

Forests

Does Well, Could Do Better

EIA's recommendations for the EU Timber Regulation 'Fitness Check'

February 2021





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ACKNOWLEDGEMENTS

This report was written and edited by the Environmental Investigation Agency (EIA). This document has been produced with the financial assistance of the Foreign, Commonwealth and Development Office (FCDO) and the Norwegian Agency for Development and Cooperation (NORAD). The contents are the sole responsibility of EIA.

ABOUT EIA

We investigate and campaign against environmental crime and abuse.

Our undercover investigations expose transnational wildlife crime, with a focus on elephants and tigers, and forest crimes such as illegal logging and deforestation for cash crops like palm oil. We work to safeguard global marine ecosystems by addressing the threats posed by plastic pollution, bycatch and commercial exploitation of whales, dolphins and porpoises. Finally, we reduce the impact of climate change by campaigning to eliminate powerful refrigerant greenhouse gases, exposing related illicit trade and improving energy efficiency in the cooling sector.

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Above: A convoy of log trucks lined up at Lao's border with Vietnam, at La Ley, Saravan Province, Laos, February 2015

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Above: Aerial view of forests in Papua; EIA and its Indonesian partners have been monitoring and reporting on illegal logging and the trade of illicit timber from the region

Overview

The European Commission (Directorate-General for the Environment) is currently conducting a 'Fitness Check'¹ of its key regulations tackling the trade in illegal timber in Europe: the European Union Timber Regulation (EUTR) and Forest Law Enforcement, Governance and Trade (FLEGT) Regulation.

The Fitness Check is reviewing how the regulations are working, their impacts and whether improvements need to be made to ensure they are doing all they can to help combat the trade in illegal timber.

EIA's position is that the EUTR and FLEGT Regulation are much-needed mechanisms to help to combat illegal logging and the associated trade that supports it. They also support reforms in producer countries under the FLEGT Action Plan through national processes under

Voluntary Partnership Agreements (VPAs) between the EU and timber producing countries. In addition, they have provided a model for other consumer countries to follow in taking action against the trade in illegal timber, as can be seen by similar laws being passed in Australia,² Japan³ and South Korea.⁴

The focus of this briefing is the EUTR, drawing on EIA's extensive experience in supporting its development as well as monitoring and reporting on

its implementation and enforcement. EIA sees that these improvements would substantially enhance the outcomes of the Regulation. The briefing will also touch on areas of FLEGT that are particularly relevant for the implementation and enforcement of the EUTR.

EIA believes the following changes should be made to ensure the EUTR meets its targets of stopping illegal timber and timber products being placed on the EU market:

- the product scope of the EUTR should be expanded to include all timber products;
- the language of the EUTR should be made clearer. Implementing legislation should be amended where necessary to enable enforcement;
- Competent Authorities must be better-resourced and supported by national governments in order

to independently assess whether operators' due diligence is adequate and to bring prosecutions where the EUTR is violated;

- Member States and the European Commission must expand and consistently apply approaches to enforcement, such as developing processes for determining if a common non-negligible risk assessment needs to be made for timber species or countries;
- implementing legislation must be amended to enable enforcement by competent authorities, including enabling civil actions or providing for criminal penalties beyond what is currently provided.

This briefing will explain these recommendations through the lens of EIA's work.

What is the EUTR?

The EUTR⁵ and FLEGT Regulation⁶ are the EU's major policy responses to the trade in illegal timber.

The EUTR, which came into force in March 2013, introduced two major rules for those wishing to introduce timber onto the European market. The first was that the timber must not have been harvested illegally, wherever it was from and the second was the requirement for due diligence. This required companies to conduct an assessment of the risk that the timber they sourced was illegal and then to mitigate any identified risks which were not negligible.

The FLEGT Regulation, which is part of the 2005 FLEGT Action Plan, complements the EUTR. It empowers the European Commission to negotiate bilateral trade agreements – VPAs – with timber-exporting countries. As a part of the Agreement, the producer country may reach a point where it can issue FLEGT licenses to export timber products to the EU. A FLEGT licence is effectively a gold standard for legality: if a European trader wants to import timber products, a FLEGT licence assures compliance with the EUTR, giving it automatic access to the EU market. The FLEGT Regulation governs the use of FLEGT licences in the EU.

12.11.2010		Official Journal of the European Union		L 295/23	
REGULATION (EU) No 995/2010 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market (Text with EEA relevance)					
THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,					
Having regard to the Treaty on the Functioning of the European Union, and in particular Article 192(1) thereof,					
Having regard to the proposal from the European Commission,					
Having regard to the opinion of the European Economic and Social Committee ⁽¹⁾ ,					
After consulting the Committee of the Regions,					
Acting in accordance with the ordinary legislative procedure ⁽²⁾ ,					
Whereas:					
(1)	Forests provide a broad variety of environmental, economic and social benefits including timber and non-timber forest products and environmental services essential for humankind, such as maintaining biodiversity and ecosystem functions and protecting the climate system.	(5)	The Commission Communication of 21 May 2003 entitled Forest Law Enforcement, Governance and Trade (FLEGT): Proposal for an EU Action Plan ⁽³⁾ proposed a package of measures to support international efforts to tackle the problem of illegal logging and associated trade in the context of overall efforts of the Union to achieve sustainable forest management.	(6)	The European Parliament and the Council welcomed that Communication and recognised the need for the Union to contribute to global efforts to address the problem of illegal logging.
(2)	Due to the growing demand for timber and timber products worldwide, in combination with the institutional and governance deficiencies that are present in the forest sector in a number of timber-producing countries, illegal logging and the associated trade have become matters of ever greater concern.	(7)	In accordance with the aim of that Communication, namely to ensure that only timber products which have been produced in accordance with the national legislation of the timber-producing country enter the Union, the Union has been negotiating Voluntary Partnership Agreements (FLEGT VPAs) with timber-producing countries (partner countries), which create a legally binding obligation for the parties to implement a licensing scheme and to regulate trade in timber and		
(3)	Illegal logging is a pervasive problem of major international concern. It poses a significant threat to forests as it contributes to the process of deforestation and forest degradation, which is responsible for about 20 % of global CO ₂ emissions, threatens biodiversity, and undermines sustainable forest management and				
<small>⁽¹⁾ OJ C 318, 23.12.2009, p. 88. ⁽²⁾ Position of the European Parliament of 22 April 2009 (OJ C 184 E, 4.7.2010, p. 143), position of the Council of 18 June 2009 and Decision of the Council of 18 June 2009.</small>					



