

Questions and Answers on the Proposed Regulation laying down the obligations of operators who place timber and timber products on the EU market

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A. ILLEGAL LOGGING AND ITS IMPACTS

1. What is illegal logging?

Illegal logging is the harvest, transportation, sale or purchase of timber in violation of national laws. The harvesting procedure itself may be illegal, including using corrupt means to gain access to forests; extraction without permission or from a protected area; the cutting of protected species; or the extraction of timber in excess of agreed limits. Offences can also occur whilst materials are being transported, such as illegal processing and export; fraudulent declaration to customs; and evasion of tax and other charges.

2. What is the extent of the problem?

The clandestine nature of illegal logging makes its global scale and value difficult to estimate in relation to the global trade in forest products. Strong evidence suggests that it is a substantial and growing problem. In many countries, illegal logging matches legal timber production or even substantially overtakes legal logging. Research also shows that more than half of all logging activities occur in particularly vulnerable regions, such as the Amazon Basin, Central Africa, Southeast Asia and the Russian Federation. While not generally considered a major EU problem, illegal logging has also been reported in some EU countries such as Bulgaria and Estonia.

3. What are the underlying motives and causes?

Illegal logging does not relate only to high demand for timber or weak law enforcement, but is part of a larger problem which consists of a lack of forest governance, and general corruption. The illegal exploitation of natural resources, including forests, tends to be closely associated with corruption and organised crime. Corruption in forestry can take many forms, ranging from give-away logging concessions, log smuggling and illegal logging operations, to fraud and tax evasion schemes. In some well reported cases, the corruption fuelled by profits from illegal logging has grown to such an extent that it undermines the rule of law, principles of democratic governance and respect for human rights. In other cases, the illegal exploitation of forests is also associated with violent conflict. Profits from exploitation of forests and other natural resources are often used to fund and prolong these conflicts. These factors in developing and emerging countries, compounded by strong international demand for timber, provide incentives for illegal behaviour including illegal logging on a large scale.

4. What is the economic cost of illegal logging?

Illegal logging costs governments vast sums of money. Estimates suggest that illegal logging costs timber-producing countries €10-15 billion per year in lost revenues, which could otherwise be spent on better healthcare, education and other public services, as well as on the implementation of sustainable forest management. Illegal logging and its associated trade undercuts timber prices and undermines the competitiveness of the legitimate forest industry in both exporting and importing countries. Companies trading legal timber face unfair competition from cheap, illegal timber. Ultimately, this type of activity largely discourages industry from engaging in forest operations that take a long-term perspective on exploitation and that foster sustainable forest management in particular, and sustainable development in general.

5. What are the social impacts of illegal logging?

The social impacts of illegal logging are less well known. Serious human rights abuses have, however, been documented particularly where local communities (including indigenous peoples or concerned citizens) have attempted to stand up to powerful logging interests. Illegal logging also provokes conflict over land and access to resources. In addition local people - who would otherwise use forest resources with a long term perspective to meet their basic needs - are forced into breaking the law because they are left with almost no other alternatives for survival. While illegal logging activities often stimulate rural employment, this is often short-term as resources are not managed in a sustainable and responsible fashion.

6. What are the environmental consequences of illegal logging?

In recent years there has been increasing awareness of the vital role that forests play in the global carbon cycle. Forests store roughly half the world's terrestrial carbon. There is now an ever-increasing consensus that unless the deforestation challenge is addressed, it will simply not be possible to limit global warming to 2°C above pre-industrial levels; nor will it be possible to reap the benefits of EU efforts to combat climate change. Illegal logging is one of the factors contributing to forest degradation and deforestation, the latter responsible for approximately 20% of global emissions of global carbon dioxide (CO₂) - more than the total EU greenhouse gas emissions. It undermines forest governance and sustainable forest management – both of which are essential elements to reach the proposed EU objective to halt global forest cover loss by 2030 at the latest and to reduce gross tropical deforestation by at least 50% by 2020, compared to current levels. Illegal logging also causes loss of biodiversity, for instance through logging in national parks, and is preceded by, or causes, unsustainable, illegal exploitation of wildlife.

7. What is the volume of the EU timber market and what percentage of that is considered illegal?

In 2005, 512 million m³ of timber and timber products (including pulp and paper products) were placed on the EU market, of which 142 million m³ was imported. While there are no reliable estimates for the use of illegal produce in the pulp and paper sector, it is estimated that some 19% of the 83 million m³ of timber and timber products imported (excluding pulp and paper products) is of illegal origin. This represents a volume of 16 million m³ of timber and timber products.

