

Regulation concerning the placing of timber and timber products on the EU market

SUMMARY assessment and suggestions for improvement

As a major consumer and importer of timber, the EU has a duty to adopt timber legislation that bans illegal timber from the EU market, makes corporate actors accountable, reduces its environmental and social footprint on the world's forests and helps reform the international forestry sector.

The draft law, as proposed by the Commission, will not achieve these goals. Greenpeace and Friends of the Earth Europe therefore urge the EU Council to work with the European Parliament to make the necessary amendments to transform this law into an effective and therefore credible tool to fight illegal forest destruction.

As a matter of priority, we believe the Commission proposal should be amended to:

1. Establish a strong legality standard for wood and wood products that supports the goals of forest and biodiversity protection, climate change mitigation and respect the rights of forest-dependent people.
2. Explicitly prohibit the import, selling and possession of timber and timber products from illegal sources, and set out strong sanctions against those involved in such practices.
3. Provide the regulator (relevant government departments, competent authorities, etc) with powers to control the trade in timber products, investigate crime and alleged infringements, take immediate measures towards enforcement and prosecute offenders.
4. Require operators (traders, commercial entities, etc) to provide documentation proving the legality of their products, and establish rules for :
 - a reliable traceability system that requires third party verification, tracking wood products from forests to retailers,
 - an EU-wide independent public monitoring system to assess and ensure harmonized performance levels of private certification and chain of custody schemes, and
 - a public information system to help operators identify high-risk products or suppliers.
5. Delete the loophole that has been created to exempt wood products used for energy production (and other wood products, which may be subject to mandatory sustainability criteria in the future) from being covered by the law.
6. Enter into force and be implemented immediately after its approval. Deforestation and forest degradation are urgent matters. Implementation should not be delayed by an additional two years after approval.

DETAILED assessment and suggestions for improvement

1. Establish a strong legality standard for wood and wood products that supports the goals of forest and biodiversity protection, climate change mitigation and respect the rights of forest-dependent people.

We are seriously concerned about the proposal's poor contribution towards the objectives of halting deforestation, mitigating climate change, reducing biodiversity loss, alleviating poverty and protecting indigenous peoples' rights. In the proposal, "legally harvested timber" is defined narrowly, limiting legality to compliance with a subset of the domestic laws under which timber is harvested and traded. It also excludes equally relevant regional and international conventions and agreements that the EU and major forest-rich countries have signed throughout the years.

The proposed Regulation should require that all legal timber fulfils the principles of sustainable forest management: i.e. legality should be defined in a way that encompasses all relevant domestic economic, social and environmental laws, and that prevents and discourages operations in contravention with international laws. By setting a strong legality standard, the EU would ensure that operations, which exploit poor governance, cause environmental damage and exacerbate social conflicts, become unprofitable.

We suggest the following improvements:

- The preamble should attest to the fact that the European Community and its Member States have legally and politically committed themselves to the conservation of forest biodiversity and sustainable use of forest resources, to sustainable forest management, as well as poverty alleviation and the protection of the rights of indigenous peoples, and local and forest-dependent communities. The proposed Regulation should actively contribute to the fulfillment of these international obligations and commitments, including in particular those contained in footnote 1 of this document.¹
- The fourth recital should be amended to reflect the full and correct objective of the package of measures proposed by the Commission in its Communication on an EU FLEGT Action Plan (May 2003), as follows: "support international efforts to tackle the global problem of illegal logging and associated trade and contribute to the wider objective of sustainable forest management" (underlined text should be added, mirroring the original wording of the Commission)².
- The fifth recital should be amended to reflect accurately the Agriculture Council Conclusions of October 2003. Particular emphasis was placed by European Agriculture Ministers on the need to address the problem of illegal logging 'within the framework of sustainable development, sustainable forest management and poverty reduction, as well as social equity and national sovereignty'. Hence this should be added.³