EIA's engagement with the EUTR

EIA has been engaged with the EUTR since its inception, supporting the development of the EU's wider FLEGT Action Plan and campaigning for a prohibition on illegal timber long before the law became a reality.⁷

Since the law came into force, EIA has focused on the trade in high-risk timber into the EU from Myanmar. This focus has arisen due to the lack of a credible timber legality assurance system in place in the country which would provide a basis for importers of timber from Myanmar to be able to conduct due diligence to ensure its legality. This fundamental weakness allows EIA to monitor Myanmar timber imports into the EU as a practical measure of the effectiveness of the EUTR.

In 2013, EIA released a briefing on the trade in non-compliant teak from Myanmar into the EU⁸ and since then has released five further briefings and reports on the trade of Myanmar teak (*tectona grandis*) into Europe.⁹

Since the EUTR came into force, EIA has submitted 15 substantiated concerns¹⁰ in six countries. The aim of

EIA's work has been to stop the trade in non-compliant timber into Europe, in order to support reform efforts towards effective forest governance in Myanmar. EIA has also submitted two substantiated concerns in Italy related to timber sourced from Laos.

EIA's US office has also conducted investigations into Chinese plywood being traded into the EU and has submitted substantiated concerns in three countries in relation to this.

EIA is also working in tropical timber producer countries, particularly Indonesia and Vietnam, to support the development of robust VPAs between these countries and the EU.

Top: The first page of the EUTR, which was adopted in 2010 and came into force in 2013

Impacts of the EUTR

Trade impacts in Europe

EU imports of tropical timber

The FLEGT Independent Market Monitor (IMM)¹¹ has been examining the impact of the EUTR and FLEGT VPA, including FLEGT licensing on tropical timber imports. As part of this process, they conduct trade surveys in the EU member states and a large minority of the respondents reported small or large decreases in the share of tropical timber in their overall timber imports as a result of the introduction of the EUTR.¹²

Some importers have changed their supply base, often substituting tropical timber with alternatives. The implication is that many importers are making additional efforts to ensure the legality of their timber and timber products.

Based on EIA's experience where the EUTR is properly enforced, high-risk timber flows are significantly reduced. However, if the regulation is not enforced consistently, this leads to the timber trade shifting geographically and high-risk timber flows increasing elsewhere. This is illustrated by EIA's work on high-risk Myanmar teak.

Above: In 2020, EIA analysed documents for 10 shipments of Myanmar teak being imported into the EU, via Croatia in contravention of the EUTR; nine of the shipments went on to companies elsewhere in the EU

EUTR and imports of timber from Myanmar

Traders in the EU import a relatively large amount of timber products from Myanmar (more than €40 million worth in 2019 - Figure 1), particularly teak for use in the high-value yacht building industry. Unfortunately, the forestry sector in Myanmar currently faces insurmountable challenges in ensuring timber is from legal sources.

The EU has recognised this, adopting a common position in 2017 that imports of timber from Myanmar could not comply with the EUTR¹³ as it is "... impossible to come to a negligible risk of illegally harvested timber or derived products being placed on the EU market when the timber was harvested in MM [Myanmar]"

This action by the EU was taken in response to well-documented issues with illegal logging and systematic State corruption.¹⁴ Specific issues provided as reasoning for this decision include the unavailability of relevant legislation, high levels of corruption, internal armed conflict and the persistence of illegal logging as a pervasive problem.¹⁵

According to trade data, since 2014 (when Myanmar introduced a log export ban), sawn timber coming from

Myanmar to Europe steadily increased until 2018 (Figure 1). In early 2018, significant quantities of sawn timber were entering the Netherlands, Germany and Belgium. During the course of 2018, these three countries took action to prevent the trade in non-compliant timber – the Netherlands issued injunctions against specific operators,¹⁶ Belgium issued a letter to the industry notifying that it was not possible to mitigate risks of Myanmar timber to non-negligible levels¹⁷ and Germany issued a press release with the same message.¹⁸

By the beginning of 2019, the direct trade of timber from Myanmar into these three countries had completely stopped. This demonstrates successful EUTR enforcement.

However, at the same time, trade into other EU countries increased. Italy (which at all times was the largest importer of timber from Myanmar into Europe) saw substantial increases in the inward trade of sawn

wood from Myanmar, while Croatia and Greece also saw significant increases in the amount of Myanmar timber imports²⁰ (Figure 2). The overall quantity of sawn timber moving from Myanmar into Europe has remained steady since 2017, when the FLEGT experts' group first established a common position that risks of illegality could not be reduced to non-negligible levels for Myanmar timber.

The impacts of the action taken against Myanmar teak show that trade in high-risk timber will reduce if enforcement action is taken, however, where there is not consistent enforcement and implementation, operators will take advantage of that and shift the trade to target Member States which are not properly enforcing the regulation.

