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Supporting Legal Timber Trade

EUTR Q&A

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What is the EU Timber Regulation?

In July 2010, the European Parliament approved legislation which prohibits the sale of timber logged illegally under the rules of the country of origin. In addition, companies must use a system of 'due diligence' to ascertain that the timber they sell in the EU was harvested legally. It will be implemented

The full text of the regulation can be seen on the EU website.

What does legal timber mean?

A key obligation on Operators is a prohibition to place illegally harvested timber on the EU market.

The EUTR applies the following definitions of legislation relevant to determine what should be considered as illegal timber:

- rights to harvest timber within legally gazetted boundaries,
- payments for harvest rights and timber including duties related to timber harvesting,
- timber harvesting, including environmental and forest legislation including forest management and biodiversity conservation, where directly related to timber harvesting,
- third parties' legal rights concerning use and tenure that are affected by timber harvesting, and
- trade and customs, in so far as the forest sector is concerned.

What are the key due diligence requirements

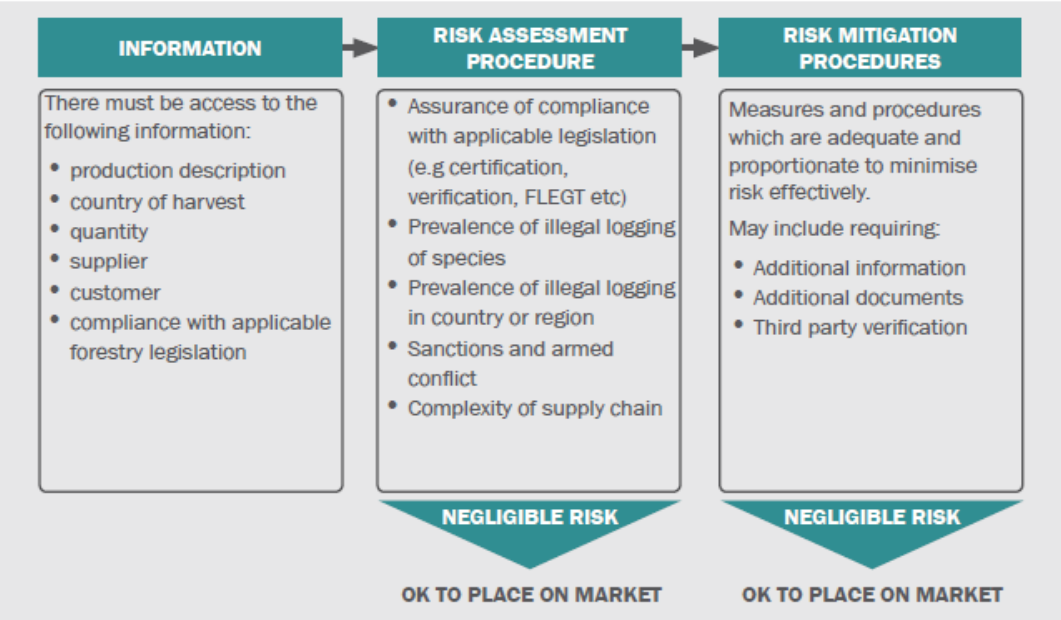
Article 4 (3) of the EU Timber Regulation states that:

> *'Each operator shall maintain and regularly evaluate the due diligence system which it uses, except where the operator makes use of a due diligence system established by a monitoring organisation.'*

A "due diligence system" can be described as a documented, tested, step-by-step method, including controls, aimed at producing a consistent desired outcome in a business process.

Article 6 outlines the details of the due diligence system.

Operators can either set up their own due diligence systems, or make use of one provided by a Monitoring Organization.



Source: ProForest

The EUTR requires Operators to implement Due Diligence systems to assess and mitigate any risks of illegal timber entering into their supply chain. The fundamental process of due diligence in the EUTR includes the following three main steps:

1. access to information
2. risk assessment
3. risk mitigation

Each of these is further detailed in the regulation as below.

Access to information

Operators must have 'measures and procedures' in place that provide access to specific information, about the timber that they will be placing on the market.

The following information is required:

- a description of the timber(including its trade name),
- the country of harvest, and if applicable
  - Region
  - FME
- quantity,
- the name and address of the operator's supplier,
- the name and address of the trader to whom the operator supplies the product,
- and documents indicating compliance with applicable legislation.

The absence, or non-availability, of any of the required information is a point that must be incorporated into the risk assessment and, to the extent necessary or possible, subsequent risk mitigation.

What is a Risk Assessment?

An operator must assess the risk that the timber it is placing on the EU market is illegal, taking account of information collated on the origin of the timber, and also considering further criteria:

- assurance of compliance with applicable legislation, which may include
- certification or other third-party-verified schemes which cover compliance with
- applicable legislation;
- prevalence of illegal harvesting of specific tree species;
- prevalence of illegal harvesting or practices in the country of harvest and/or sub-national
- region where the timber was harvested [...];
- complexity of the supply chain.