¹ The Convention on Biological Diversity of 1992 (CBD); the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES); the International Tropical Timber Agreements (ITTA) of 1983, 1994 and 2006; the United Nations Framework Convention on Climate Change (UNFCCC); the United Nations Convention to Combat Desertification; the Rio Declaration on Environment and Development; the Johannesburg Declaration and Plan of Implementation as adopted by the World Summit on Sustainable Development in September 2002; Intergovernmental Panel on Forests/International Forum on Forests Proposals for Action; the UNCED Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests; Agenda 21 as adopted by the United Nations Conference on Environment and Development in June 1992; the United Nations General Assembly Special Session (Ungass) resolution 'Programme for the further implementation of Agenda 21; the Millennium Declaration; the World Charter for Nature of 1982; the Declaration of the United Nations Conference on the Human Environment of 1972; the 1972 Action Plan for Human Environment; the proposals of the Intergovernmental Panel on Forests endorsed by the United Nations General Assembly in its 1997 Special Session; the United Nations Forum on Forests, Resolution 4/2; the Stockholm Declaration; the Convention on European Wildlife and Habitats.

² Proposal for an EU FLEGT Action Plan (May 2003), p.5 : "This Action Plan adopts the same approach taken in the Africa and Asia regional processes, and deals only with the question of legality, but it should be noted that the EU's wider objective is to encourage sustainable forest management[...]. The Action Plan should thus be placed in the context of the overall efforts of the European Community to achieve sustainable forest management, both within and outside the EU".

³ Agriculture Council Conclusions (2003/C 268/01), point 6, "Acknowledges the fact that forest law enforcement, governance and trade needs to be addressed within the framework of sustainable development, sustainable forest management and poverty reduction, as well as social equity and national sovereignty"

- In the operational part of the Regulation, the principles and overall goals of the proposed Regulation should be spelt out. In particular, the Regulation should be explicitly stated that the Regulation will be implemented in conformity with *'the precautionary principle'* and the principles that *'preventive action should be taken'*, that *'environmental damage should, as a priority, be rectified at the source'*, and that *'the polluter pays'*. Member states shall also ensure that timber and timber products placed on the European market *'do not cause damage to the environment in areas beyond their jurisdiction'*, contribute to *'sustainable development'* and to *'the safeguarding and promotion of the rights of indigenous peoples, local and forest-dependent communities'*.
- Moreover, the Regulation should require Member States to:
 - create strong incentives to implement sustainable forest management and deter the illegal harvesting of timber and timber products, amongst others by preventing the placement of such illegally obtained products on the European market, promoting and assisting sustainable forest management and utilisation, and levelling the playing field for sustainable and responsible businesses;
 - contribute to the implementation of 'applicable legislation', as defined in Article 2 (f) of the proposed Regulation, and international commitments, principles and recommendations including also those concerning mitigation of climate change, reduction of biodiversity loss, reduction of desertification, labour and community welfare, payment of taxes, royalties or fees to local, state and national governments, land tenure and the protection and promotion of the rights of indigenous peoples, local and forest-dependent communities,
 - ensure maintenance of high conservation value forests (HCVF) in the context of a precautionary approach.⁴

The definition of 'applicable legislation' should be amended accordingly.

- Finally, the Council should include provisions to ensure that timber and timber products that are placed on the EU market do not come from forests in conflict areas. Due diligence systems should be used to this end.

2. Explicitly prohibit the import, selling and possession of timber and timber products from illegal sources, and set out strong sanctions against those involved in such practices.

If adopted as proposed, the Regulation would NOT prohibit the import, selling and possession of illegal timber outright. It would only be considered a breach of the Regulation, if operators were found not to have put in place an acceptable 'due diligence system'. The proposal should be amended to explicitly make trading in illegal timber and timber products, or the placing of these products on the market a punishable offence. This is the approach the U.S. has taken in its revised Lacey act, adopted in June 2008. Moreover, in the case of EU fisheries, the Member States have agreed to prohibit the selling of illegally caught fish (see Reg. 1005/2008 to prevent, deter and eliminate illegal, unreported and unregulated (IUU) fishing).