Below: A Myanmar Forest Department staff member marking a log. Since 2017, it has not been possible to import timber from Myanmar into the EU due to its inability to comply with the EUTR

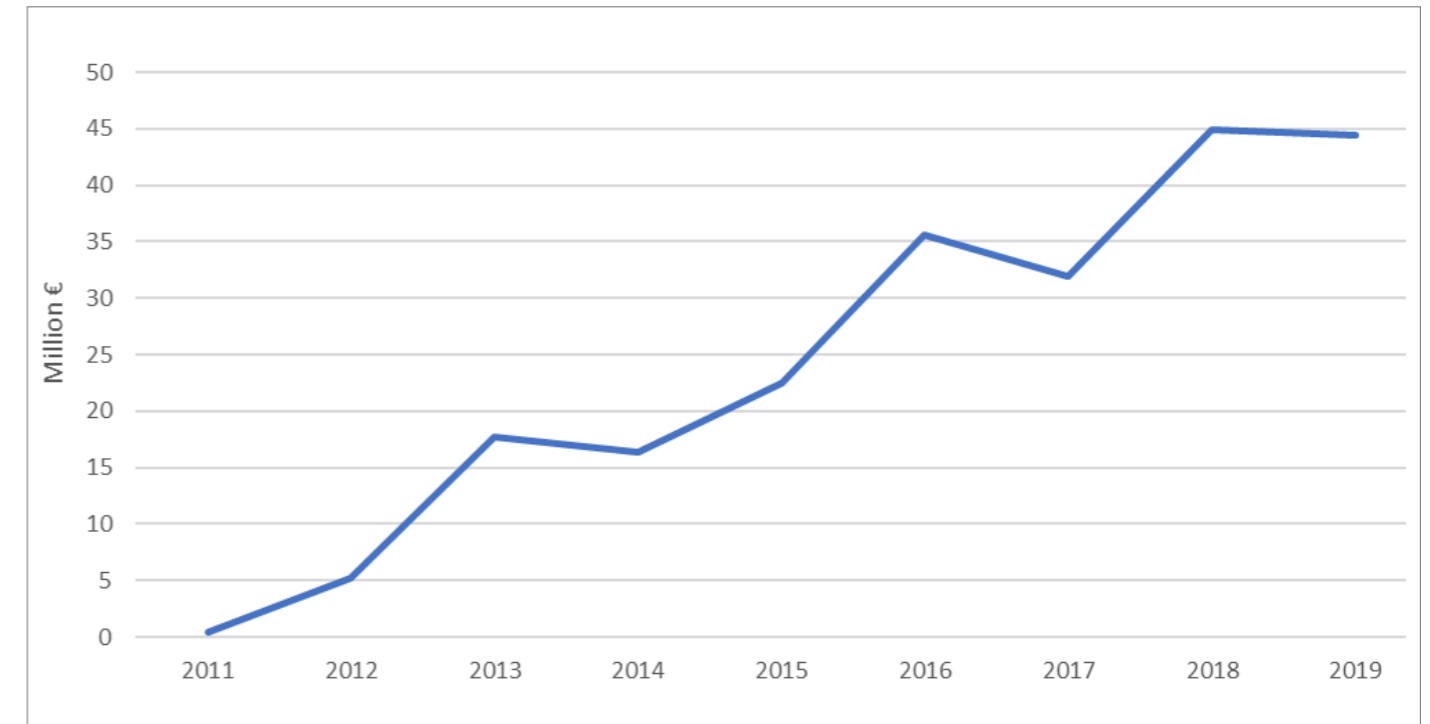
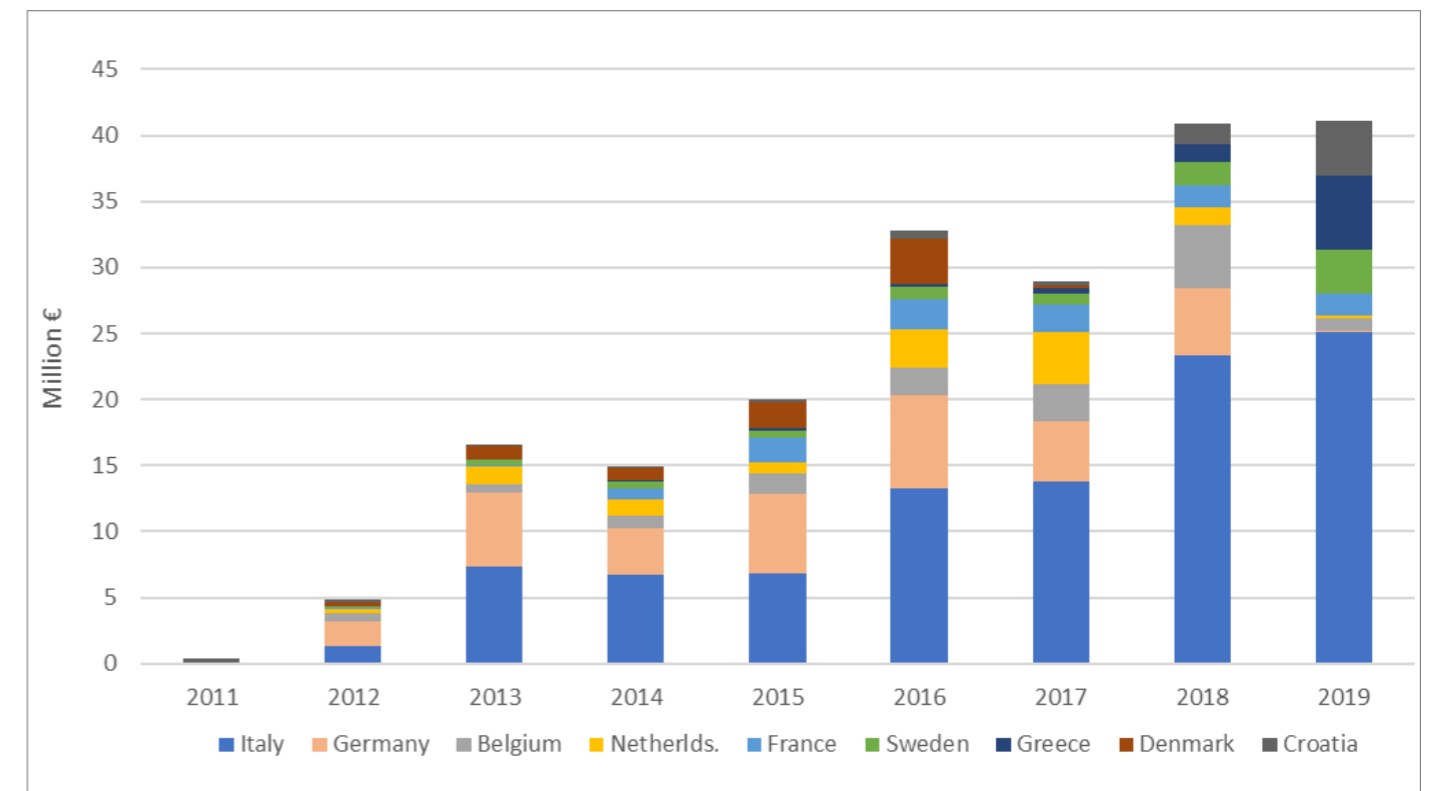


