



Reducing our forest footprint by tackling EU's role in illegal logging and related trade

Trilogue negotiation

NGO recommendations for the proposed Regulation on the placing of timber and timber products on the EU market

Civil society groups welcome that, after six years of debate, the draft regulation concerning the placing of timber and timber products on the EU market was introduced by the European Commission. However we are concerned by the lack of ambition of the Council's first reading position which, if confirmed, would neither ensure an effective system to ban illegal timber from the EU market nor reassure consumers that they are not contributing to deforestation and forest degradation by buying illegal wood products.

Following the second reading vote of the EU Parliament's Environment committee on May 4th, we call on the Council to improve its position and to show openness and flexibility during the trilogue negotiations with Parliament and Commission in order for a positive second reading agreement to be concluded before the summer break.

In our view, a positive second reading agreement should include, as a minimum:

1. A prohibition of the trade in illegal timber and timber products, as an integrated and complementary tool to the due diligence approach;
2. A clear definition and delineation of obligations placed on operators:
 - Robust "due diligence" system to exclude illegal wood for operators which FIRST place timber products on the market;
 - Traceability of timber products through the supply chain for ALL timber operators;
3. A framework for a minimum level of sanctions and penalties throughout the Community, including requirements for EU member states to apply criminal sanctions for serious infringements;
4. A comprehensive definition of applicable legislation that must be complied within the country of harvest, covering laws relating to all areas of forest management, including timber harvesting as well as conservation aspects;
5. Clear mandate and powers for competent national authorities to control operators and timber products;
6. Centralised accreditation procedure at EU level for monitoring organisations,
7. Stringent eligibility criteria to avoid conflict of interests;
8. No delay in the application of the regulation;
9. No exemption of certain wood products;
10. An advisory group to advise the Commission and Council on implementation issues;

The EU started its debate on actions to tackle illegal logging in 2003, and we expect this lengthy process will be concluded with an effective law. Meanwhile the United States is one step ahead, adopting their own legislation – an amendment to the U.S. Lacey Act – in May 2008, which prohibits the trade in illegal timber and timber products, and includes a stringent regime of sanctions and a robust enforcement mechanism. This legislation is now in force and was first used by the US at the end of 2009 when investigating timber suspected to have been illegally harvested in Madagascar. We urge the EU to show its political leadership and determination by adopting legislation with equivalent or higher standards before the summer.

SUMMARY NGO RECOMMENDATIONS FOR TRILOGUE NEGOTIATIONS

We strongly recommend that Council revises its position in the following priority areas in order to close loopholes and ensure an effective EU system.

1. Prohibition of the trade in illegal timber and timber products, as an integrated and complementary tool to the due diligence approach

Council should support the introduction of a general prohibition, in addition to due diligence requirements (**Parliament amendment 38**). Whilst a prohibition will discourage operators from entering the illegal-timber trade, the due diligence system will give clarity on their responsibilities and what they have to do to avoid illegal timber. The combination of 'due diligence' and a prohibition already exist in other EU laws, such as food safety, hazardous substances and money laundering. And the combination is necessary for successful implementation. The US amended Lacey Act of May 2009 already provides a precedent for a workable prohibition of illegal timber traded in the US and the first prosecution cases are currently under investigation.

The enforcement of the prohibition does not require unilateral interpretation of foreign countries' laws or inspection trips abroad. In suspected cases of infringement, national courts and tribunals will simply act upon the request of, or require assistance and cooperation from, judicial courts or competent authorities in third countries and will follow their interpretation and sworn evidence. Courts and tribunals in the EU already apply laws from third countries, for example in family law and contracts.

The advantage of an approach combining prohibition, due diligence and traceability requirements is to provide legal certainty for operators, and a clear disincentive to those who consider handling cheaper illegal timber. The purpose of the due-diligence requirement is to minimise the risk of illegal timber being placed on the market. A prohibition ensures that operators minimise risk. The prohibition should permit prosecution of companies that deliberately or through serious negligence or recklessly place illegal timber on the market. The use of a credible due diligence system would be offered as a defense for a company found with illegal wood. Finally, the traceability system would help determine responsibilities and liabilities throughout the supply chain.