- Member States shall regard as infringements the placing on the market of any timber and timber products that have been harvested, taken, sold, traded or possessed in contravention with the applicable legislation, if attempted or committed with intent, recklessly or by serious negligence.
- With a view to establish a strong, coherent and dissuasive regime of penalties against the illegal exploitation of natural resources at EU level, Member States should draw upon existing models of legislation in this field, including the Illegal Fishing Regulation (Reg. 1005/2008).
- Using similar text as in the Illegal Fishing Regulation (Reg. 1005/2008), the proposed Regulation should be amended to include sanctions (e.g. in Article 13), in particular by adding provisions of the following type:

⁴ Maintenance of HCVF is a criteria widely applied by the Forest Stewardship Council (FSC) and recognized by the Roundtable for Sustainable Palm Oil (RSPO).

- (i) Fines should be proportionate to the tax losses and environmental damage occasioned by the infringements, and should be at least 'X' times the value of the timber or timber products obtained by the infringement of the regulation.
- (ii) Without prejudice to other provisions laid down in community law, pertaining to public funds, Member States shall not grant any public aid under national aid regimes or under community funds to operators convicted in an infringement of the regulation.

3. Provide the regulator with powers to control timber products, investigate crime and alleged infringements, take immediate measures towards enforcement and prosecute offenders.

National control authorities should be given the necessary powers to control timber products traded in or placed on the market. They should further be given the means (incl. staffing and financial resources) to detect illegalities and take immediate enforcement measures, investigate crime and alleged infringements and prosecute offenders.

In the current draft, their role is limited to controlling due diligence systems, rather than the trade and marketing of timber and timber products itself. For the purposes of achieving the objectives of the Regulation, the due diligence approach should be supplemented by an additional control approach, by extending the role of competent authorities. In particular, their mandate (Article 7) should include the possibility to perform a range of actions, including field audits, investigations, raids and sting operations.

As is the case of the Illegal Fishing Regulation (Reg. 1005/2008), competent authorities should also be equipped with powers to take immediate enforcement measures, when a natural person is suspected of having committed or is caught in the act of committing an infringement, or a legal person is suspected of being liable for such an infringement. The enforcement measures shall be of such nature as to prevent the continuation of the infringement concerned and to allow the competent authorities to complete its investigation.

The following immediate enforcement measures should be considered (consistent with the Illegal Fishing Regulation):

- Immediate cessation of commercial activities;
- Rerouting to port of the shipment, or the temporary immobilization or rerouting of the transport vehicle to another location for inspection;
- Seizure of timber and timber products;
- Temporary immobilization or confiscation of any transport and supply vehicle or machinery used for the operation concerned;
- Suspension of the authorization to place timber and timber products on the market,

Moreover, mirroring the Illegal Fishing Regulation, a new article should be added to establish clearly the criminal liability of legal persons committing infringements to the regulation concerning the placing of timber and timber products on the market.

Finally, the mandate of competent authorities in the EU Member States should be extended to control and investigate allegations of infringements to FLEGT licenses and CITES documentation, or they should be required to co-ordinate their activities with the relevant authorities dealing with FLEGT and CITES. This would allow the optimization of the sharing of information, knowledge and experience between competent authorities responsible for controlling timber products on the EU market.

4. Require operators to provide documentation proving the legality of their products

The legislation merely requires operators to have due diligence systems in place to assess and manage the risk of illegally harvested timber entering their supply chain. It does not require them to ensure the legal origin of products sold to consumers. In other words, the provisions are not sufficient to ensure full traceability, including proof of legality, of wood products from forests to retailers. The Regulation should be amended to require all operators until the last point of sale on the

EU market to provide documented proof of the legality of their timber products. Unless all operators are included, the risk of illegal timber or timber products being sold to consumers would increase.

