



Blocking Loopholes with Law: Why FLEGT VPAs require New EU Legislation

The merits of VPAs

FLEGT VPAs are currently the most pro-active and positive initiative in the global effort to stop illegal logging and regulate the trade in illegal timber, and represent significant leadership on behalf of the EU, its member states, and those countries who are negotiating VPAs.

FLEGT VPAs represent an opportunity for legal verification of timber (through licenses) for both the exporting country and the European Union. But VPAs offer much more than environmental reform through enforceable mechanisms that give confidence to legally produced timber. For producer countries which may be plagued by illegality and corruption, VPAs will act as a much needed catalyst and point of leverage in the reform of forestry and enforcement sector governance.

VPAs are also conceived to provide support for poverty alleviation by reducing violence and corruption that result in significant financial losses to both the state and affected communities.

The problem with VPAs

Serious loopholes in FLEGT VPAs mean significant volumes of illegal timber will not be restricted from the EU market. The loopholes include:

- Non-licensed, and therefore potentially illegal timber from non-VPA countries will be permitted into the EU market without restriction. This timber will include laundered illegal timber from VPA countries.
- Unless otherwise negotiated, non-licensed imports from non-VPA countries into VPA countries will be permitted into the EU under a VPA.
- VPAs will still allow illegal timber from VPA partner countries in products not included in the small number of product categories currently under discussion. The vast majority of timber products are not currently covered by VPAs.

What should the EU do?

The EU must introduce new legislation to restrict illegal timber and timber products from the EU market, regardless of where the timber is from, or what form it takes.

The European Commission has competency for legislation concerning imports and exports at the EU level. Recent legal disputes between EU institutions on this issue have ruled that, while potentially infringing on the competency of member states in proscribing domestic criminal law, such legislation is legitimate on the basis of implementing rules concerning environmental protection. The European Court of Justice (ECJ) concludes that the EC is justified in "*taking measures which relate to the criminal law of member states which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective.*"¹

¹ Case 176/03 Commission v Council, para 48., from *EU FLEGT Initiative: Assessment of "Additional Option" to Exclude Illegal Timber from EU Markets*, by Duncan Brack, Chatham House, 3rd April 2006.

If VPAs are concluded with important timber producing partner countries, then the FLEGT Regulation will have negotiated such rules, and, based on the serious loopholes in the VPA system, these rules would not be fully effective without additional criminal law measures being taken by member states - i.e. restrictions on the sale and marketing of illegal timber within the EU.

What should new EU laws look like in the EU?

New EU laws should specifically *prohibit from the markets of its member states imports, exports, the sale, marketing, transportation and possession of illegal timber and timber products, and timber and timber products linked to crimes abroad.* The law would allow legal challenges to be submitted against companies on the basis of the legality of their timber and timber products.

Such a law would be less of a burden on national customs organisations than VPAs will be, as it would not necessitate checks on imports of timber and timber products arriving at EU member states' ports. Such a law would be efficient, while providing the legislative framework within which companies could be prosecuted for importing, exporting, selling, marketing or possessing timber and timber products which reasonable enquiry indicated to be illegal, or linked to criminal activity abroad. If, when challenged by a relevant individual or organization², an importer or trader was unable to demonstrate legality with credible and established documents³, they could be found guilty under the law. A penalty and forfeiture system will need to be established, but this will also be required under the VPAs, and will not represent new obligations for the EC or member states.

Example: Indonesia currently prohibits export of sawn timber. However, many companies in EU member states are currently importing sawn timber from Indonesia. This law would provide the legal mechanism to prosecute these companies. Currently no provision exists.

Why this would strengthen VPAs?

The lack of relevant legislation restricting illegal timber imports from non-VPA countries is a serious disincentive to potential VPA countries, which have no guarantees that EU importers will buy their VPA licensed products instead of illegal timber from non-VPA producers.

The lack of such laws is also a serious disincentive for potential partner countries to include further timber product categories (e.g. flooring, mouldings, furniture, etc) to the existing VPA licensed product categories (logs, sawn timber, veneers and plywood) because they would lack a competitive edge. It is the right of partner countries to include more products in a VPA than originally proposed in the FLEGT Action Plan, and new EU laws would likely be an incentive for them to do so.

How would this impact on other initiatives?

Other initiatives to restrict illegal timber from the EU include; government procurement policies; certification schemes; and industry purchasing policies. While these are all positive initiatives, the last two are voluntary, and have to compete or try to operate in an uneven market where rewards for responsible or legal forestry are far from guaranteed. EU Legislation would provide additional support to government procurement policies, create a level playing field for businesses trading in legal timber, and encourage producers to work towards SFM.

² Relevant institutions could include: National Police, NGOs, Customs Officials, local authorities, other timber traders, trade associations, consumer associations, or members of the public, etc. Enforcement agencies and/or companies or individuals in the timbers' origin country may also press charges where relevant and practical.

³ A database of information about and contacts for relevant institutions across the world, and correspondingly relevant documentation pertaining to the legality of timber, could be established to inform the police, courts, and where appropriate, customs authorities, etc, in adjudicating any cases or challenges brought against individual companies or consignments of timber or timber products.

Most of these non-legislative initiatives have the increased uptake of “sustainable” timber in the market as an end goal, and as such, new legislation on legality would support these initiatives as legality provision is vital for sustainability.

Could Legislation incorporate VPAs and other initiatives?

Legislation must be designed with FLEGT VPAs, and other initiatives such as certification, government procurement policies, and industry purchasing policies in mind.

Numerous industry bodies have already expressed support for new import legislation as a means of levelling the playing field for fair competition⁴, and certification schemes have been incorporated into the government procurement policies that have emerged over past 5 years.

What do European consumers want?

The move towards European legislation and the VPAs has been demanded by consumers. Responsible companies have reacted and civil society groups have driven many of the arguments. The most common response to the question “Should we have laws to prohibit illegal timber from the EU markets? Is “Surely, we have it already?” We don’t.

Conclusions

FLEGT VPAs require supplementary EU legislation in order to block loopholes allowing substantial volumes of illegal timber into the EU market. The most practical and legislatively coherent option is for an EU initiated prohibition on imports, exports, sale, marketing, transport and possession of timber or timber products thought to be illegal, or linked to criminal activity abroad.

Such legislation would protect the effectiveness of FLEGT VPAs with individual countries, give the VPA licensing system the chance to succeed, and give incentives for the consolidation of government and industry procurement policies and certification schemes. Such legislation would promote VPAs as a means of meeting the proof of legality standards required by EU industry, thereby promoting VPAs per se, and will likely promote the expansion of timber product categories to be included in the VPA licensing scheme. This is essential if VPAs are to really cut the flow of illegal timber products like furniture, flooring and even pulp and paper from European markets.

European consumers do not expect illegal timber to be available in the EU, and European citizens expect Europe’s governance structures to ensure it is not.

⁴ Examples include: *FLEGT Industry Statement: Common EU rules for fair competition and Sustainable Markets*. Over 73 timber companies and groups called for the EU to “Adopt new EU legislation which makes it illegal to import all illegally-sourced timber and wood products into the European market.”