A due diligence system alone will not stop illegal timber being traded on the EU market. In fact, it could actually lead to illegal timber being sold without any offence under EU law. This unclear system would neither produce an effective law nor convince EU citizens that the EU is acting in a meaningful way to stop illegal wood products being sold.

2. A clear definition and delineation of obligations placed on operators:

- **Robust "due diligence" system to exclude illegal wood for operators which FIRST place timber products on the market,**
 - **Traceability of timber products through the supply chain for ALL timber operators**
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a) **Robust due diligence system and risk management procedures**

To ensure that all due diligence systems are functioning as requested by the regulation, the Operators who establish their own due diligence system (article 4 par.2) should have it audited regularly by an independent third party, namely a monitoring organisation. The regulation also needs to provide a clear definition of risk assessment procedures and risk mitigation procedure, describe how this is to be implemented, how the Commission and Member States will help determine the level of risk, and what actions should be taken by the operators when faced with a risk of illegal logging and trade. As soon as a risk is identified, whether the risk is determined as negligible, medium or high, appropriate actions to minimise the risk should be taken. This will avoid differing standards of risk management, level the playing field and reduce legal uncertainties for the operators. Precluding action against negligible risk could be considered as a disguised restriction on trade. Council should support Parliament's proposals intended to provide clarification for the users of "due diligence system" and close loopholes (**Parliament amendments 39, 40, 43, 44**).

b) Basic traceability requirements

Parliament's second reading introduced an amendment allowing the traceability of timber and timber products through the supply chain. We urge Council to support this proposal which would allow timber to be traced back from the point of sale to the forests (**Parliament amendments 29, 41, 42**). Similar traceability requirements exist for other goods and agriculture commodities on the European market, such as food – meat and eggs, or chemicals.

When inspections take place, or if there is doubt about legality of certain timber, a chain of custody will help to identify who first placed the product on the market, and which individual or company harvested the timber. It is critical that competent authorities be able to unearth the source of the timber to discover: (i) where the illegal timber went once placed on the market in order to prevent it from being sold further down the supply chain; and (ii) where the illegal timber came from, its country of harvest, and the suppliers in that country. This is the only way to get a handle on the illegal timber trade. The traceability of timber through the supply chain will be particularly beneficial for operators found with illegal timber but who followed the due diligence requirements as it will help to identify who committed the infringement in the first place and should therefore be made liable for it.

This is a summary of how the system of control proposed by Council in its first reading position, plus the EU Parliament's second reading proposals would work (**Parliament amendments 10, 17**).

- Step 1: EU forest owners who log and sell timber on the EU market need to show that the logs they sell are legally harvested, which should be possible to prove in most cases through existing documentation. (Council position)¹
- Step 2: EU timber traders who import from 3rd countries are required to operate 'due diligence' systems of checks and controls to minimise the risk of importing timber from illegal sources into EU. This includes the collection of relevant information on the timber and the supplier. (Council position 1st reading)
- Step 3: All other EU companies (e.g. wood processing and retail companies) that buy and sell timber within the EU supply chain will be asked to keep records of their direct suppliers and their direct customers to form a traceability system. Such records already exist as part of tax and accounting procedures or as obligations under other EU or national laws. One such example is the framework of product recall procedures

The argument that small foresters and small or medium timber companies might face more red-tape and higher costs from these proposed changes has not been substantiated so far. It appears to be exaggerated with no evidence to support the allegation. The actual requirements for timber products under a strengthened regulation would be comparable in many respects to existing requirements for other regulated goods and agriculture commodities on the EU market. However for precaution, we urge the Council to support the Parliament's amendment proposals which encourage the European Commission to provide support to small forest owners and small or medium timber companies to meet the new legal requirements, and assess the impact of the Regulation on an ongoing basis (**Parliament amendments 25, 27, 70**).

3. A framework for a minimum level of financial sanctions and penalties at EU level, including requirements for EU member states to apply criminal sanctions for serious infringements

We support the Parliament's proposal to amend the Environmental Crime Directive, and to introduce a framework for minimum financial sanctions and penalties at EU level, including the requirement for EU member states to apply criminal sanctions for serious infringements (**Parliament amendments 79, 80**). This is necessary to ensure consistency in the application of the Regulation across the EU.