To address these concerns, we recommend that the Council:

- Deletes Recital 12
- Amends Article 1 to state explicitly that the legality of timber products should be ensured throughout the supply chain, starting with the production in the forest. Regulators and operators should carry the responsibility for ensuring the legality of the timber and timber products placed on the market.
- Amends Article 4 to specify that due diligence systems shall ensure the legality of timber and timber products throughout the supply chain by means of traceability system and third party verification. A new provision should be made to clarify what requirements must be fulfilled to ensure robust and reliable traceability systems.

To strengthen the provisions on due diligence, we recommend that the Council:

- Extends the list of information on timber and timber products that should be provided as part of the due diligence systems (Article 5) to enable effective verification of the legality. In particular, the following should be added: the supplier, the name of the timber species, the country/area/concession of harvest, and the operator to which the product is being supplied.
- Requires monitoring organizations to demonstrate appropriate expertise
- Deletes the first two sentences of Recital 16. There is no evidence that membership-based associations or other organizations/federations of operators have the capacity and experience to effectively facilitate the compliance of their members. Self-regulation has not worked to date. Private entities should also not interpret legislation, nor monitor compliance with the rules, in their own capacity.

Furthermore, to enable European consumers to make an informed decision about their purchase, we recommend that the Council:

- Obliges operators to label timber and timber products placed on the EU market with information on the timber species, and the country/area/concession of harvest, as is already required for other products placed on the EU market, such as fish.

4a. Establish the rules for an EU-wide independent public monitoring system to assess and ensure harmonized performance levels of private based systems.

The proposed legislation is reliant on private-based systems of legality verification and risk management (referred to as 'monitoring organisations' in the proposed Regulation). Environment groups have expressed concern that some of the existing schemes are not robust enough and therefore may not provide reliable proof of legality.

While competent authorities are charged with recognising private-based schemes, they should do this in co-ordination with competent authorities in other Member States and with administrative authorities of third countries. Alternatively, the accreditation process could be centralised or co-ordinated through the Regulatory Committee. Without co-ordination, varying approaches to accreditation could create loopholes and unfair competition. The process should be opened to input from stakeholders and include a dispute-settlement procedure.

Furthermore, with a view to maintaining a level playing field within the EU, the Regulation should be amended to include an EU-wide public monitoring system to assess and supervise the long-term performance of these schemes on the ground, once they have received accreditation. The proposed Regulation should specify who will assess private schemes and how, and who and how one may initiate an appeal system in case of a drop in performance. To this end, amendments should be made to Article 5.

- EU inspectors should be mandated to carry out checks and field based audits on private schemes at regular intervals, or on the basis of substantiated concerns from a third party, to ascertain that individual schemes comply with the requirements of the Regulation. (This role should not be given to 'national competent authorities', as they should not be responsible for assessing those schemes that they have endorsed in the first place). Any failure to comply should be promptly reported to the Regulatory Committee.
- The Regulatory Committee (Article 11) should suspend or withdraw the recognition of a private scheme, if it has been established that the requirements of the Regulation are no longer fulfilled.
- The right to initiate such a procedure on the basis of evidence or substantiated concerns should be with EU inspectors, competent authorities, administrative authorities of third countries and other parties. Resulting decisions should be published in the Official Journal of the EU and made available on the Commission website.
- The Regulatory Committee should also ensure coherence with other relevant EU policies and regulations, for instance by suspending or removing the participation of deficient private schemes from other EU schemes, national aid regimes or Community funds.
- The Regulation should also set up a mechanism to oblige those private schemes that have been withdrawn or suspended to conform with the reforms and changes identified in the context of the assessment carried out by EU inspectors, before they can qualify for renewed endorsement.

An EU-wide public monitoring system would provide an incentive for private schemes to maintain good performance at all levels. It would also prevent situations in which European consumers and public authorities are provided misleading information.

