Enforcing a Due Diligence based regulation for forest risk commodities

#DueDiligence

17 March 2021
Enforcing a Due Diligence based regulation for forest risk commodities
1. Please ask **questions via** the “Q&A” window.

2. **All other questions** will be dealt with after panellists’ presentations. We will select the most relevant ones to be shared with speakers.

3. We will invite **participants whose questions were chosen** to intervene. Please make sure your microphone (and ideally your camera) is on and introduce yourself (name and organisation).

4. This event will be **recorded** and shared on Fern’s YouTube channel and event page: 
   
   fern.org/Enforcing-Due-Diligence
Enforcing a Due Diligence
based regulation for forest risk commodities
Welcome and introduction
– based on the European Parliament's report,
'An EU legal framework to halt and reverse EU-driven global deforestation'

Delara Burkhardt
Member of the European Parliament (S&D)
Findings of Fern report, Enforcing due diligence legislation ‘plus’
Duncan Brack

Enforcing due diligence legislation ‘plus’

17 March 2021
• Purpose of report:
  • Reach conclusions for the **enforceability** of due diligence legislation – both design and implementation
  • Draw lessons from existing legislation
• Two types of due diligence approach:
  • Broad corporate due diligence requirement (‘continuous process of improvement’) – e.g. French Devoir de Vigilance law
  • Product-specific due diligence – requirement for placing on the market – e.g. EU Timber Regulation, Conflict Minerals Regulation, UK legislation (in preparation)
• Based on UN Guiding Principles, OECD DD Guidance
  • Companies to take risk-based approach to problems
  • Not expected to solve all problems instantly – rather, should stimulate a continuous process of improvement, work with suppliers to resolve problems
  • This can make judging a company’s performance difficult
• Obligations must be clearly defined
  • E.g. ‘environmental harm’
• Transparency is an essential element
  • Degree of risk in supply chains, companies’ actions in addressing it

**Broad corporate obligation of due diligence**
1. Exercise due diligence for the risk of human rights and environmental harms throughout company’s operations and supply chains (not product-specific, but could have guidance for specific sectors)
2. Have in place a due diligence system to a specified standard, possibly third-party-audited
3. Activities to be monitored by a government enforcement agency – should demonstrate progress (benchmarks system?) in addressing risks, otherwise risk of inaction
4. Publish report on company’s due diligence system and activities in implementing it.
5. Create grievance/early alert, complaints and remediation systems (pan-EU contact point?)
6. Provisions for civil liability
• EU Timber Regulation has had positive impacts:
  • More scrutiny of supply chains, far more information collected, more purchasing of certified timber (and higher prices) and FLEGT timber, changes of source countries, suppliers, timber species to avoid high risk
• However:
  • Obtaining reliable evidence of breaches of due diligence, or proof of legality or sustainability, always likely to be difficult
  • Particularly true for prohibition
  • Lots of documentation collected, not clear how reliable
  • Independently verifiable evidence ideal
• Due diligence obligation must not be restricted to first placers; should extend throughout the supply chain
• Substantial variation in enforcement efforts between member states seen in the EUTR is a key weakness
1. Commodity-specific requirements for placing on the market:
   - Prohibition should be limited to criteria that can be credibly verified
   - Wider range of criteria possible in due diligence obligation – framework to address criteria and reduce risk rather than assuming every product can be free of problems
   - Due diligence as defence against liability? Danger of possession of due diligence system used as excuse for inaction

2. Possible requirement for import declaration
   - Forces companies to acquire information on products, can take action against them if shown to be inaccurate
• Obligations and criteria must be as clearly defined as possible
• Due diligence obligations should extend throughout the supply chain
• Certification helpful, but by itself not proof of compliance
• Enforcement should be a task primarily for government agencies
• To enforce the law effectively needs:
  • Systematic monitoring of companies’ performance based on reports, investigations and other sources of information, including ‘substantiated concerns’
  • Adequate resources for enforcement agencies
  • Adequate enforcement powers and penalties, including powers to issue injunctions against sales and confiscate products (harmonised as much as possible)
  • The ability to bring cases before specialist courts familiar with and trained in human rights and environmental cases
  • Access to data, primarily from customs
  • Encouragement for collaboration with other member states’ authorities and with equivalent enforcement agencies outside the EU (like e.g. TREE network)