The process of risk assessment is to consider the information to which the operator has access, taking account of where relevant information is not available to assess whether or not the risk of the timber in question being illegal is more than 'negligible'. If there is more than a negligible risk, the operator must take mitigation steps.

What does it mean to do Risk Mitigation?

In the EUTR it is required that where the risk assessment determines that the risk that the timber in question is greater than 'negligible', an operator must take risk mitigation steps. These must consist of a set of 'measures and procedures' that are 'adequate and proportionate to minimize effectively that risk'. Risk mitigation steps may include requiring additional information or documents and/or requiring third party verification but an operator is free to use other methods, at its own discretion, with the only requirement being that they are ‘adequate and proportionate’ to effectively minimize the risk.

Accordingly, an operator must take mitigation steps until the risk of illegality is negligible, with, in practice, risk mitigation steps to be followed by further risk assessment to consider that fact. The nature of the suggested risk mitigation steps reflect and build on the access to information and risk analysis steps: they suggest further information and/or third party verification, as appropriate tools.

What documents can I use to prove legality?

The regulation does not specify guidance for documenting legality. Therefore the documents that are necessary to assure legality for a specific forest operation depends on the legislation applicable in the country of harvest. However, it should be underlined that the ability of documents alone to be used as a proof of legality depends on the ability to connect the documentation with the specific material or product in question. Normally the ability to connect documentation with material is closely related to documented Chain of Custody systems, such as those implemented by certification and verification systems.

It is therefore not enough that a company is presented with a number of documents from a forest, if there is no way of connecting the material with those documents.

In relation to documentation the level of corruption in the country of origin of the material also plays a vital role. If there is a high level or corruption the integrity of documents must be considered with skepticism.

What is enough to mitigate risks?

The regulation does not specify a threshold for when certain risks can be considered to be mitigated. It will therefore always be a subjective exercise to conclude when a certain activity has been effective in meeting a specified risk.

The risk mitigation activity chosen should always relate directly to the specified risk and be designed to control that risk. It is therefore necessary to carefully evaluate the types of risks in order to identify risk mitigation measures. NEPCon has developed due diligence guidelines which includes a framework for risk specification and mitigation identification that can be used in this regard.

Will certified material meet the EUTR requirements?

It is clear from the wording of the regulation and the delegated act 607/12 that certification and verification can play a strong role in lowering risks and assuring that the required information and legality assurance is available. To meet these requirements the schemes has to be “credible”. Credible schemes are those verification or certification schemes that fulfill the minimum requirements as outlined in Article 4 in EU Implementing regulation 607/12 (*see below for details).

In order to verify if your supplier is covered by a valid certification or verification certificate you can refer to the following websites:

Certification systems:

- FSC Certification: www.fsc-info.org
- PEFC Certification: http://register.pefc.cz/search1.asp

LEGALITY VERIFICATION SYSTEMS:

- Rainforest Alliance VLO and VLC: http://www.rainforest-alliance.org/forestry/verification/transparency/verification-clients
- SCSLegalHarvestVerification: http://www.scscertified.com/nrc/legal_harvest_verified_clients.php
- CertiSource Verified Legal: http://www.certisource.co.uk

See also CPET website for general information about legality verification systems:http://www.cpet.org.uk/uk-government-timber-procurement-policy/evidence-of-compliance/other-evidence-as-assurance/verification-systems/voluntary-legality-verification-systems/

*Article 4

Risk assessment and mitigation

Certification or other third-party verified schemes referred to in the first indent of the second paragraph of Article 6(1)(b) and in Article 6(1)(c) of Regulation (EU) No 995/2010 may be taken into account in the risk assessment and risk mitigation procedures where they meet the following criteria:

(a) they have established and made available for third-party use a publicly available system of requirements, which system shall at the least include all relevant requirements of the applicable legislation;

(b) they specify that appropriate checks, including field-visits, are made by a third party at regular intervals no longer than 12 months to verify that the applicable legislation is complied with;

(c) they include means, verified by a third party, to trace timber harvested in accordance with applicable legislation, and timber products derived from such timber, at any point in the supply chain before such timber or timber products are placed on the market;

(d) they include controls, verified by a third party, to ensure that timber or timber products of unknown origin, or timber or timber products which have not been harvested in accordance with applicable legislation, do not enter the supply chain.

What is the interaction between the prohibition and the due diligence obligation?

The EUTR places two distinct obligations on operators. The prohibition in Article 4(1) stipulates that:

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

The due diligence obligation requirement in Article 4(2) states that:

> *'Operators shall exercise due diligence when placing timber and 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'*

The central question is the extent, if any, to which compliance with the due diligence obligation should mitigate breaches of the prohibition. No due diligence system will be perfectly effective; if an operator exercises due diligence in good faith and as fully as possible, but through no fault of his own places illegally harvested timber on the market, should he be prosecuted for breach of the prohibition?