¹ The measures described under (step 1) might need to be adapted for those EU forest owners operating in areas where illegal logging is reported (e.g. Bulgaria recently). Risk assessment by purchasing companies might come to the conclusion that additional information is needed from forest owners operating in these areas.

- Pencho Dermendjiev, 5 April 2010, www.focus-fen.net/index.php?id=n215522

- Bulgaria Police Arrest 'Major Shady' Businessman in Lovech, 8 April 2010, www.novinite.com/view_news.php?id=115028.

The Council and Commission wording that “penalties must be effective, proportionate and dissuasive” is not precise or rigorous enough to prevent the creation of weak points of entry in the EU market. It is important to note that there is no legal obstacle to the specification of administrative or financial sanctions in EU laws. Similar provisions already exist in other EU regulations, such as the IUU (Illegal, Unregulated or Unreported) Fishing Regulation. For us, the regime of sanctions to combat illegal logging should be at least equivalent to the regime established to combat illegal fishing. It is a matter of policy coherence in the action of the EU against the illegal exploitation of biodiversity resources.

4. A comprehensive definition of applicable legislation that must be complied within the country of harvest, covering laws relating to all areas of forest management, including timber harvesting as well as conservation aspects.

The Council should support a comprehensive definition of legal timber to live up to the demand of the EU FLEGT action plan to develop just and equitable solutions²: As a minimum, EU member states should support a definition of legally produced timber that is fully consistent with the definition contained in the FLEGT VPAs³. We are concerned that any definition of legally produced timber below these requirements could create a disincentive for developing countries to engage in the negotiation of FLEGT voluntary partnership agreement (VPAs) and place at disadvantage those countries who have already signed a VPA.

In particular, we believe the Council should support the Parliament’s proposal to include laws related to forest management and biodiversity conservation into the scope of the definition of “applicable legislation.” This conforms to the FLEGT negotiating mandate that requires “compliance with legal requirements regarding forest management” as something that, at a minimum, must be covered in the definition of applicable legislation for FLEGT VPAs. It is sound public policy to ensure a close approximation with the FLEGT VPA programme. So far the Council’s definition is restricted in scope to laws directly related to timber harvesting. Regional and international laws in force in the country of harvest should also be brought in the definition of “applicable legislation as recommended by Parliament” **(Parliament amendments 16, 36)**.

5. Clear powers for competent national authorities to check and enforce timber legislation

To discourage infringements, ensure a robust enforcement mechanism and facilitate implementation throughout the Community, the Council should support the Parliament’s proposal to provide national competent authorities with clear powers to perform various controls on both monitoring systems and on timber products and individual operators where necessary **(Parliament amendments 22, 48, 52, 59)**. The Parliament provides a good description of what these controls may entail (i.e. examination of the due diligence system, examination of documentation, spot checks, including field audits, etc) **(Parliament amendment 60)**.

We also urge the Council to support the Parliament’s amendments intending to:

- initiate immediate enforcement actions when illegal logging operations or illegal timber shipment are suspected or identified, until a thorough investigation is completed **(Parliament amendment 63)**.
- enhance cooperation efforts between national competent authorities and to the extent possible with civil society organisations, administrative authorities of third countries and the Commission in order to increase information exchange, cross-fertilization of best practices and to optimize cost efficiency in law enforcement **(Parliament amendments 24, 61, 67, 68)**.
- ensure that remedial action is taken immediately by operators when shortcomings are detected and that penalties are not predicated on failure to take remedial action but on a failure to implement a due-diligence system⁴ **(Parliament amendment 63)** .

² Commission Communication to the Council and Parliament, proposal for an EU Action Plan on Forest Law Enforcement, Governance and Trade (FLEGT), May 2003 http://ec.europa.eu/development/icenter/repository/com2003_0251en01_en.pdf

³ FLEGT Briefing Note (2007), What is legal timber? http://ec.europa.eu/development/icenter/repository/B2_Flegt_BR2_2007final_en.pdf

⁴ Under the Council position, it would appear that penalties are only appropriate in the instances of a double failure, in other words a failure to implement a due-diligence system followed by a failure to take such remedial action listed in the notice of remedial action. This would severely hinder enforcement and compliance.