Both approaches: enforcement practicalities
Thank you
dbrack@dbrack.org.uk
Clarification questions?
What main changes a new Due Diligence Regulation would need to incorporate?
Enforcing (?) a Due Diligence based regulation for forest risk commodities

Based on Competent Authorities experience

Ing. Pavla Slavíčková
EUTR Specialist
Forest Management Institute, Czech Republic
Mobile: +420 724 947 235
E-mail: Slavickova.Pavla@uhul.cz
www.uhul.cz/home
Summary

• EUTR in a nutshell
• DDS in a nutshell
• Issues with DDS and implementation
• Corruption? Certification? Other solution?
EUTR in a nutshell

1. The placing on the market of illegally harvested timber or timber products derived from such timber shall be prohibited.

2. Operators shall exercise due diligence when placing timber or timber products on the market. To that end, they shall use a framework of procedures and measures, hereinafter referred to as a ‘due diligence system’, as set out in Article 6.

3. DD system: a) information of trader, origin location, b) assurance of compliance with applicable legislation, c) set of measures and procedures that are adequate and proportionate to minimize effectively that risk
DDS for EUTR in practice

- The biggest issue – Corruption

- DDS is always based on documentation
  - What kind of? Types of documentation and whole systems concerning forestry varies across the World.
    - 11 country overviews by UNEP-WCMC, others up to CA’s to find out
  - Language – up to CA’s to be oriented within the documentation (Chinese, Portuguese, Russian, ...)
  - How to verify its authenticity? - No database of tools for verification / national points to contact for verification
  - Corruption? Papers worth of papers written on?

- Negligible risk - what is it?

- Third party verification - Certification? – Most common, within checks, is Chain of Custody (CoC)
  
  – CoC – no GIS base, tracing volumes up and down
    - can CA assume, while CoC certification, the risk is negligible? Issues UA, RU, BR,...
    - CA´s faces same issues with certification from countries with high level of corruption as with other documentation
    - If issues within CoC – no available information on time
    - What if third party verification scheme is not available in the country of origin (DRC, Nigeria, Myanmar, ..?)

- Illegal timber – how to proof? Burden on CA’s within the authorities, to prove, timber is illegal (impossible), or proof the risk is NOT negligible, if operators states otherwise
Food for thought

• Considering timber is solid, huge material, facing huge challenge to trace it back to stem (no available laboratory method is even close to trace back to stem, even isotopic is close, but still far, while declared origin is unknown) – how hard it will be for oil/ cocoa/ beef/…?

• Many operators have will to fulfil requirements and they ask how to mitigate the risk to negligible level? … There is ALWAYS risk…

• Cost – who will pay for it? Operators? – Extreme burden for small and middle size companies. The big ones (with good lawyers) will always „somehow“ do it…

• Illegals - uncatchable two steps ahead, burden on fair operators

• EC – negotiation with countries of origin – VPA?
Thank you for your attention
Research on mandatory reporting systems

Jade Saunders
Forest Trends
EU Due Diligence Obligations on FRC traders: meaningful reporting challenges

PRESENTED BY
Jade Saunders
Overview

- System-based reporting
- Implementation of system reporting
- Supply base reporting
- The accountability gap
- Integration with other initiatives
DD System based reporting

- What is the company policy (maybe set by legislation)?
- What tasks / information have been identified as critical?
- Which team is responsible for them?
- What internal management arrangements are in place to implement the policy (eg reported to the board)?
DD implementation reporting

