality verification represents a hybrid of global certification and FLEG efforts: similar to FLEG efforts legality verification recognizes and promotes national sovereignty; however like certification it relies on third-party verification.<sup>464</sup>

"Legality verification" has been given increased importance as a leading policy instrument with which to combat the forest degradation and deforestation associated with illegal logging.<sup>465</sup> Timber legality verification is one of the most recent global instruments for forest governance, focusing on ensuring

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<sup>462</sup> EU FLEGT Facility, What is a Voluntary Partnership Agreement ?, available at <https://www.euflegt.efi.int/what-is-a-vpa>.

<sup>463</sup> Nogueron and Cheung 2014, p.10.

<sup>464</sup> Cashore and Stone 2012, p.15.

<sup>465</sup> Cashore and Stone 2012, p.15.

traceability along the supply chains, providing more significant reflection on technical challenges and innovations to remove illegal supply (or a portion of it) from global forest products.<sup>466</sup>

With regard to forest certification, certificates from the Forest Stewardship Council (FSC) and the Programme for the Endorsement of Forest Certification Systems (PEFC) and associated systems are often recognized as means to comply with legality requirements. Other resources include independent third-party verification to verify “the legality of the product against a pre-determined standard or set of criteria and indicators.”<sup>467</sup> This involves a two-level process whereby the timber legality origin is for instance used to ensure that the place where the timber was harvested is legally designed for such use. The second level enables the verification of compliance of the harvesting operation with applicable laws and regulations. These legality verification systems and projects often include chain-of-custody criteria to ensure traceability through the supply chain and make certain that verified products are not mixed with non-legally verified products.<sup>468</sup>

The timeframe as regards the implementation of any VPAs and the risk of circumvention and laundering make VPAs alone insufficient to address the problem of illegal logging. As a result, the EUTR was adopted to prohibit the placing of illegally harvested timber or timber products on the internal market. It requires operators to exercise due diligence to ensure that the risk of illegality is negligible. Traders, in turn, must meet traceability requirements. The FLEGT-licensing scheme links these demand-side and supply-side measures.

These measures contributed to increase cooperation between the EU and many producer countries on the basis of voluntarily formed contracts. Bilateral negotiations and capacity building have sparked major legal and institutional reforms in VPA partners in order to establish effective legality verification systems. In addition, thanks to the inclusive participatory approach advocated by the agreements, a greater acceptance of the laws is expected, which will in turn lead to better implementation and enforcement.

Within the EU, the prohibition to place illegally harvested timber or timber products on the internal market and the requirement to exercise due diligence also have positive impacts on improving forest governance. To name but a few, enforcement actions unveiled major shortcomings in the verification system in Myanmar, followed by drastic measures for improvement. Weak implementation and enforcement within the EU itself were highlighted by a few cases, and Competent Authorities have endeavored to seek adequate solutions to address the issues. Substantiated concerns by civil society have been one of the major contributors to the progress made because the constant scrutiny of these actors helped enlighten decision-making by both economic operators and enforcement authorities.

## 8.1 Substantiated concerns by third parties

The opportunity given to civil society actors and non-governmental organizations to be involved in the enforcement of the timber regime is an important pillar in the fight against illegal logging. 182 substantiated concerns were addressed to CAs between 2016 and 2018. Even though Member States generally interpret and assess these concerns in different ways, more than half of the received

<sup>466</sup> Jonsson et al. 2015; Cashore and Stone 2012, p.15.

<sup>467</sup> Nogueron and Cheung 2014, p.11.

<sup>468</sup> *Idem*.

substantiated concerns led to checks on both domestic and imported timber. 49 of these checks revealed non-compliances which resulted either in notices of remedial action, penalties or court cases.<sup>469</sup>

The importance of these substantiated concerns can also be illustrated by the commitment of EIA to support reform efforts towards effective forest governance. With regard to Myanmar, EIA has submitted 15 substantiated concerns in 6 countries, and two substantiated concerns in Italy related to timber sourced from Laos. EIA's US office has also conducted investigations into Chinese plywood being traded into the EU, leading to substantiated concerns in three countries. EIA is also working in tropical timber producer countries, particularly Indonesia and Vietnam, to support the development of robust VPAs between these countries and the EU. Each of the substantiated concerns followed several months of (undercover) investigations, illustrating the commitment of the organization to advance the fight against illegal logging.

The work of these organizations equally helped decision-making at meetings of the Expert Group/Multi-Stakeholder Platform on Protecting and Restoring the World's Forests, including the EU Timber Regulation and the FLEGT Regulation.