B. EU INVOLVEMENT

8. How is the EU affected by illegal logging?

Citizens of the EU are affected through the impact illegal logging has on global public goods, such as biodiversity loss and the long-term impact of forest loss on climate change. The industries in the EU that produce and trade in legal timber and timber products are put at a disadvantage as they face unfair competition from cheap illegal timber. EU donors contribute aid to countries affected by illegal logging, while at the same time a valuable resource is looted and the profits generated are lost to the state. High-level scandals relating to imports of illegal timber into the EU have shaken consumer confidence in EU timber purchasing policies. Illegal logging also undermines many essential elements of the EU's development objectives: public sector financing for development targeted at the poor, peace, security, good governance, the fight against corruption, and sustainable environmental management.

9. How is the EU addressing this problem?

The EU's policy to fight illegal logging and associated trade was defined back in 2003 when the Forest Law Enforcement Governance and Trade (FLEGT) Action Plan was adopted. The FLEGT Action Plan consists of three essential elements:

1. The conclusion of FLEGT Voluntary Partnership Agreements with timber-producing countries which voluntarily decide to conclude such agreements in order to improve forest governance and transparency in the forest sector of the countries. The first agreement was successfully negotiated with Ghana in September 2008. Negotiations are at an advanced stage with Malaysia and ongoing with Cameroon, Indonesia and Congo. A good number of other timber-producing countries have expressed an interest in concluding a FLEGT agreement with the EU.
2. Public procurement policies for timber and timber products. The Action Plan encourages Member States to implement public procurement practices that give preference to legally harvested timber and timber products.
3. An assessment of additional measures, including legislation, to complement and strengthen the above-mentioned elements and address the problem of illegal logging and associated trade in a more comprehensive way. Such measures should prevent the trade in illegally harvested timber, further strengthen the growing demand for timber from guaranteed legal sources and act as an incentive for timber-producing countries to join FLEGT and improve forest governance.

The current Commission proposal constitutes the third essential element of the EU-FLEGT policy above.

C. OBJECTIVE AND SCOPE OF THIS REGULATION

10. What is the objective?

The objective of the proposed Regulation is to avoid illegally harvested timber and timber products from being placed on the EU market. In pursuing this objective, it also complements and strengthens the current policy framework, mainly the FLEGT Voluntary Partnership Agreements without putting unnecessary burdens on the economic operators.

11. What does the proposed Regulation require?

The proposed Regulation asks operators to take concrete steps to minimise the risk of putting illegally harvested timber and timber products on the EU market. In doing so, they will have to use a system, known as the due diligence system, which will enable them to ascertain the legality of the products. The proposal does not establish new conditions for the marketing of timber and timber products. It does require responsible and proactive behaviour by operators and it recognises the efforts of those operators that have invested in good practices and source guaranteed legal timber, for example by placing FLEGT licensed timber and timber products on the EU market .

12. How is legality defined?

“Illegal logging” can be defined as occurring when timber is harvested, transported, bought or sold in violation of national and/ or international laws. There is however, no internationally agreed definition. What is “illegal” depends on national laws. In order to avoid any discriminatory or unfair definition the country where the timber was harvested should be the basis for any such definition. In view of the environmental, economic and social impacts of illegal logging and related trade and in line with the objectives of this Regulation, the focus is on those national laws applicable to forest management, timber harvesting and timber trade.

13. What is 'due diligence'?

Due diligence means the prudence and activity expected from, and ordinarily exercised by, a reasonable person under the particular circumstances. It is commonly referred to as the 'duty of care'. However, the two concepts are distinct and in fact one flows from the other. 'Due care' reflects the duty to adhere to an obligation, often legal, and 'due diligence' to the concrete steps to be taken to fulfil this obligation. The principle of due diligence is commonly used in the banking, food safety and medical sectors. In the context of the proposed Regulation, due diligence entails the obligation on the part of the trader to seek reasonable assurance of the legality of the timber and timber products that he buys and sells and the specific process to underpin due diligence. Traders shall demonstrate the exercise of due diligence on the basis of a system of procedures and measures which will enable legality to be reasonably assured. This standard does not require that it is proven that each individual piece of timber is legal. Due diligence in the timber trade is not a new concept. The UK Timber Trade Federation (TTF) has for a number of years advised its members to voluntarily implement responsible purchasing policies with the aim of reducing the risk of trading in illegally harvested timber. From 2008, implementing a due diligence system has been made a condition for TTF membership.