Figure 1 (above): Imports of EUTR relevant wood products (Euros) from Myanmar to EU-28 during period 2010-19¹⁹

Figure 2 (below): Imports of timber (Euros) from Myanmar to 10 selected EU countries during the period 2010-19²¹





EIA's EUTR recommendations

Problem: Not all timber products are covered

The EUTR applies only to products which are “in scope”, specifically to a certain list of products defined by their code in the Harmonised System of Codes²² used for international trade.

Currently, the list does not include all possible timber products. This means it does not cover every product which could include illegal timber and it also leads to arbitrary differences between products that are included and excluded. For example, fuel wood is included, but charcoal is not and while most wooden furniture is included, wooden seats are not.²³

Solution: Expand the product scope of the EUTR

In 2018 the European Commission conducted a consultation on the product scope of the EUTR,²⁴ however so far no additional products have been added to the scope of the regulation.

EIA believes the product scope review should be taken forward, with amendments to include a wider range of products so that all timber sold in the EU is covered. This would ensure the EUTR is fulfilling its promise to aid in the fight against illegal logging, ensure a level playing field across timber products being traded in the EU and avoid any potential trade distortions from applying the regulation to some timber products and not to others. It

is clearly possible for the EU to make this adjustment, considering that the US Lacey Act Amendment covers all timber products.²⁵

Problem: It isn't always clear what the EUTR's requirements are

Solution: Amend the EUTR to make language clearer

Although not an excuse for non-implementation, there are several ways in which the EUTR could be clearer for operators and competent authorities.

The first is in the definition of illegally harvested timber, which fails to clearly and comprehensively include the following laws, which it should:

- laws against corruption in the acquisition of timber concessions or the trade of timber;²⁶
- laws requiring payment of taxes by companies trading the timber;
- associated financial offences;
- laws protecting the rights of forest communities.

Clear inclusions of these categories of law would provide greater clarity in the regulation, which currently only includes them implicitly, and ensure the greatest protection against the placing of illegal timber on the EU market.²⁷

The second clarity issue is the meaning of “non-negligible” risk and what constitutes adequate risk mitigation. Under the EUTR's due diligence requirements, timber operators must implement risk mitigation measures except where the risk identified is negligible.²⁸ The risk mitigation measures must be “adequate and proportionate to effectively mitigate that risk”.

This provision can only be sensibly interpreted to require that due diligence measures remove any non-negligible risks that may attach to the timber being placed on the market. Otherwise, the non-negligible risk has not been mitigated. However, the provision would be clearer were it to state that if due diligence does not eliminate non-negligible risks, then the due diligence system fails to comply with the law and the timber in question should not be placed on the market.

Likewise, it should be clear that the exclusion for negligible risks is a safeguard for situations that cannot be realistically anticipated. Where the timber is sourced in situations of known risks – such as known instances of illegal harvesting, corruption or difficulties with traceability – the due diligence system must as good as confirm that those risks do not apply to the timber being traded by the operator.

The third clarity issue is the status of timber that has been placed on the market in violation of the EUTR. In a number of instances, EIA has been challenged by timber traders when characterising shipments of timber as being in contravention of the EUTR, including stating

that terms such as “EUTR non-compliant product” are misleading.²⁹ The point here appears to be that as due diligence is a process conducted by a person importing timber, a failure to conduct due diligence means only the person has violated the EUTR and the timber itself does not have any status of being in violation of the EUTR. This has consequences for what traders can state about their timber and, possibly, for the regulation's relationship with other laws such as the Lacey Act.

The position described above does not make sense. Due diligence is not an abstract process – it relates to specific shipments or deliveries of timber to ensure any risks associated with it have been mitigated. If the risks have not been mitigated, it makes perfect sense to say the timber has been placed on the market inconsistently with the EUTR and then, as a shorthand, that the timber is non-compliant with the EUTR.

The responses EIA has received appear to be calculated to diminish the significance of EUTR violations and suggest that violating the EUTR says nothing about the potential illegality of timber. The result is a confusing and misleading message for both the public and operators.

It should be clarified in the fitness check that due diligence is conducted in relation to specific timber, such that individual placements of timber can be treated as in violation of the EUTR.

Problem: Circumvention of EUTR enforcement

Currently, the bulk of the EUTR's requirements apply only to the “operator”, defined as the person who first places the timber product on the European market. The only requirements on traders (apart from the operator) are to identify the operators or traders who have supplied them the timber products and any traders they to whom supply the product.