However international efforts hinged on a combination of factors, e.g. commitment by the partner countries, establishment of the necessary governance arrangements, and a clear and evidenced commitment from the EU and other major producers and importers to act together for a common purpose.<sup>470</sup> Illegal logging is rarely confined to one specific country. A global response is needed to account for this transnational character because countries that are lagging behind can contribute to significantly undermine the regulatory efforts of the few that are pioneering in tackling illegal logging. In this regard, the case of China certainly deserves to be underlined.

## 8.2 Implications of Chinese trade on illegal logging regulation

China has been reported to be the world's biggest trader in illicit timber.<sup>471</sup> While China and the U.S. are the top two largest wood products trading countries, China's total value of wood products trade (imports and exports combined) surpasses that of the U.S. in 2010. China is also the largest supplier of wooden furniture and flooring imports, most of which is exported to the EU and the US.<sup>472</sup> China's importance in the timber trade is indicative of the fact that further progress against illegal logging depends on the nation taking measures to exclude illicit timber from its market.<sup>473</sup> In 2013, while in most countries the import of illegal timber was strongly reduced after the adoption of the FLEGT AP, in China the import of illegal timber is estimated to have increased. Moreover, China continues to logs from countries from countries in which a log export ban is in place – namely, Equatorial Guinea, Ghana and Côte d'Ivoire. Myanmar, Laos and Vietnam also export significant volumes of suspected illegal products to China – primarily logs, sawnwood and veneer. The report also underlines that the largest proportion of high-risk imports consists of logs – nearly half of all such imports in 2013 – while the remainder comprises mostly sawnwood and pulp. These three products also account for the majority

<sup>469</sup> WWF 2019, p.14.

<sup>470</sup> European Court of Auditors 2015, p.15.

<sup>471</sup> EIA 2012, p.3.

<sup>472</sup> Lu et al. 2014, p.660.

<sup>473</sup> EIA 2012, p.3.

of China's low-risk imports, together with paper.<sup>474</sup> China itself participated in several initiatives aimed at combating illegal logging including the East Asia and Europe and North Asia FLEG ministerial conferences, which took place in 2001 and 2005 respectively. China is also actively engaged with the EU, the US and Russia on the subject and signed memorandums of understanding with timber exporting countries such as Indonesia and Myanmar.<sup>475</sup> Nevertheless, China has not yet taken strong regulatory steps like the EU and the US towards eliminating illegal logging and trade in illegally products.<sup>476</sup> Despite the lack of specific legislation on illegal timber trade, partly in response to the increasing pressure from international NGOs, the Chinese government and industry stakeholders have however launched several voluntary certification and membership initiatives that highlight the importance of supply chain traceability and due diligence : Legal Timber Verification (LTV) certification, the China Responsible Forest Product Trade and Investment Alliance and the China Timber Legality Verification Scheme (CTLVS). Moreover, the State Forestry Administration has published voluntary guidelines emphasising legal timber production, trade and investment for Chinese timber companies.

On 1 July 2020, China's amended forest law came into effect, marking the first revision of the law in over twenty years.<sup>477</sup> The amendment introduced new components that clarify forest ownership in China, management and logging control measures for forest protection. Article 65 of the amended forest law stipulates: "Any timber operating or processing enterprise shall keep a standing book for entry and exit of raw materials and products of woods. No organization or individual may purchase, process, and transport woods in full awareness of their illegal origins such as illegal felling or wanton deforestation." While the law seems to introduce a ban on illegally sourced timber, it has clear ambiguity and thus leaves a loophole if an operator claims lack of knowledge.<sup>478</sup> More than a year after the entry into force of the amended forest law, its impact on the Chinese involvement in trade in illegal logged timber remains to be seen. Strong enforcement is therefore very important, and an implementable due diligence system is urgently needed.<sup>479</sup>

As regards the EUTR, a few challenges still need to be addressed to ensure the full effectiveness of the regime. The EUTR is not uniformly implemented across Member States and sometimes a low budget allocation contributes to weak enforcement. Other issues such as the lack of a harmonized definition of illegal logging and the limited scope of the EUTR are also stumbling blocks for the timber regime.

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<sup>474</sup> Wellesley 2014, p.19.

<sup>475</sup> Other initiatives include: producing in 2009 of "A Guide on Sustainable Overseas Forest Management and Utilization by Chinese Enterprises"; hosting in 2011 the first APEC forestry ministers meeting, where the focus was on promoting sustainable forest management. See OECD 2012, p.57.