- How many supply chains or contracts have been subject to due diligence checks?
- How many supplier engagement workshops/meetings have been held?
- What % of company purchases have been subject to full traceability (with physical separation/Mass balance?) or are certified?
- How many suppliers have been rejected or subject to third party audit?
- How many complaints have been received?
Supply base reporting

- How much of each commodity has been purchased?
- When?
- Where from?
- What is the land use change history?
- Are contiguous or related areas being monitored in real time? Volumes?
- Which suppliers have been subject to engagement? Scrutiny? Which producers have been subject to …?
Transparency vs the accountability gap

- UK Modern Slavery Act – LESSONS LEARNED
- Scope for independent audit of reports?
  - How to avoid conflict of interest?
  - How to regulate auditors
- How to make this “outsourcing” of enforcement credible, consistent and cost effective? (EUTR)
Integration with other initiatives

- Civil accountability for human rights and environmental harms – Member State patchwork / DG Justice proposal
- UK Mandatory climate-related financial disclosure
- EU Sustainable Finance and Disclosure Regulation
CONTACT

Jade Saunders
Senior Policy Analyst
Forest Policy, Trade and Finance
Forest Trends

jsaunders@forest-trends.org

www.forest-trends.org  @foresttrendsorg  facebook.com/foresttrends

Thank you!
Reactions from the private sector

Bart Vandewaetere
Nestlé Europe, Middle East & North Africa
Towards deforestation-free supply chains in Europe

Bart Vandewaetere
VP Corporate Communications & Government Relations, Nestlé EMENA
Our Responsible Sourcing Standard includes clear requirements for our suppliers to protect forests, ecosystems & land rights

The raw materials we buy at origin level:

- **Do not** come from areas cleared of natural forest after December 31, 2015.
- Protect **High Carbon Stock** (HCS) land.
- Protect **High Conservation Value** (HCV) land and nearby territory (including landscape-level ecosystems and peatlands)

Suppliers shall demonstrate:

- Evidence of **Free, Prior and Informed Consent** (FPIC) of local and indigenous communities
- **Legal right** to use the land

These requirements are classified as **Urgent** and must be implemented within 6 months after being found as non-fulfilled.
Achieving 100% deforestation-free supply chains requires a combination of tools

We apply a holistic, ‘toolkit approach’ to assess, address and report on deforestation risks within our supply chains
Example: Ten years of progress in addressing sustainability issues in palm oil

2010
- No traceability beyond Tier 1
- No understanding of the issues or root causes of the issues
- No collaboration or collective action on the ground

Supply chain mapping
On-the-ground assessments
In-depth assessments (e.g. Human Rights Impact assessment)
Satellite monitoring for deforestation risks
RSPO certification
Worker voice
Industry collaboration

2020
Palm oil volumes we source:
- 70% traceable to plantation
- 96% traceable to mill
- 70% deforestation free

Note: we source from 88 direct suppliers, originating from more than 1,600 mills in 21 countries. Various Tiers between our Tier 1 supplier and plantations
Supply chain transparency = more trust and accountability

**Progress reporting** on our No Deforestation commitment

**Disclosure** of Tier-1 suppliers and volumes for 15 priority raw materials

**List** of suspended palm oil suppliers who violated our RS Standard

---

**Nestlé responsible sourcing Key Performance Indicators (KPIs) 2019**

<table>
<thead>
<tr>
<th>Priority raw materials</th>
<th>Volume (% of total)</th>
<th>Traceability (at harvest)</th>
<th>LCOI of raw material</th>
<th>Responsibly sourced</th>
<th>KOC (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cacao &amp; sugar</td>
<td>4110</td>
<td>36%</td>
<td>92%</td>
<td>53%</td>
<td>91%</td>
</tr>
<tr>
<td>Cane</td>
<td>65</td>
<td>40%</td>
<td>93%</td>
<td>42%</td>
<td>99%</td>
</tr>
<tr>
<td>Coffee</td>
<td>111</td>
<td>60%</td>
<td>96%</td>
<td>9%</td>
<td>99%</td>
</tr>
<tr>
<td>Rice</td>
<td>17,300</td>
<td>93%</td>
<td>96%</td>
<td>91%</td>
<td>99%</td>
</tr>
<tr>
<td>Rapeseed</td>
<td>1,140</td>
<td>40%</td>
<td>95%</td>
<td>92%</td>
<td>99%</td>
</tr>
</tbody>
</table>