This differentiation of obligations has been abused by companies trading high-risk timber products. For example, in response to enforcement of the EUTR against operators placing Myanmar teak on the market, supply routes have shifted so that timber has been placed in countries which previously received virtually no Myanmar teak products at all.³⁰

Other than inconsistent enforcement (addressed below in the section on enforcement and penalties), there are several other ways this circumvention problem could be addressed. Even with consistent enforcement, making one or all of these changes would be advantageous, as there may be ways to exploit this apparent loophole in the regulation even if Member States are consistent in enforcement.³¹

Solution 1: Amend the EUTR to extend due diligence obligations further along the supply chain

Circumvention would be resolved by expanding the application of the EUTR to apply beyond the first placement of timber on the market. One way to do this would be to apply the EUTR to retailers as well as operators. This change would have the further benefit

of having the most public-facing traders of timber responsible under the regulation, making the law easier to enforce.

Solution 2: Alternative/more consistent interpretation of EUTR

It is possible to crack down on abuses by taking a different approach to the current law. As it stands, many competent authorities treat the person clearing customs as the “operator” under the regulation. However, the EUTR is not an import regulation and if competent authorities treated the “operator” as the person first able to make use of the timber how they wish (i.e. not applying to someone simply required to supply the timber to another person), then it is likely the loophole would have a much lesser effect.

EIA understands that one method for circumventing the EUTR is the use of “customs procedure 42”, which applies when a product is imported into one Member State but immediately shipped on to another and VAT is paid in the final destination rather than the place of import. It would be simple to clarify that the company paying VAT is acting as the operator in these cases.

Similarly, it appears that traders are only being made to identify a supplier one step back in the supply chain. The law could be interpreted to require traders to identify all operators and traders in the supply chain and therefore competent authorities would always be able to identify where timber had been first placed on the market.

Amending the regulation or the guidance to the regulation to clarify these interpretations would also assist.

Solution 3: Amend implementing legislation to ensure participants in EUTR breaches can be penalised

Many laws allow penalisation of “participants” in offences; for example, in English law it is illegal to encourage or assist many offences.

In circumvention cases, either encouragement or assistance of EUTR breaches may occur, depending on who is treated as the operator. If a person is paid to place timber on the market in violation of the EUTR, the person paying them to place the timber on the market is encouraging them to commit the offence if they know the placement is in violation of the EUTR. Where there is a strategy to circumvent EUTR enforcement, the person making payment would know the placement was an EUTR violation. Alternatively, if the person making the payment is the operator, the person being paid would be assisting them to commit the violation. In either case, both participants in the scheme could be viewed as violating the law if participation offences are applied to EUTR violations.

Member States could therefore respond to circumvention issues by amending implementing legislation to ensure ‘participation’ offences such as encouraging, assisting or aiding primary offenders apply to EUTR violations (including due diligence violations).

Problem: Under-enforcement

The EUTR has not been very strongly enforced, with delays in any penalties for clearly high-risk timber supply chains and low penalties when action has been taken. For example, Heartland Furniture was convicted of criminal offences for failing to properly implement a due diligence system in the UK and penalties of £13,347.86 were imposed.³² Given the value and volume of timber products traded in the EU, rare impositions of penalties of this small size are unlikely to be dissuasive.

EIA believes there needs to be a change in attitude by, and greater resources provided to, enforcement authorities.

When the EUTR was being developed, the impact assessment for the European Commission stated that the following administrative costs would arise:

“The administrative costs relate to sample checking of timber consignments that have been imported or originate from EU Member States. The unit cost of inspection is assumed to be the same irrespective of the origin of the consignment.”³³

This was accompanied with a cost estimate for the private sector about 40 times higher than the cost for administration.³⁴

The view that there would be minimal costs for enforcement appears to have carried through the process of development of the EUTR and has influenced the resourcing of EUTR enforcement since it has come into force.

While EIA is not able to conduct its own analysis of the cost of enforcing the EUTR, it is clear that in order to properly enforce the regulation, competent authorities must do more than check and inspect shipments of timber. They must be able to understand the risks of illegality for the sources of imports of timber and assess the value of mitigation efforts. This, in effect, requires competent authorities to replicate due diligence work themselves.

The necessity of this can be seen from evidence of declarations by importers of timber. A series of shipments of Myanmar teak imported into Germany from 2015 to 2017 declared the timber as being “low risk” based on “internet searches” conducted by the importer.³⁵ This finding of low risk would require no mitigation on behalf of the importer. The subsequent common position on Myanmar teak agreed on by the FLEGT Experts’ Group indicates there is no way the timber in question could have been low risk. However, in order to understand that the timber was high risk, the competent authority would need to have developed an independent understanding of the risks involved in sourcing Myanmar teak. During 2015-17, the German competent authority allowed the timber into the country and took no enforcement action.

The capacities to enforce the EUTR have been raised in previous assessments. For example, a gap analysis of Belgium’s ability to address imports of illegal timber found that “the capacities are still deemed low in



proportion to the magnitude of the timber flow through Belgium.”³⁶ A similar assessment in France found that “there is a structural lack of staff considering investigations are time-consuming. Experience and capacity still need to be built up. A clear framework is missing that could guide authorities in determining when a sanction should be issued and to define adequate fines to ensure dissuasive administrative penalties, which tend to be low compared to the maximum fines defined in the French laws.”³⁷

This capacity issue is the only possible explanation for another clear lack of enforcement in many EU member states – importing logs from countries with log export bans.³⁸ An analysis of 2019 imports of logs from nine countries with log export bans found that the main EU importer countries were Italy (€22.04 million), followed by Portugal (€11.63 million), Belgium (€10.17 million), France (€9.36 million) and Slovenia (€7.16 million).³⁹ In total, in 2019 nearly €80 million of logs were imported into the EU from just these nine countries.

Solution 1: Better resourcing for more proactive competent authorities

In order to properly enforce the EUTR, authorities will need to have conducted some independent risk assessment for all the timber products coming into their jurisdiction.

This assessment requires a substantial amount of resources and commitment, although those costs can be reduced by cooperation and support from the European Commission, which is already occurring through the meetings of the FLEGT Experts’ Group. It is clear that commitment was not anticipated when the EUTR was being developed. However, there now needs to be a change in attitude to ensure the regulation is properly enforced.