4b. Establish the rules for a reliable public information system to help operators identify high-risk products or suppliers.

The creation of a strong and reliable EU risk management system is essential, if the EU is to make it harder for high-risk operators to sell timber and timber products on the European market. While the proposed Regulation requires operators to use risk management tools to direct monitoring and control efforts towards high-risk products or suppliers, it does not specify who determines the level of risk, on what grounds and with what aim.

One might interpret the provisions in a way that risk could simply be assessed by operators or industry federations. This effectively means self-regulation, and may result in weak risk analyses, legal uncertainties and unfair competition between companies based in different Member States. This should be avoided. To this end, a new article should be inserted which describes:

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

The following suggestions may be considered:

- Operators (or private schemes) should be required to determine and assess systematically the risks associated with products, suppliers, and countries or areas of origin. All measures necessary for limiting exposure to these risks, should be taken based, where appropriate, on international, Community, national or independent sources of information or risk management.
- In implementing a risk management procedure, operators (or private scheme) should be required to collect data and information, prescribe and take appropriate action, and monitor and review the process of risk management and any outcomes on a regular basis.
- The Commission and Member States (in accordance with the Regulatory Procedure with scrutiny) should help determine the level of risk by:

- compiling a list of existing sources of information that operators can use to assess risk levels;
 - developing guidance on the use of risk management tools; and
 - establishing and managing one or more public database(s) that keep record of the names of logging companies and operators convicted of illegal activities, the nature of the infringement and the country and area where the infringement occurred.
- Operators (or private scheme) should be required to take supplementary measures when faced with high-risk situations. This should include, for instance:
 - the obligation to give prior notification to the control authorities of the date and details of the transaction, and
 - the obligation to provide proof of relevant management systems under which the transaction is agreed.

Moreover, the draft Regulation should be amended to include a definition of 'risk. Risk is commonly defined in EU law as the likelihood of an event that may occur, with regard to a product placed on the European market, which prevents the correct application of the corresponding Regulation(s).

The definition of "risk management" that is contained in the proposal is inconsistent with the more detailed/stringent definition used in the recently adopted Illegal Fishing Regulation (Reg. 1005/2008). In the interest of coherence and clarity, it would make sense to apply the same definitions in all case of EU action against the illegal exploitation of natural resources.

6. The loophole for wood products used for energy production (and other wood products for which sustainability criteria will be developed in the future) should be deleted.

The Commission has proposed to exempt wood and wood products from the legislation, which are subject to mandatory sustainability criteria. The aim is to exempt "energy wood" and biomass from the obligations under the Regulation.

- This loophole should be deleted in order to avoid the creation of a double standard: if approved unchanged, EU rules would require « energy wood » and biomass to be sustainable but not necessarily legal, whereas all other wood products would need to be legal but not necessarily sustainable. Instead, it should be made clear in this Regulation that all timber and timber products must be legal, regardless of their end use.

It should also be noted that the new EU sustainability criteria would not apply to all biomass and « energy wood », but only to those that count towards targets set in the Renewable Energy Directive.

7. The Regulation should enter into force and be implemented immediately after its adoption.

The proposed Regulation aims to contribute to reducing greenhouse gases emissions and biodiversity loss from deforestation and forest degradation. The issue of legality and sustainability of timber has been discussed for many years and progressive businesses have already put in place systems, which will enable them to satisfy the requirements of this Regulation. Moreover, the process of negotiation will itself take time, while there is a need to reduce greenhouse gases emissions and biodiversity loss immediately. Consequently, Recital 23 should be deleted.

For further details, please contact:

Greenpeace EU Unit, Sebastien Risso, EU Forest Policy Director, Tel: +32 (0)2 274 19 01, email : sebastien.risso@greenpeace.org

MilieuDefensie for Friends of the Earth Europe, Danielle Van Oijen, Forest Campaigner, Tel : +31 (0)20 55 07 300, email: danielle.van.oijen@milieudefensie.nl