<sup>476</sup> Two articles in the Chinese Regulation on the Implementation of the Forestry Law of the P.R.C. (2000) do refer to legality. "Timber-sourcing companies and individuals are not allowed to source timber without harvesting permits (in the case of timber produced in China) or other evidence of legal origin (Article 34).

To obtain timber transportation permit, one needs to provide the following documents: 1) timber harvesting permit or other evidence of legal origin... (Article 36)." However, this Regulation is not explicit as regards what constitutes "other evidence of legal origin." See Tacconi 2016, p.29.

<sup>477</sup> Forest Law of the People's Republic of China.

<sup>478</sup> Clientearth, 2020, China introduces new law to safeguard forests and improve governance

<https://www.clientearth.org/latest/latest-updates/opinions/china-introduces-new-law-to-safeguard-forests-and-improve-governance/>

<sup>479</sup> *Idem*.

### 8.3 Defining illegal logging

Despite the progress in regulating illegal logging, the concept itself has not been clearly defined. Countries, organizations and various stakeholders still have different interpretations as to what illegal logging actually entails. While the 'applicable legislation' in the country of harvest is used as a benchmark to define illegal logging in each specific context, the relevant laws are still difficult to navigate because there is no clear definition of the fields of law that are to be included. There is a need for a clear and comprehensive definition that would facilitate a greater compliance with the requirements of the EUTR. Such a definition should be practical, enforceable, and cover environmental, social, political, and economic issues and spell out the responsibilities of those involved.<sup>480</sup>

#### 8.4.1 Scope of the EUTR: exception printed products

The EUTR does not cover every product which could include illegal timber and it also leads to arbitrary differences between products that are included and excluded. For example, while most wooden furniture is included, wooden seats are not.<sup>481</sup> Other products such as wooden coffins and musical instruments are also not covered by the EUTR. Moreover, excluding recycled products and printed materials such as books, magazines and newspapers from the scope of the EUTR seems to be subject to controversy. The EU imports each year a total worth of €3.2 billion of printed products, 25 per cent of which coming from China.<sup>482</sup> Considering that a large proportion of all wooden raw materials enters China from Burma, Russia, the Amazon region of Brazil and the African Congo Basin where the prevalence of illegal logging is high, it is suspected that illegal harvested timber can still reach the EU market in the form of books, magazines and other printed products imported from abroad, especially from China.<sup>483</sup> This situation could undermine a level-playing field and potentially lead to unfair competition. Since paper itself is not excluded from the EUTR, unlike foreign suppliers, the European paper industry will have to comply with due diligence requirement. As a result, print buyers may prefer non-European suppliers to avoid high compliance costs, thereby excluding European papermakers and their suppliers.<sup>484</sup>

Overall, the wood products that are not covered by the EUTR can be placed on the internal market without any obligation to perform a risk assessment or ensure that the product is legally harvested. This loophole can limit the effectiveness of the EUTR.

In 2018, a public consultation was conducted by the European Commission on the product scope of the EUTR. Operators, traders, affected industry and/or trade associations, EU Member States' EUTR Competent Authorities, Monitoring Organisations under the EUTR, civil society organisations, non-EU timber-producing countries and the general public were invited to provide their views and evidence

<sup>480</sup> Waite 2012, p.338.

<sup>481</sup> EIA 2021b, p.10.

<sup>482</sup> Levashova 2011, p.295.

<sup>483</sup> *Idem*.

<sup>484</sup> Levashova 2011, p.295.

on possible changes to the EUTR product scope.<sup>485</sup> The results of this consultation should be acted upon to consider amending the product scope of the EUTR.

## 8.5 Criminalization of illegal logging?

Held in November 2005 in Madrid, Spain, the “Workshop on combating illegal harvesting of forest products and related trade in Europe”, supported discussions at the Pan-European Ministerial Conference on the Protection of Forests in Europe (MCPFE) aimed at developing options for prohibiting or criminalizing the importation and trade of illegally harvested timber, including preventing corruption and money laundering.<sup>486</sup> In the same way, in May 2014, the Member States of the United Nations adopted Resolution 23/1 on “strengthening a targeted crime prevention and criminal justice response to combat illicit trafficking in forest products, including timber”. The resolution included the promotion of the development of tools and technologies that can be used to combat illicit trafficking of timber. In the timber sector, corruption, fraud, money-laundering, violence and murder have indeed become commonplace and are clear signals for the need for strong actions.