EIA believes that this lack of understanding of the requirements of enforcing the regulation, and consequent lack of resourcing and support for authorities, is the reason for problems in implementation of the regulation. More staff and resources would enable more effective implementation.⁴⁰

Solution 2: Amending implementing legislation to boost enforcement

In some instances, enforcement could be better enabled by amending implementing legislation. In particular, providing for the right balance of administrative and criminal penalties is important, as is ensuring that competent authorities are enabled to utilise the most effective penalties available.

For example, under the Italian implementing legislation, due diligence violations are not able to be treated as criminal offences.⁴¹ This prevents authorities from being able to confiscate or seize timber even where there are persistent due diligence violations. In other Member States, such as Germany, being able to confiscate timber has proven to be an effective penalty. Allowing seizures of timber would be a useful step in Italy (see page 14).

Solution 3: Greater transparency to enable NGO action

The degree to which competent authorities disclose information about imports of EUTR-covered products, the due diligence information they receive and the extent to which they conduct checks or enforcement actions is inconsistent between Member States. In some instances, it is difficult to receive any information at all about the actions competent authorities take to implement the regulation.

More work needs to be done to ensure that information about implementation of the regulation is made public. Ideally, competent authorities should be proactive and publish information themselves; they should certainly respond promptly to requests for information. To do otherwise is in violation of national freedom of information laws, European law and the Aarhus Convention.⁴²

Top: Illicit timber seized by Dutch authorities in December 2019. The teak originated from Myanmar, allegedly imported into the Netherlands via the Czech Republic

Italy's problematic legal foundations

One Member State which has had particular issues with enforcement is Italy. EIA would like to address Italy specifically as alternative explanations have been given for its failure to enforce the regulation.

EIA has received the following reasons, from various sources, as to why it has been difficult to impose adequate sanctions for the EUTR in Italy:

1. due diligence is a foreign concept to Italian law, as it is derived from the common law system;
2. the fines that can be imposed are too small, such that operators can continue to trade and make a profit even if penalties are imposed;
3. It takes a long time to complete court processes, which means a lot of resources must be committed to adequate enforcement.

Based on EIA's understanding, the first two claims are incorrect. The third claim concerns the degree of commitment required for the regulation to be properly enforced.

Concepts of due diligence exist in other areas of Italian law, such as the anti-money laundering regime.⁴³ The due diligence concept in the EUTR does not bear much resemblance to the steps required to discharge a duty of care in common law negligence, as the EUTR is not related to harm-prevention (in other words, the due diligence concept in the EUTR would seem to be equally alien to common law systems as to the Italian legal system).

The Italian implementing legislation provides for administrative sanctions for due diligence failures, as stated in Article 6 para 4. These sanctions also

provide for fines of €5,000 per 100kg of timber up to €1 million (so €1 million could be imposed as a fine for a 20 tonne shipment). As this sanction relates to quantities, it must apply to individual shipments of timber.

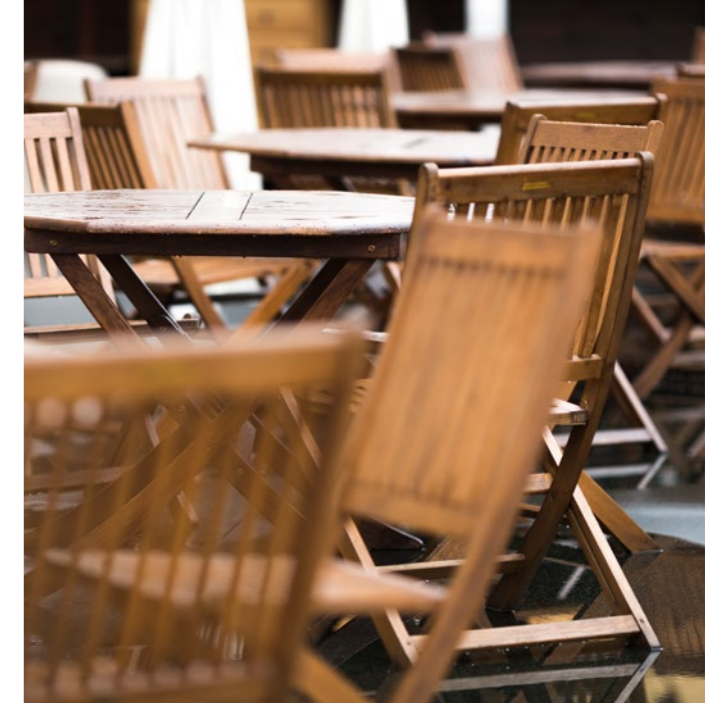
EIA has observed individual shipment data for Myanmar teak shipments into Italy for January to August 2019. The largest shipment that arrived in that data was 103 tonnes of timber, with the declared value of €575,718. A €1 million fine could have been imposed on this shipment and would have been nearly double the entire value of the timber, which is likely much higher than the profit the company would have made. Therefore, imposing available fines would likely have provided a dissuasive effect if this timber shipment was a placement in violation of the EUTR.

Italy is not the only country in which courts or court processes have hindered the enforcement of the EUTR. But EIA believes, in many cases, willingness to fight court processes and appeal unfavourable decisions on the part of authorities may in the long term lead to better outcomes.

The EUTR is a new regulation with components which courts may initially struggle with. Such laws frequently require test cases to confirm how they will operate and what obligations they truly impose. It is important that authorities are supported to properly fight such test cases and defend their right to enforce the regulation.

This is ultimately about the attitude of enforcement, not a problem with the regulation itself.

Below: Trieste Port, Italy, through which a large amount of teak from Myanmar enters the EU



Solution 4: Expand non-negligible risk assessments beyond Myanmar

In relation to Myanmar, the FLEGT Experts' Group has found it is not possible to reach a negligible risk that the timber was illegally harvested, which has been referred to as a "joint non-negligible risk assessment". These decisions are only formally available in the minutes of meetings of the FLEGT Experts' Group.⁴⁴

This decision has significant implications in that it essentially prohibits operators from placing the timber in question on the market. EIA supports the decisions made in relation to Myanmar. We are, however, wary that these kinds of decisions need to be made in a way which avoids accusations of targeting particular countries or that the decisions are being made in an ad-hoc manner.

