On 17 March 2021, Fern and the European Parliament’s Working Group on Responsible Business Conduct hosted a webinar to discuss ways to reduce the risk of EU imported deforestation. We discussed the type of regulation the Commission should adopt and how it could be enforced.

This webinar also outlined the findings of a recent Fern report that draws lessons from the enforcement of existing due diligence laws, including the European Union Timber Regulation (EUTR), the EU Conflict Mineral Regulation, and the US Lacey Act.

This report summarises discussions held on the day. Presentations are available here.

1) Due Diligence is a relatively new legal concept; there is still a lot to learn

Corporate governance is evolving thanks to the development of due diligence instruments. These range from overarching tools such as the 2011 UN Guidelines for Business and Human Rights; to product specific binding rules such as the EUTR (2010, but effective from 2013); Conflict Minerals (2017, but effective from 2021); the French Loi de Vigilance (2017); and the Dutch Child Labour law (2019, not yet in force). UK and US legislation addressing forest risk commodities are also currently being designed.

Although it may feel like we have been working on this for decades, it is a new field, and the impacts still need to be assessed. In the meantime, we should continue to learn lessons from what has been achieved so far in terms of new EU legislation.

2) Lessons learnt to date

Because the EUTR is the oldest product specific due diligence (DD) legislation it provides the most learning.

There are, however, also lessons from the Conflict Minerals legislation and the Loi de Vigilance.

These include:

- Certification can be a useful tool, but it is not enough. A number of recent reports show that it cannot and should not serve as proof of legal compliance.
- Fines must be high enough to be dissuasive, which they are not under the EUTR. Injunctions and confiscation have shown to be as or even more effective enforcement tools.
- There are serious concerns about the different Member State interpretations of due diligence, as well as a lack of consistency in Member State enforcement. Illegally sourced timber that has been rejected by some has been let in by others as indicated by Forest Trends’ report on teak from Myanmar. These flaws must not be repeated in new legislation. It is also important to harmonise Member States’ legislation and their interpretation of due diligence as companies need adequate guidance to set up due diligence systems.
- Monitoring of enforcement should be done by governmental bodies and not only by NGOs, as is the case of the French Loi de devoir de Vigilance.
- Limiting regulation to ‘first placer on market’ is not working and increases corruption inter alia because it could encourage the creation of shell companies. Hence, the legislation should apply to companies across the full supply chain.
- Documentation from exporting countries should not be the main tool for verification as it is open to corruption. Independent and publicly accessible tools (e.g. independent monitoring reports including from NGOs and satellite monitoring, such as that done by Starling) are much more reliable and should be the backbone of new legislation. Information on progress should be made public. Requesting mandatory reports and making them public is important if the relevant information is included. Nestlé sees transparency as essential and believes it needs to be mandated through legislation with the aim of finding solutions. Jade Saunders, senior analyst at Forest Trends, gave many good suggestions of what would be important information to include, such as making supply base reporting mandatory and publicly available.

3) Debate on effective enforcement should continue once the content of a new EU regulation is clear

There are several unclear points with regards to the possible content of the legislation currently being drafted that will impact the enforcement.

(a) Focus of the regulation. The European Parliament wants the regulation to focus on deforestation and other ecosystems, as well as human rights, including tenure rights. It also wants the legislation to apply to all sectors including the finance and investment sectors. MEP Delara Burckhardt, Rapporteur of a report on an EU legal framework to halt deforestation, recognised that the EUTR has a lot of problems that we should learn from but stressed that mandatory due diligence is still the right approach. She also stated that an overall due diligence regulation to improve corporate governance as proposed by the European Parliament in its recent report needs to be complemented by a forest specific regulation which should provide market restrictions for products tainted by deforestation, forest degradation, the destruction of other ecosystems or human rights abuses. In the spirit of the European Green Deal, Europe should be a world champion in deforestation free supply chains.