14. Which timber products will fall under the Regulation?

In terms of types, categories and species, this Regulation does not make any distinctions as there was no hard evidence suggesting there should be any exclusion on the basis of technical characteristics, end-uses and production processes. In terms of origin, both imported and domestically-produced timber and timber products are covered. The proposal establishes the due diligence obligation for operators who are the first to place timber and timber products on the EU market. This essentially covers importers of timber and timber products and primary producers of timber in Europe.

15. Who will the Regulation apply to?

The Regulation will apply to all operators. An operator is defined as any person or company that supplies the EU market with timber or timber products on a professional basis. This definition applies irrespective of the selling technique used and irrespective of whether the products are made available in return for payment or free of charge. This includes import into the customs territory of the EU. However, as this Regulation is limited only to the first time timber or timber products are placed on the market, it doesn't apply to all operators involved in the distribution chain.

16. Is the measure proportionate given that most illegal logging takes place outside the EU?

Most illegal logging occurs outside the EU. However, evidence suggests that illegal logging is an issue in some EU Member States. This Regulation will help Member States gain stronger control over their forest sector. The EU timber sector has established forest management and purchasing procedures with a view to ensure legality. It is therefore not expected that they will be subject to additional burden.

17. Why is FLEGT timber considered to meet the due diligence requirements?

The proposed Regulation is the result of a commitment the Commission undertook in the context of the FLEGT Action plan. It has the objective of fighting deforestation, forest degradation and biodiversity loss through combating illegal logging and related trade. It aims at strengthening the FLEGT Voluntary Partnership Agreements initiative, as countries which have entered into a FLEGT Voluntary Partnership Agreement with the EU will be recognised as implementing a licensing scheme which effectively verifies compliance with the applicable legislation.

D. OBLIGATIONS OF OPERATORS AND MEMBER STATES

18. What exactly is required of operators?

Operators have the primary responsibility to place legally harvested timber and timber products on the EU market. However, it is not required that they ensure legality beyond reasonable doubt. Operators have to show due diligence. In other words, they need to ensure legality to their best ability. Although lower as a standard, due diligence is not exercised in a haphazard manner but calls for concrete steps to be taken. It takes the form of ascertaining the negative, the absence of any doubts as regards legality. Operators are required to demonstrate due diligence on the basis of a properly documented and effectively audited system of procedures and measures (due diligence system) which will enable legality to be reasonably assured. It essentially relies on knowing the product placed on the market in terms of species, volume, value and origin in order to understand any issues relevant for its legality in order to be able to mitigate possible risks.

19. Do operators have to design a due diligence system from scratch?

Not necessarily. Timber traders can either develop a system of their own or make use of a recognised scheme. A recognised scheme is a scheme that (1) is in conformity with the requirement of due diligence established in the proposal, or (2) is developed by a monitoring organisation, such as trade federations or certification bodies. The recognition of such schemes will be made at national level. The Commission will keep a monitoring role and the responsibility to maintain a well-informed list of all recognised schemes.

20. Are the obligations for operators immediately binding?

As the effective implementation of this Regulation will largely rely on secondary measures which will elaborate on the due diligence requirements and on the national processes for recognition of the market-based schemes, the Regulation will become applicable two years after its entry into force. In other words, Member States and traders will have two years after the adoption of the Regulation to prepare themselves in order to meet the necessary requirements.

21. Who is responsible for enforcing the Regulation?

The enforcement of this Regulation rests with Member States. The competent authorities who will be identified by each Member State will be required to monitor implementation by the operators falling under their jurisdiction. To that effect they will conduct checks and will keep records, a summary of which will be made publicly available. Given the transnational character of timber trade Member States will ensure effective collaboration and information sharing.

22. How will the involvement of all interested parties in the implementation be ensured?

Realising that the most comprehensive approach can not function effectively without the commitment and full collaboration of all interested stakeholders, it is essential that a permanent platform is established where discussions between stakeholders can promote effective implementation. To that end the Commission will establish an advisory mechanism for consultations with all stakeholders such as the forest-based industries, NGOs, academics and so on.

E. COSTS AND BENEFITS

23. What are the costs to the timber trade associated with the Regulation?

Estimates for the costs involved in the various options were made as part of the impact assessment. Estimates show that the costs associated with the proposed Regulation are around €29.9 million to the non-EU timber industry. Costs to the EU private sector are likely to amount to € 40.4 million annually. However, many high-volume timber product importers and producers, the pulp and paper sector, and also timber traders organised in Member State trade federations have due diligence requirements and systems in place and are already carrying out the checks and supply chain controls that the proposed Regulation aims to make mandatory. This means they will not have to incur the additional costs of putting in new systems from scratch. In addition, funding is available in the context of the FLEGT VPA negotiations to assist FLEGT partner countries in off-setting the costs of providing legality guarantees. Also important to note, is that the costs to EU importers and producers under the proposed Regulation are relatively light when compared to other options investigated in the impact assessment. For example the option of mandatory proof of legality by EU traders was estimated to lead to an annual cost of € 136 million.