---

**Creating Shared Value** report

---

**Protecting natural capital**

---

**Nestlé, Good food. Good Life**
Key considerations for upcoming EU legislation

1. **EU-wide mandatory due diligence complemented by other measures**: partnerships with producing countries, dialogue with other consumer countries, sustainable finance & investment

2. Alignment of **key definitions** with existing guidance and definitions like the Accountability Framework initiative / High Carbon Stock Approach, covering forests, ecosystems and legal rights to use land

3. Apply a **bulk commodity approach** rather than a bulk product approach

4. Promote the **principle of continuous improvement** to get all actors engaged at landscape level but also set a **clear timeline** that obligates all actors to:
   a) fix **commitments** to 100% deforestation-free
   b) implement a process to **identify, act and report** on deforestation risks as a “license to operate” on the EU market

5. Include **enforcement provisions** that incentivize businesses to be **fully transparent** and **collaborate on the ground** to end deforestation. **Businesses should only be held liable for their own actions.**
Reacting to proposals and summarizing state of play on fitness check of EUTR and forest risk commodity regulation

Hugo-Maria Schally
European Commission, DG Environment
EU Action on Deforestation: State of Play

Enforcing a due diligence based regulation for forest risk commodities
17th March 2021

Hugo-Maria Schally
European Commission, DG Environment
1) EUTR/FLEGT Fitness check

- **EUTR** shows positive results with regard to keeping supply chains clean, however:
  - **Difficult to prove in the courts**, undermining the dissuasive power (MS authorities complaining).
  - **Complex supply chains** = high costs for companies (especially SMEs) and authorities (checking).
  - **Imports of illegal timber increasing from some high-risk countries**: Unfair to companies that invest in clean supply chains.
  - **Way forward**: Improved due diligence complemented by other measures, covering gaps.
2) EUTR/FLEGT Fitness check

- **FLEG Regulation** shows positive results in stakeholders’ participation and improvement of governance, however:

  o No evidence that VPAs have contributed to reducing illegal logging in the partner countries and the consumption of illegally-harvested wood in the EU.

  o Since 2005, only one country (out of 15) has an operating licensing system in place.

  o Only one VPA country among the top 10 EU trading partners.

  o Way forward: Determine whether it fits into a system that is based on sustainability rather than legality.

  o Alternative support mechanisms to enable partner countries to comply with requirements (Forest partnerships), without the elements which do not work (licencing).
MS CAs insights

• EUTR:
  - Current provisions are not sufficient to ensure operators and CAs can effectively assess risks
  - Cases have difficulties being accepted by administrative and criminal courts
  - Demands from prosecutors are hard for CAs to meet
  - Breach of EUTR is difficult to prove in court
  - DDS obligation is complex and time-consuming to comply with, especially for those not specialized in wood products.
  - Often hard to find detailed information on the origin of timber (source countries, exporter, concession)
  - Term ‘negligible risk’ is subjective – operators can have a different view to CAs
  - Difficult for economic operators to take sufficient action when there is a ‘large’ (not negligible) risk

• FLEGT Regulation:
  - VPA do not necessarily lower the risks
  - For VPAs without an licensing system in place (14 out of 15) it is sometimes even more difficult to get the necessary information to implement EUTR
  - The lack of progress undermines credibility of the whole process
  - Can be difficult for CAs to identify the status of recognition of VPA documents
2) EU forest policy and deforestation – problems to address

The Problem
• Recent studies and data\(^1\) show that forest cover around the world continues to decrease at an alarming rate.
• Deforestation is a major driver of global warming and biodiversity loss.
• Deforestation threatens the wellbeing of all citizens on the Earth and in particular the livelihoods of 1.5 billion people that rely on forest for their subsistence.