The Experts' Group has also signalled concern about timber imports from various countries with non-negligible risk of illegal harvest. Thus far the assessment for Brazil is the only one publicly available.⁴⁵

The scale of the challenge is shown in Preferred by Nature's (previously known as NEPCo) timber legality risk assessments. As of 2018, these assessments, which are developed to help companies carry out due diligence, have been conducted in 61 countries. Nearly half of the countries assessed had high levels of risk of illegality associated with their timber.

While it is burdensome for companies to conduct due diligence and mitigate the risks, it is also time-consuming and expensive for Competent Authorities to also conduct checks on imports from these countries. For example, the guidance provided to operators importing timber from Brazil to mitigate risks include getting independent verification of the due diligence and that the entity providing independent verification should demonstrate having appropriate "level of resources as well as the adequate scientific competence and professional expertise and demonstrate that they or their experts are not in a situation of conflicts of interest. In addition, their verification should be based on proven methodologies, such as the one approved by IBAMA/

EMBRAPA. These methods should include on-site visits and cannot solely consist of document verification."⁴⁶

The competent authorities would then be required to check that the evaluator adheres to these requirements – taking time and resources which these authorities are sorely lacking.

EIA suggests a transparent process for how the non-negligible risk assessments are made and clearly stated grounds on which such an assessment might be reached.

Further to this, there should be a process by which NGOs or other organisations can suggest certain timber supply chains are eligible for non-negligible risk assessments and, conversely, how those suggestions could be opposed and how non-negligible risk assessments can be overturned by improvements in due diligence or governance systems. This process could potentially be integrated into the new multi-stakeholder group on FLEGT and the EUTR.

Regardless of the process, there are additional supply chains where a non-negligible risk assessment may be appropriate and such an assessment should be considered by competent authorities and the European Commission. Examples include:

- logs sourced from countries with active log export bans, such as Cameroon;⁴⁷
- plywood sourced from China, where complex supply chains involving multiple transactions between small producers, low profit margins and recent evidence of certification fraud suggest structural problems in mitigating risks of illegality;⁴⁸
- countries noted as high risk by assessments conducted by Preferred by Nature, particularly where similar risks to Myanmar have been flagged, including corruption and the inability to access applicable laws.

Top: Teak is used for decking on luxury yachts as well as high-end furniture



Problem: Penalties imposed

Article 19(2) of the EUTR states that the penalties provided for must be “effective, proportionate and dissuasive” and adds detail to this by stating that they may include:

“fines proportionate to the environmental damage, the value of the timber or timber products concerned and the tax losses and economic detriment resulting from the infringement, calculating the level of such fines in such way as to make sure that they effectively deprive those responsible of the economic benefits derived from their serious infringements ...”

It further provides that penalties may include seizure of timber and immediate suspension of authorisation to trade.

Penalties under the EUTR so far have not been effective, proportionate and dissuasive. Generally, they have consisted of small fines and warnings, with some more

recent instances of confiscations and orders to send timber back to the place from which it was exported. Although these latter instances are encouraging, EIA is not aware of cases where fines could be described as proportionate to environmental damage or to value of the timber or timber products.

The fact that circumvention of enforcement is occurring indicates that the penalties being imposed are not dissuasive and while they might have the effect of stopping individual operators from placing timber on the market when they are caught, they do not have the effect of stopping operators from attempting to place high risk timber on the EU market. On that basis, it seems the penalties are not effectively depriving operators of the benefits of their infringements.

Solution: Support competent authorities to bring prosecutions

Competent authorities should push to impose more substantial penalties for breaches of the EUTR.

Summary of EUTR recommendations

EIA's recommendations to the European Commission:

1. Expand the scope of the EUTR to include all timber products.
2. Amend the laws included as predicate offences for the EUTR to clearly include:
 - a. laws against corruption in the acquisition of timber concessions or the trade of timber;
 - b. laws requiring payment of taxes by companies trading the timber;
 - c. associated financial offences;
 - d. laws protecting the rights of forest communities.
3. Amend or clarify the interpretation of the EUTR to ensure circumvention of enforcement is not possible.
4. Clarify that when timber is placed on the market in violation of the EUTR, the timber is itself non-compliant.

5. Continue to support competent authorities so they understand the risks associated with imports of timber and are therefore able to assess due diligence systems.
6. Take action against Member States failing to adequately implement the EUTR or impose effective, proportionate and dissuasive penalties for violations.
7. Develop a process for consistent application of non-negligible risk assessments for high risk timber and use this process to reach non-negligible assessments where appropriate.

EIA's recommendations to Member States:

1. Provide greater resourcing and support for enforcement.
2. Impose effective, proportionate and dissuasive penalties.
3. Increase transparency by operators and competent authorities.