24. What is the economic impact of the proposed Regulation on the competitiveness of the EU forest sector?

No specific study has been conducted on the impact of illegal logging on the competitiveness of the EU forest sector. However, in the US the American Forest Products Association commissioned a comprehensive study on this topic in 2004¹. The conclusions can, to a large degree, be applied to the EU and suggest that if illegal logging were to be eliminated, an increase in domestic production of round wood of 5% or 16 million cubic metres would occur. While there are a number of assumptions behind these figures they nevertheless provide an

¹ Illegal logging and global wood markets: the competitiveness impacts on the US wood products industry. Seneca Creek Associates and Wood Resources International, Nov 2004

estimate for the order of magnitude of the impact of illegal logging on global forest trade and how this currently undermines the competitiveness of EU forest industry.

25. What are the expected benefits of the proposed Regulation?

While the option of placing the full burden of proof on traders is considered too burdensome for the EU industry, simply relying on voluntary private sector measures is deemed insufficient to tackle the problem of trade in illegally-harvested timber and timber products. The proposed Regulation strikes a balance between these two considerations. Requiring EU traders to meet basic due diligence requirements with regard to timber legality will:

1. Create a level playing field between those companies that are currently trying to address illegality and those that are currently undercutting the market by selling cheaper illegally harvested timber products;
2. Provide an incentive to traders to buy and sell low-risk timber rather than high-risk timber, thereby reducing the use of illegally harvested timber by EU consumers.
3. Provide an incentive to producer countries to conclude FLEGT Voluntary Partnership Agreements with the EU, as well as to exporters in non-VPA countries to put in place timber tracking and legality verification schemes.

F. SHOULDN'T THE EU BE MORE AMBITIOUS?

26. Why not prohibit the placing on the market of illegal timber?

As part of its consultative process leading up to this Regulation, the European Commission conducted an in-depth impact assessment of a number of possible options including the prohibition of placing illegally harvested timber and timber products on the EU market. The impact assessment concluded that this option was not feasible for two reasons, both pertinent to proving illegality in a third country:

- 1) The enforcement authorities in Member States would need to establish the offence on the basis of foreign laws through investigations beyond their jurisdiction and European courts would be compelled to rule on the legality of timber products harvested elsewhere. Europe is generally reluctant to act beyond its jurisdiction or to pass judgement on other countries' legal frameworks unless there is an immediate threat to the well-being of its population, such as in the case of food safety or terrorism.
- 2) Obtaining the necessary proof that a specific batch of timber was harvested at a certain time and place in contravention of applicable legislation in the country of harvest is deemed to be a difficult if not, in many cases, impossible task. It is not always possible for traders to know how to avoid being implicated in illegal activities and this would create uncertainty and would not bring meaningful changes in the timber sector. Practical difficulties and political implications would limit its application to very few high profile cases, thereby undermining its effectiveness in meeting its objectives.

27. Why not ask for a documentary proof of legality?

This option was also considered in the context of the impact assessment process. Requiring that every piece of timber being traded in the EU is proved to be legal is a burdensome and expensive marketing condition and was therefore found to be incompatible with the

fundamental EU principles of proportionality and simplification. The reluctance to challenge third countries' legal requirements outside a multi-lateral environment and the implications of this also extend to official documents issued by third countries. EU authorities and consumers would have to accept and respect documents attesting legality irrespective of the particular conditions prevailing in the country of issue, corruption for example. Creating a paper-based system would also open the door to fraud and forgery.

28. Why not require sustainability?

The proposal, in line with the FLEGT Action Plan, focuses only on the question of legality, and does not address sustainability. However, in many countries forest legislation is based on the premise of sustainable forest management and therefore legality is not totally distinct from sustainability. This proposal aims at encouraging better law enforcement and governance and it would thus represent a major step along the road to sustainability, particularly in countries affected by illegal logging. This proposal does not preclude the development of sustainability criteria. On the contrary, it encourages it by clearly stating that any products that will be subject to mandatory sustainability criteria should be excluded from the application of this Regulation. This will also avoid placing an unnecessary burden on the operators and on enforcement authorities.