6. Accreditation procedure of monitoring organizations centralised at EU level

We welcome Parliament's first and second reading proposal to centralise accreditation of all monitoring organisations at EU level rather than at national level, and we recommend Council to support this position **(Parliament amendment 51)**.

There are at least three other good reasons why the accreditation procedure should be centralized:

- The accreditation procedure requires subjective determinations as to whether any given monitoring organization complies with regulatory requirements, which could create different standards across Member States under a fully, or partially decentralized accreditation procedure.
- A centralized accreditation procedure would prevent inconsistent standards, inconsistent recognition, forum-shopping, and undue burdens, any of which would diminish the effectiveness of the regulation and harm enforcement and compliance efforts.
- A centralized accreditation procedure would lead to a more efficient distribution of resources, allowing competent authorities to allocate scarce time and resources toward activities that simply cannot be performed at the Commission level.

7. Stringent eligibility criteria to avoid conflict of interests for monitoring organizations who provide and check "due diligence" systems

Council should support Parliament's proposals intending to ensure that only entities with appropriate expertise and established to carry out particular functions regarding the forest sector qualify as monitoring organisations, and that conflicts of interests are avoided between monitoring organisations and the operators that they certify **(Parliament amendment 50)**. To ensure consistency with this objective, we urge Council to re-state its opposition to the provision of article 2(h) of the Commission's proposal that would make "organisations of operators" (membership-based association or a federation) suitable for the role of monitoring organisations, regardless of potential conflicts of interest as stated in Article .2 (c) of the Council's common position.

8. No delay in the application of the Regulation

We urge Council and Parliament to revise their position and make the Regulation applicable immediately after its entry into force (article 19 – Paragraph 2). Policies and instruments to combat illegal logging and related trade and that, in addition, enhance sustainable forest management are being discussed at EU level since 2001 (first consultation before publication of the EU FLEGT action plan), with the active involvement and participation of the industry. Due diligence systems exist and are already available on the market. There is no good reason for further lengthy delays before the application of the Regulation, especially when looking at the US Lacey Act that came immediately into force after its adoption.

9. No exemption of certain wood products

Product coverage

ALL wood products, which could contain illegally sourced timber, should fall under the scope of this regulation. Parliament's second reading confirmed that the Regulation should apply to timber and timber products "without exception". We call on the Council to support closing of all loopholes, including for printed materials **(Parliament amendments 85-93)**.

Amendment to the list of products in the Annex

It is important to ensure, that the list of products in the Annex will be supplemented, but not reduced by the Commission, which would increase the risk of illegal timber to be traded on the EU markets. In this regard, we urge Council to support **Parliament's amendment 71**.

Status of recycled wood products

The Council should close a loophole in the exemption for recycled wood products first introduced in the Council's first reading position. The purpose of the due diligence regulation is to minimize the risk of illegal timber entering into the supply chain of wood products. There is clear risk of illegal timber entering into the supply chain from recycled wood products. For example, virgin fiber from illegal sources can be mixed with recycled fiber in order to reduce the price of production.

Products labeled as made from recycled fiber but in fact manufactured with virgin fiber from illegal sources can also be placed on the market. But there are also legitimate public policy reasons for excluding recycled materials. As it stands now, however, operators can claim that a product is recycled to avoid regulation with little recourse for competent authorities to ensure the validity for the claim. Therefore, to minimize these risks, recycled wood products should be subject to a sworn declaration under that the product or components of such products—or any portions thereof—are indeed recycled as defined in the Framework Directive on Waste.

10. An advisory group to advise the Commission and Council on implementation issues

Council should support Parliament's proposal to create an advisory committee composed of representatives of stakeholder groups to advise the Commission and Council on implementation issues **(Parliament amendment 69)**. This would put on an official footing for consultations rather than taking place bilaterally and informally. The Committee on Timber Trade referred under article 11 only consists of EC representatives or Member States representatives. This would not provide a balanced input in the Commission's decision related to "delegated acts" unless the parliament and other stakeholders are involved as well **(Parliament amendment 78)**.

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