In their letter addressed to the President of the European Commission, the EU Executive Vice-President for the European Green Deal, and three EU Commissioners<sup>487</sup>, Dacian Ciolos<sup>488</sup> and Vlad Gheorghe<sup>489</sup> emphasized the severity of the issue.<sup>490</sup> The letter pointed out that according to Eurojust environmental crime has become the fourth-largest criminal activity in the world, with an annual growth rate between five and seven percent. It recalled the commission’s report on Romania that estimates illegal logging costs to be up to €6bn every year. During 2014-2019 in Romania six people were killed and 650 wounded in violent attacks on foresters and activists trying to fight illegal logging.

Europol and the EnviCrimeNet have suggested that “any illegal action with a negative, harming impact on the environment can be regarded as environmental crime, as well as any offence in relation to endangered species.”<sup>491</sup> Environmental crime remains a low-risk and high-profit activity for perpetrators. Europol estimates that it can be as profitable as drug trafficking, but with much lower risk of detection and punishment. Given the scale of the problem, impunity cannot continue to be the norm. This letter, as well as multiple organizations and actors from the civil society are calling on the European Parliament to take action and institute an independent body that will tackle transnational environmental crime within the EU. Such a body “will facilitate information gathering, deliver investigative support, coordinate cross-border operations, facilitate prosecution and bring criminals to justice, alert national authorities to risk factors and share best practices. At the same time, it will raise public awareness of the ways to tackle environmental crime and its activities will be instrumental in investigating other types of serious crime, in strong cooperation with the European Public Prosecutor’s

<sup>485</sup> FLEGT.org, European Commission invites views on EUTR product scope, 2018, available at <http://www.flegt.org/news/content/viewItem/european-commission-invites-views-on-eutr-product-scope/05-02-2018/172>.

<sup>486</sup> MCPFE 2005.

<sup>487</sup> Namely the EU Commissioner for Environment, Oceans and Fisheries, EU Commissioner for Justice and the Eu Commissioner for Home Affairs.

<sup>488</sup> President of Renew Europe Group, European Parliament.

<sup>489</sup> Member of European Parliament.

<sup>490</sup> Ciolos D., Letter to the EC on environmental crime, Renew Europe, July 2021, available at <https://reneweuropengroup.app.box.com/s/fldybjxc18tm1tfkyq35h549qbe3ozkf>

<sup>491</sup> Ciolos, D, 2021, supra note 490



Office (EPPO), responsible for investigating and prosecuting fraud against the EU budget."<sup>492</sup> "A EU Green Prosecutor, as a framework of measures, is a progressive, timely and absolutely necessary solution to protect the nature in Europe from criminal exploitation, solution able to finally bring to response to EU citizens' legitimate claim for justice in environmental matters."<sup>493</sup>

## 8.6 Necessity to tackle Corruption

Corruption is endemic in the illegal timber trade<sup>494</sup> and is one of the biggest challenges to legality verification in timber supply chains. "Weak law enforcement has a significant impact on the extent of illegal logging activities because the likelihood of detection and prosecution of environmental crimes is low while the incentives to operate illegally are correspondingly high."<sup>495</sup> Many of the VPA countries have poor ranking in Transparency International's Corruption perception index. In the DRC for example, corruption in the forest is widespread, and it is reported that up until 2015, none of DRC's timber production met the requirement set in international timber trade laws.<sup>496</sup> Similarly, the case of Myanmar revealed many irregularities that cast doubts on the Competent Authority's ability to eliminate corruption from the licensing process.

It is also noticeable that many of the largest timber exporting countries in Africa (e.g. Cameroon, South Africa), Asia (e.g. Indonesia, China), or South-America (e.g. Brazil, Peru) are also some of the most heavily involved in corruption. Many VPA countries also have considerable needs with regard to anti-corruption measures due to their rankings in Transparency International's Corruption perception index. While in certain VPA countries a positive trend can be observed, most of them remain among the countries with the highest perceived rate of corruption in the world.<sup>497</sup>

Corruption within and around the forest sector undermines the design, implementation and subsequent monitoring of policies aimed at conserving forest cover, while also jeopardising development goals and poverty alleviation in many countries.<sup>498</sup> The prevalence of corruption in the timber sector has several causes. For example, in many timber-rich countries, particularly in Africa, the system is prone to corruption because the government is legally the largest landowner and the key actor in overseeing national logging matters. The majority of the global timber trade is produced from logging concessions on government-owned land, and concessions are often awarded through public tendering processes and include licenses and concessions. As a result, these contracts concentrate power in the hands of those who assign them, leading to a high risk of corruption, especially in contexts plagued with deep-rooted governance and accountability challenges.<sup>499</sup> In many producer countries on the African continent, land-tenures issues also contribute to illegitimate land grabbing and displacement of locals which are exacerbated by corruption. It therefore appears that timber reaching the EU market is at a great risk of originating from a supply chain contaminated with corruption. Legality verifications schemes must therefore include effective measures and strategies to tackle issues of corruption in timber supply chains.