The European Commission indicated that we can expect the draft regulation to cover, likely progressively, a range of commodities, products containing them, and products derived from them. It will also focus on ‘sustainability’, deforestation and forest degradation (rather than covering the conversion of other ecosystems). It was suggested that the inclusion of other ecosystems in the scope of the new legislation may not be desirable as it might make implementation more difficult. [After the event the Commission clarified that the forthcoming Impact Assessment will look into this]. Hugo-Maria Schally, Head of Unit, DG Environment explained that human rights due diligence obligations will fall under the DG Justice regulatory proposal.

Furthermore, the Commission indicated that they want to ensure there will not be dual legal ‘regimes’, and that a switch from ‘legality’ to ‘sustainability’ for the timber sector, which will be included in the new draft regulation, was therefore required. Schally stated that an EUTR type of regulation risks overburdening competent authorities in Member States as well as economic operators.

In term of options he said the Commission may be in favour of using additional benchmarking through country assessments to evaluate risks. The existence of mandatory public certification systems in EU and third countries could imply lesser or stronger due diligence requirements. An Illegal, Unreported and Unregulated Fishing (IUU) type legislation coupled with due diligence requirements is also still being assessed.

(b) Which definitions and data to use. The Commission wants to focus on solid scientific evidence but wants to refer to UN Food and Agricultural Organisation (FAO) definitions and data which, according to Saskia Ozinga, are political, mostly out of date, and assess tree cover rather than forests. This is a contradiction. Basing the regulation on independent scientific data is critical.

(c) Cut-off date implications. A cut-off date with a range of between 2015 and 2020 is being considered, but it is relevant to discuss when and
how to remedy damages done before the cut-off date. See also Fern’s report Getting the Incentives Right.

(d) Company liability. Conducting due diligence should not be a free out of jail card for companies when environmental or social harm is found in their supply chain. Companies also have an obligation to set up a grievance and remediation system. See Fern’s report Enforcing Due Diligence Legislation Plus.

Once these four points are clarified in DG Environment’s regulatory proposal, we should look again at enforcement possibilities.

4) Regulation should work hand in hand with other legislative and non-legislative actions

Other EU legislative actions include DG Justice’s forthcoming corporate governance legislative proposal, expected in June; the EU Cocoa Talks with the Governments of Ghana and Côte d’Ivoire (which may or may not lead to legislation); the Sustainable Finance Disclosure Regulation and the revision of the Non-Financial Reporting Directive. EU Forest Partnerships are also being developed.

Bart Vandewaetere from Nestlé suggested that we need a smart mix of measures to address deforestation, while referring to a recent Tropical Forest Alliance paper signed by over 50 companies and NGOs.

The aim should be to ensure all these initiatives work effectively together. Then, the impact will be massively increased. But this requires a good understanding of the problems and root causes of deforestation.

5) No regulation alone will tackle root causes, other initiatives must accompany them

Three key root causes of deforestation are (1) overconsumption in the Global North – (it is worth nothing that it was Nestlé that mentioned the need to limit growth and/or find acceptable growth levels); (2) lack of clarity/non recognition of tenure rights of local communities and Indigenous Peoples; and (3) corruption/poor governance.

No single legislation can tackle this ‘wicked problem’ but assessing the extent to which any legislation enhances or mitigates these problems is key. For example, in a study looking at 73,000 concessions in eight countries it was found that in 93 per cent of cases the concessions overlap with Indigenous/local community territories leading to conflicts and murder. Not recognising land tenure as a key root cause of deforestation has consequences.

The Forest Law Enforcement, Governance and Trade (FLEGT) approach aims to link improved governance with improved trade. DG ENV claims that there has not been any impact on volumes of trade, but the Centre for International Forestry Research (CIFOR) and Chatham House did find some impacts of the FLEGT programme on trade as well as governance improvements. Either way, it is critical to understand why the impact has been more limited than most of us had hoped. Any new legislation and improvements to existing legislation should be based on a thorough understanding of the problems faced by the existing programmes.

One of these problems is corruption, a key underlying driver of deforestation. Lack of clear tenure rights of local communities and Indigenous Peoples is another driver. To have any chance of reducing deforestation and degradation of other ecosystems, this mix of regulations and policies must therefore tackle corruption, reduce consumption to sustainable levels (such as through the circular economy) and recognise customary tenure rights (e.g. by implementing the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (VGGT)).