The prohibition is drafted as a strict liability offence, and on a narrow reading an operator would be in breach of it even if he could not have had any knowledge that timber he placed on the market was illegally harvested (for example because he was provided with fraudulent paperwork).

Article 19 provides that it is a matter for individual Member States to decide upon the appropriate penalties and sanctions applicable to breaches of the prohibition and the due diligence obligation. These must be effective, proportionate and dissuasive. The requirement for proportionality might allow fines to be tapered to reflect the degree of intentional breach of the prohibition.

Ultimately it will be a matter for the Courts to determine how the prohibition and the due diligence obligation interact. It is however clear that the more assurance an operator obtains from a supplier about the legality of his supply of timber the lower should be the risk that he will breach the prohibition.

How is valuation of due diligence systems to be interpreted?

Article 4 (3) of the EU Timber Regulation states that:

> *'Each operator shall maintain and regularly evaluate the due diligence system which it uses, except where the operator makes use of a due diligence system established by a monitoring organisation.'*

It is important that an operator using its own due diligence system should evaluate that system at least annually to ensure that those responsible are following the procedures that apply to them and the desired outcome is being achieved.

An evaluation can be carried out by someone within the organisation (ideally independent from those carrying out the procedures), or by an external body. The evaluation should identify any weaknesses and failures and the organisation's management should set deadlines for addressing them.

In the case of a timber due diligence system, the evaluation could for example check whether there are documented procedures for collecting and recording key information about each supply of timber product to be placed on the market, for assessing the risk that any component of that product contained illegally harvested timber, and describing actions to take with different levels of risk. It should also check whether those who are responsible for carrying out each step in the procedures both understand and are implementing them, and that there are adequate controls to ensure that the procedures are effective in practice (i.e. that they identify and result in exclusion of high-risk timber supplies).

What products are covered by the Regulation?

Definition: 'timber and timber products' means the timber and timber products listed below, with the exception of timber products or components of such products manufactured from timber or timber products that have completed their lifecycle and would otherwise be disposed of as waste.

The products are listed in the annex with a code according to the Combined Nomenclature or CN comprised of the Harmonized System (HS) nomenclature. The Combined Nomenclature codes are set out in Annex I to Council Regulation (EEC) No 2658/87 which is available for download here. The CN

codes are followed by a description which can help establish if a specific timber or wood product is covered by the regulation.

The timber and timber products covered are listed here:

4401 Fuel wood, in logs, in billets, in twigs, in faggots or in similar forms; wood in chips or particles; sawdust and wood waste and scrap, whether or not agglomerated in logs, briquettes, pellets or similar forms

4403 Wood in the rough, whether or not stripped of bark or sapwood, or roughly squared

4406 Railway or tramway sleepers (cross-ties) of wood

4407 Wood sawn or chipped lengthwise, sliced or peeled, whether or not planed, sanded or end-jointed, of a thickness exceeding 6 mm

4408 Sheets for veneering (including those obtained by slicing laminated wood), for plywood or for other similar laminated wood and other wood, sawn lengthwise, sliced or peeled, whether or not planed, sanded, spliced or end- jointed, of a thickness not exceeding 6 mm

4409 Wood (including strips and friezes for parquet flooring, not assembled) continuously shaped (tongued, grooved, rebated, chamfered, V-jointed, beaded, moulded, rounded or the like) along any of its edges, ends or faces, whether or not planed, sanded or end-jointed

4410 Particle board, oriented strand board (OSB) and similar board (for example, waferboard) of wood or other ligneous materials, whether or not agglomerated with resins or other organic binding substances

4411 Fibreboard of wood or other ligneous materials, whether or not bonded with resins or other organic substances

4412 Plywood, veneered panels and similar laminated wood

4413 00 00 Densified wood, in blocks, plates, strips or profile shapes

4414 00 Wooden frames for paintings, photographs, mirrors or similar objects

4415 Packing cases, boxes, crates, drums and similar packings, of wood; cable-drums of wood; pallets, box pallets and other load boards, of wood; pallet collars of wood (Not packing material used exclusively as packing material to support, protect or carry another product placed on the market.)

4416 00 00 Casks, barrels, vats, tubs and other coopers' products and parts thereof, of wood, including staves

4418 Builders' joinery and carpentry of wood, including cellular wood panels, assembled flooring panels, shingles and shakes

47 and 48 Pulp and paper of Chapters 47 and 48 of the Combined Nomenclature, with the exception of bamboo-based and recovered (waste and scrap) products

9403 30, 9403 40, 9403 50 00, 9403 60 and 9403 90 30 Wooden furniture

9406 00 20 Prefabricated buildings

What products are NOT covered by the Regulation?