<sup>492</sup> *Idem*.

<sup>493</sup> *Idem*.

<sup>494</sup> Elliot 2007, p.546.

<sup>495</sup> European Court of Auditors 2015, p.17.

<sup>496</sup> Global Witness 2015, p.8.

<sup>497</sup> European Court of Auditors 2015, p.17

<sup>498</sup> Global witness 2017, p.6.

<sup>499</sup> Global witness 2017, p.6.



Since 1977, the US enacted the Foreign Corrupt Practices Act (FCPA) for the purpose of making it unlawful for certain classes of persons and entities to engage in bribing foreign government officials and corruption abroad.<sup>500</sup> In 2016, France adopted its law on Transparency, the Fight against Corruption and Modernization of the Economy.<sup>501</sup> At the EU level, the EU Transparency Directive<sup>502</sup> was amended in 2013 to require extractive or logging of primary forest industries to deliver reports on payments they make to governments.

## 8.7 Recommendations

- 1- The EUTR should provide a clear and comprehensive definition of 'Illegal logging'. Such a definition should incorporate laws against corruption and tax evasion, laws protecting the rights of forest communities and laws against human rights violations;
- 2- The product scope of the EUTR should be reviewed and extended to include all timber and timber products sold on the EU market to ensure an effective level-playing field and eliminate unfair competition and trade diversion;
- 3- Taking the example of the interpretation of "operator" in German case law, the definition of an operator under the EUTR could be extended to include "any person who by virtue of its economic or other influence, exerts control over logging or import processes";
- 4- The due diligence obligation should be extended to traders to increase their liability and reduce the risk of trade circumvention. The prohibition to place illegally harvested timber and timber products on the EU market should be addressed both against operators and against traders;
- 5- The EU should promote the use of scientific methods to monitor deforestation and verify the legal origin of timber;
- 6- The EU should support Member States in allocating a more significant budget to the implementation and enforcement of the timber regime. This would contribute to a more consistent approach throughout the EU;
- 7- Existing penalty regimes should be assessed and revised where applicable, taking into account the damage to the environment and the profit derived from illegal activities. A more

<sup>500</sup> Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494.

<sup>501</sup> French Law on Transparency, the Fight against Corruption and Modernization of the Economy, n° 2016-1691, 9 December 2016.

<sup>502</sup> Directive 2013/50/EU of the European Parliament and of the Council of 22 October 2013 amending Directive 2004/109/EC of the European Parliament and of the Council on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, Directive 2003/71/EC of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading and Commission Directive 2007/14/EC laying down detailed rules for the implementation of certain provisions of Directive 2004/109/EC Text with EEA relevance, *OJ L 294*, 6.11.2013, p. 13–27.

harmonised approach across Member States should be promoted to limit the risk of changing supply routes;

- 8- As currently data on monitoring, enforcement and sanctioning are largely lacking, it is of crucial importance to collect data on the enforcement of the EUTR in the Member States, i.e. on the inspection activities, the number of violations established and the types and size of the sanctions imposed;
- 9- The necessity for an EU Green Prosecutor should be considered to account for the transnational character of environmental crimes, including illegal logging and associated financial crimes and human rights violations. A Green prosecutor at EU level would facilitate cross-border investigations and harmonised prosecutions across the EU;
- 10- The need for cross-sectoral mandatory human rights and environmental due diligence legislation should be explored. Such regulatory instruments should provide for effective remedies and access to justice for victims, as well as liability for companies.
- 11- Compliance should not be solely motivated by the fear of sanctions. Increased awareness raising among operators/traders can trigger voluntary compliance initiatives and a shift towards more systematic Corporate Social Responsibility- along the supply chain.

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## Abstract

This study, commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the PETI Committee, aims at gaining deeper insights into the legal aspects of illegal logging and related trade in illegally harvested timber and timber products. It analyses the legal requirements and their implications. The study examines the disparities in enforcement and penalties regime in Member States and analyses their role in trade diversion. The study further explores the possibility for strengthening the timber regime by broadening its scope and tackling underlying issues such as corruption and human rights violations. The study also assesses the external dimension, specifically focusing on the Voluntary Partnership Agreements with major producers' countries. The study formulates various recommendations to improve the regime taking into account both the internal and external dimension of illegal logging