

The EU Timber Regulation due diligence obligation: An appropriate tool

Introduction

The EU Timber Regulation (EUTR) places an obligation on operators¹ to exercise due diligence to prevent illegally harvested timber or timber products entering the EU market. A correct understanding and implementation of this key obligation is essential to the effectiveness of the EUTR.

Yet, over two years after the EUTR and its due diligence obligation came into effect, its application is often still seen as a challenge. Part of this challenge comes from an apparent uncertainty around the detail of what operators need to do to meet their due diligence obligation.

The relevance of a due diligence approach to timber legality

The aim of the EUTR is to prevent illegal timber from accessing the EU market. To achieve this goal, operators have to consider the legality of the timber they plan to place on the market². However, the legality of timber cannot always be known with certainty. Firstly, relevant laws may be difficult to identify or access. Secondly, due diligence is conducted by operators from a perspective that may be remote both in time and distance from the point of harvest.

Given that operators are therefore likely, at times, to work in a 'grey zone' of information, a risk-based approach which focuses on the risk of, rather than a certainty of, illegality is an appropriate approach to controlling market access of timber. A lack of absolute certainty as to the legality of timber may appear disconcerting but is unavoidable given the context. However, it need not have a negative impact on operators.

¹ Any individual or company who first places timber on the EU market.

² The Timber Regulation has two key provisions: a prohibition on placing illegally harvested timber on the EU market and an obligation on operators to exercise due diligence to assess the risk that timber has been harvested illegally. The Timber Regulation defines illegal timber as timber harvested in breach of the relevant legislation in force in the country of harvest, see Article 2 (f), (g) and (h) Timber Regulation.

To strike the balance between the need for both flexibility and certainty, the EUTR sets up a mandatory legal framework with a fixed set of parameters for assessing and dealing with risks of illegality, while leaving it to the operator to determine which concrete measures are required in the particular context of each case.

A fixed due diligence framework...

The due diligence framework first requires operators to access certain information on their timber supply. Among the listed relevant items³, access to information 'indicating compliance with applicable legislation' has the broadest scope. To access such information, operators have to identify the legal requirements applicable to the specific timber product in the country of harvest, from points of harvest to export. They then have to collect documents or other information evidencing compliance with those requirements.

Assessing the risk of illegal timber being present in the supply chain is the second step. Operators must consider the information they have collected in light of the risk assessment criteria listed in the EUTR⁴. Doing so may or may not point to certain risks of illegality in the relevant supply chain. This could be clear information indicating the likely violation of national legal requirements. It could also be the ambiguity or absence of information on legal requirements and compliance with it.

Timber products can be placed on the market if the risk evaluation concludes that the risk is close to zero (negligible). If a greater than negligible risk is detected, the third step is risk mitigation. This must be adapted to the risk and can consist of, for example, accessing more information and/or requiring third party verification. If mitigation measures have been taken, but there is still a greater than negligible risk of illegality, then the operator cannot place the timber on the market. This of course also applies if a clear illegality has been detected.

It is important that operators respect all these parameters and are able to demonstrate that they did so by keeping records of the information gathered, of how the decisions were taken at the different stages of the risk evaluation process, and of the risk mitigation procedures applied⁵. This will enable competent authorities to meaningfully assess compliance and allow operators to defend their actions if charged with a breach of the prohibition or due diligence obligations.

It is equally important that operators do this within a specific timeframe: due diligence has to be carried out before placing timber and timber products on the market for the first time. If possible, it should be done before contracts are concluded with suppliers - otherwise operators will carry the financial burden of not being able to market the timber (unless contracts contain other protections).

³ Article 6 (1) (a).

⁴ Article 6 (1) (b).

⁵ In accordance with Article 5 Commission Implementing Regulation (EU) No 607/2012 of 6 July 2012 on the detailed rules concerning the due diligence system and the frequency and nature of the checks on monitoring organisations as provided for in Regulation (EU) No 995/2010.

...Combined with a flexible approach

The EUTR states that operators should take appropriate steps to ensure that illegally harvested timber is not placed on the market⁶. In a risk-focused system, the risk evaluation and mitigation measures should be proportional to the context and associated risk. In practice this means that the exact scope of due diligence to be carried out by an operator is adaptable. That is not to say that operators can be exempt from the due diligence obligation, or do no more than gather documents provided by suppliers. Compliance must be determined by whether the measures undertaken are informed by sufficient and reasonable information, in the context of the particular case.

This should also be reflected in competent authorities' assessment of operators' compliance. They have to check whether due diligence processes are in place and also whether the steps taken were reasonable to evaluate and respond to the level of risk in the supply chain.

In light of the above, the actions required of an operator to comply with the due diligence obligation can vary according to the circumstances in the following ways:

- Degree of risk: if the information collected by operators points to particular risks of illegality in the supply chain, they must take this into account in their risk assessment and intensify their risk mitigation. For example, in practice suppliers will frequently provide compliance documents directly to EU operators. Where information indicates that the credibility of such documents might be questionable, additional information must be actively sought⁷. Conversely, if no risks of illegality are detected after collecting information, a lighter scrutiny could be considered reasonable. This could be the case, for example, for timber harvested in a country with strong institutional oversight and forest governance - under the condition that no information points to any risks of illegality.
- Available information: if an operator has previous knowledge of specific risks in the supply chain, for example because it has been alerted by a third party to such risks, the risk assessment must reflect this knowledge.
- Product complexity: the higher the complexity of a product (because it contains different timber species and/or has undergone different stages of processing), the more difficult it may be to obtain the information needed for carrying out due diligence. Nonetheless, effort will still need to be spent on accessing and assessing relevant information.
- Certification: in principle, operators sourcing certified timber may assume a lower risk of illegality than for non-certified timber. However, certification is not a proxy for compliance with the EUTR. Operators must still conduct due diligence and, in doing so, must consider the extent to which certification tools meet the legality criteria⁸ and the veracity and reliability of the certification. They should undertake additional information gathering, risk assessment, mitigation steps (as relevant), and keep records of information linked to the use of certification tools.

The flexibility of due diligence translates not only to risk assessment, but also to mitigation processes. It is up to operators to determine which mitigation measures are best suited to their supply chains and the risks identified. For example, where information is missing or conflicting,

⁶ Recital 16 Timber Regulation.

⁷ See ClientEarth briefing "Using official documentation under the EU Timber Regulation's due diligence obligation", March 2015.

⁸ Article 4 of Commission Implementing Regulation (cited at footnote 6).

operators should try to access more information to have a clearer understanding. Where that information comes from is for the operator to determine. It could include using public information, going to the supplier for further information, or turning to external services such as independent verification. If a clear illegality is detected, the timber should not be placed on the market.

Conclusion

Respecting the core elements of the due diligence framework is a legal requirement that is applicable to all operators. But the measures actually required for due diligence in practice can vary slightly from case to case. Operators must be able to demonstrate that the measures they have taken are reasonable under the specific circumstances of their timber supply. By combining a fixed set of elements with a flexible approach, the EUTR has put in place an appropriate tool enabling operators to deal with risks of illegality in a context of imperfect information.

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