References

1. <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/11630-illegal-logging-evaluation-of-EU-rules-fitness-check->
2. The Illegal Logging Prohibition Act (2012). <https://www.legislation.gov.au/Details/C2018C00027>
3. Clean Wood Act (2017). <https://www.rinya.maff.go.jp/j/riyou/goho/english/english-index.html>
4. Act on the Sustainable Use of Timbers (2017). https://elaw.klri.re.kr/eng_service/lawView.do?hseq=43379&lang=ENG
5. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32010R0995>
6. https://ec.europa.eu/environment/forests/FLEGT_Regulation_Reports.htm
7. EIA reports calling for a prohibition on illegal timber in the EU and the UK include Blocking Loopholes With Law: Why FLEGT VPAs Require New EU Legislation (2007); Receiving Stolen Goods: Why the UK Must Legislate Against Trade in Illegal Timber (2007); Buyer Beware (2008) and Due Negligence: The Case for Stronger EU Legislation on Illegal Timber (2009).
8. <https://eia-international.org/news/eia-alert-timber-shipments-from-burma-to-the-eu/>
9. Data Corruption, Overdue Diligence, A Tale of Two Laws, State of Corruption and The Croatian Connection Exposed, all available at <https://eia-international.org/forests-forest-reports/>
10. A substantiated concern is where any relevant information regarding non-compliance with the EUTR, and supported by proof or evidence, is brought to the attention of an EUTR Competent Authority.
11. <https://www.flegtim.eu/>
12. <https://www.flegtim.eu/index.php?view=article&id=225-eutr-continues-to-affect-eu-tropical-timber-imports&catid=67:survey-results-interviews>
13. https://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail_groupMeetingDoc&docid=34247 and https://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail_groupMeetingDoc&docid=39135
14. E.g. <https://eia-international.org/news/eia-alert-timber-shipments-from-burma-to-the-eu/>
15. https://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail_groupMeetingDoc&docid=34247
16. <https://stats.flegtim.eu/> / <https://uitspraken.rechtspraak.nl/>
17. <https://www.health.belgium.be/fr/news/le-bois-importe-du-myanmar-ne-repond-toujours-pas-aux-exigences-eutr>
18. https://www.ble.de/SharedDocs/Pressemitteilungen/EN/2018/180724_Myanmar.html
19. EIA (2021) analysis of trade data from FLEGT IMM Market Dashboard
20. As Croatia and Greece had low levels of Myanmar timber imports previously, this may be a matter of their Competent Authorities adjusting to the need to take action. In February 2020, Croatia issued a corrective action order against a teak importer after conducting an inspection based on inadequate due diligence.
21. EIA (2021) analysis of trade data from FLEGT IMM Market Dashboard
22. HS codes are an international customs code that indicate what kind of product is being cleared through customs.
23. See Annex to the EUTR, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32010R0995&from=EN>.
24. https://ec.europa.eu/info/consultations/public-consultation-product-scope-eu-timber-regulation_en
25. <https://eia-international.org/wp-content/uploads/A-Tale-of-Two-Laws-FINAL.pdf> and <https://www.aphis.usda.gov/aphis/ourfocus/planthealth/import-information/lacey-act/lacey-act>
26. Recent work by EIA on tax evasion has identified a translation issue in the German version of the law whereby it is unclear if the “applicable legislation” listed in Article 2, paragraph (h) are the laws that, if broken, render the timber illegally harvested for the purposes of the prohibition offences in the regulation. The German law should be amended to ensure this legislation does apply to the prohibition offence.
27. The EUTR includes provisions which can include these categories, such as “payment for harvest rights and timber including duties related to timber harvesting” and “trade and customs, in so far as the forest sector is concerned”, but doesn’t explicitly refer to simple labels such as corruption and taxes.
28. Article 6, para (c).
29. See for example this press release by the Timber Trade Federation: <https://ttf.co.uk/sustainable-trade-requires-substantiated-reporting-from-ngos/>
30. This phenomenon is described in EIA’s briefing The Croatian Connection Exposed.
31. For example, there was a delay in enforcement related to Myanmar teak in Croatia compared to other countries, but this can be partly explained due to there being essentially no Myanmar teak imported into Croatia before circumvention began – giving no reason for Croatia to have been looking for Myanmar teak issues prior to being alerted about it.
32. <https://www.forest-trends.org/blog/uk-furniture-company-pleads-guilty-to-criminal-offences-under-the-eu-timber-regulation-as-european-enforcement-scales-up/>
33. Indufor: Assessment of the Impact of Potential Further Measures to Prevent Importation or Placing on the Market of Illegally Harvested Timber or Products Derived from Such Timber, Technical Report 9 Scenario Analyses with EFI-GTM Global Forest Sector Model, January 21, 2008 (page 65) https://ec.europa.eu/environment/forests/pdf/ia_report.pdf
34. https://ec.europa.eu/environment/forests/pdf/ia_report.pdf
35. Documents obtained from the German Federal Office for Agriculture and Food (BLE), related to shipments of timber supplied for the Gorch Fock ship.
36. <https://www.wwf.de/fileadmin/fm-wwf/Publikationen-PDF/EU-Forest-Crime-Initiative-Belgium-GAP-Analysis.pdf>
37. <https://www.wwf.de/fileadmin/fm-wwf/Publikationen-PDF/EU-Forest-Crime-Initiative-France-GAP-Analysis.pdf>
38. Congo, Croatia, Equatorial Guinea, Gabon, Liberia, Malaysia, and Ukraine. Countries identified from <https://www.forest-trends.org/known-log-export-bans/>
39. EIA (2021) analysis of trade data from FLEGT IMM Market Dashboard
40. WWF, “WWF Enforcement Review of the EU Timber Regulation: EU Synthesis Report”, December 2019, page 14.
41. Administrative penalties are imposed on due diligence violations as per Decreto Legislativo 30 ottobre 2014, n 178.
42. <https://ec.europa.eu/environment/aarhus/>
43. Legislative Decree no 231/2007 (Italy).
44. https://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail_groupDetail&groupId=3282
45. An express finding of this nature have been made in relation to timber from Myanmar. It has also been confirmed that under certain conditions risks that timber from Brazil has been illegally harvested cannot be mitigated. Conclusions in relation to Ukraine are being developed at the moment. Several other countries, including Cameroon, Congo, Morocco and Peru, appear to be classified as countries where risk is not negligible.
46. https://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail_groupMeeting&meetingId=17072
47. Recent analysis by Forest Trends suggests substantial quantities of logs are entering the EU from countries with restrictions on log exports: <https://www.forest-trends.org/known-log-export-bans/>
48. This is the subject of a forthcoming report by EIA’s US office.