The drivers
• 80% of global deforestation is driven by agricultural expansion\(^2\), in turn driven by the global demand for products such as soy, cattle, palm oil, and wood products.
• EU’s role: Over time, the EU is the market for one third of the globally traded agricultural products related to deforestation, corresponding to 10% of global deforestation associated with the production of goods or services.\(^3\)

---

1. Including FAO Global Forest Assessment, FAO and UNEP State of the World’s Forest and data from Global Forest Watch
2. FAO; 2016, Report on land use
Political commitment

**European Green Deal:**

"The Commission will take measures, both regulatory and otherwise, to promote imported products and value chains that do not involve deforestation and forest degradation."

**EU Biodiversity Strategy:**

"The Commission will also present in 2021 a legislative proposal and other measures to avoid or minimise the placing of products associated with deforestation or forest degradation on the EU market."

**Farm to Fork Strategy:**

"The Commission will present in 2021 a legislative proposal and other measures to avoid or minimise the placing of products associated with deforestation or forest degradation on the EU market."
Objectives

General

- Reducing deforestation and forest degradation at global level thus reducing GHG emissions and loss of biodiversity

Specific

- Minimise the EU’s contribution to deforestation and forest degradation worldwide
- Minimise the risk that commodities and products are placed on the EU market that are associated with deforestation and forest degradation
- Raise awareness of consumers and EU citizens on the impact of the demand for specific commodities and products
- Promote the demand for and consumption of commodities and products that are not associated with deforestation and forest degradation
- Incentivise financial and economic investors to integrate such concerns into their investment decisions
Timeline — next steps

- February 2020: Roadmap and Inception Impact Assessment published
- September – December 2020: open public consultations for the IA and Fitness Check
- October 2, 2020: First meeting of the deforestation platform
- February 25, 2021: Second meeting of the deforestation platform
- Q2 2021: Results of the fitness check and the impact assessment
- Q2 2021: Legislative proposal
Ongoing work: Deforestation-free criteria

• **Objectives:**
  1. Based on solid science
  2. Building on existing, internationally used definitions and criteria
  3. Non-discriminatory
  4. Implementable and monitorable in practice

• **Three main sources** (plus the cut-off date):
  1. FAO definition of deforestation (slight modification to exclude plantations)
  2. Accountability framework (flexibility based on national policy within UNFCCC range)
  3. Range of UNFCCC plus High Carbon Stock approach
  4. Cut-off date: Between 2015 and 2020
Ongoing work: Scope - Commodities and derived products

- **Main points:**
  - Cover selected *bulk commodities and selected derived products*
  - Preliminary list of commodities: *Beef, wood, palm oil, soy, rubber, cereals, cocoa and coffee*
  - Three options: Limited, progressive, and broad scope

- **Methodology for the choice of commodities and products:**
  - Review literature on commodities with the highest global contribution to deforestation
  - Further refine the selection based on EU market power (consumption of those commodities)
  - Select derived products to be included based on a cost-impact analysis
Ongoing work: Options for Policy measures

An initial analysis of approximately 20 options resulted in the following shortlist:

1) Improved due diligence requirement
2) Benchmarking / country carding
3) Mandatory public certification
4) Mandatory labelling
5) A deforestation free requirement

Options 2, 3 and 4 are complementary and to combined with option 1. Option 5 is the option directly derived from the IUU system. It would result in a direct impact on market access.
Questions?
Discussion summary

Saskia Ozinga
Independent consultant
Enforcing a Due Diligence based regulation for forest risk commodities

fern.org/Enforcing-Due-Diligence