Below are listed a selection of timber and wood products which are **not** covered by the EU Timber Regulation, with reference to the Combined Nomenclature codes. Please note that this list is for guidance only and that operators and traders are responsible for checking if products are covered.

- Seats (CN 9401), including wood framed dining room chairs, office chairs, garden chairs and benches (non-upholstered CN code 9401 6900 00) and sofas and arm chairs (upholstered CN code 9401 6100 00).
- Medical, surgical, dental or veterinary furniture (CN 9402).
  Note that wooden furniture of the kind used in offices (CN 940330), in the kitchen (CN 940340), in the bedroom (CN 94035000) and other wooden furniture (CN 940360) including parts of wood (CN 94039030) is **covered by the regulation.**
- Printed books, Newspapers, pictures, and other products of the printing industry, manuscripts (Chapter 49)

- Musical instruments (Chapter 92)
- Toys, games and sports requisites, parts and accessories thereof (Chapter 95)
- Tools, broom or brush bodies and handles of wood (CN code 4417) and spoons (Chapter 82)
- Brooms and brushes (CN 9603)
- Clothes hangers (CN code 4421)
- Walking sticks, umbrellas and sun umbrellas (Chapter 66)
- Clocks and watches (Chapter 91)
- Lamps and lighting fittings (CN 9405)
- Pens (Chapter 9608) and pencils (CN 9609)
- Smoking pipes (CN 9614 00)
- Works of art, collectors pieces and antiques (Chapter 97)
- Wood marquetry and inlaid wood; caskets and cases for jewellery or cutlery, and similar articles, of wood; statuettes and other ornaments, of wood; wooden articles of furniture not falling in Chapter 94 (CN 4420)
- Cork and articles of cork (chapter 45)

Waste products:

Timber products or components of such products manufactured from timber or timber products that have completed their lifecycle and would otherwise be disposed of as waste are also not covered by the EU Timber Regulation. 'Waste' is defined as 'any substance or object which the holder discards or intends or is required to discard'

Is packaging covered by the Regulation?

Article 2(a) of the EUTR applies its provisions to "the timber and timber products set out in the Annex.

The Annex sets out the "Timber and timber products as classified in the Combined Nomenclature[1] set out in Annex I to Council Regulation (EEC) No 2658/87, to which this Regulation applies" including:

> *"4415 Packing cases, boxes, crates, drums and similar packings, of wood; cable-drums of wood; pallets, box pallets and other load boards, of wood; pallet collars of wood*
>
> *(Not packing material used exclusively as packing material to support, protect or carry another product placed on the market.)"*

and

> *"Pulp and paper of Chapters 47 and 48 of the Combined Nomenclature, with the exception of bamboo-based and recovered (waste and scrap) products".*

When any of the above articles are placed on the market as products in their own right, rather than simply being used as packaging for another product, they *will* be covered by the Regulation.

Within these categories there is a further distinction between packaging that is considered to give a product its 'essential character' and packaging which is shaped and fitted to a specific product, but not an integral part of the product itself. General rule 5(b) for the interpretation of the Combined Nomenclature[2] clarifies these differences and examples are contained below. However, these additional distinctions are only like to be relevant to a small proportion of goods subject to the Regulation.

Covered by the Regulation

- Packaging material of HS codes 4415 or 4819 placed on the market as a product in itself.
- Containers which give a product its essential character: e.g. decorative gift boxes,

[1] The current version of the Combined Nomenclature is available at:

http://eur-lex.europa.eu/JOHtml.do?uri=OJ:L:2010:284:SOM:EN:HTML.

[2] http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1999:278:0011:0012:EN:PDF

Exempt from the Regulation:

Packing material used exclusively to support, protect or carry another product (which may or may not be a wood-based product):

- Packing materials and packing containers presented with the goods therein if they are of a kind normally used for packing such goods: drawing instrument cases, Camera cases, musical instrument cases, gun cases, necklace cases and similar containers, specially shaped or fitted to contain a specific article or set of articles, suitable for long-term use and presented with the articles for which they are intended.

What about "recovered'/ 'waste' products?

Recital (11) to the Regulation states that because *"the use of recycled timber and timber products should be encouraged"* the Regulation should not apply to "used timber and timber products that have completed their lifestyle, and would otherwise be discarded as waste". This is achieved through two provisions.

Firstly, Article 2(a) defines the timber and timber products to which the Regulation applies:

> *'timber and timber products' means timber and timber products set out in the Annex, with the exception of timber products or components of such products manufactured from timber or timber products that have completed their lifecycle and would otherwise be disposed of as waste, as defined in Article 3(1) of Directive 2008/98/EC of the European Parliament and of the Council of 19 November on waste.'*

The definition of waste in Article 3(1) of Directive 2008/98/EC is:

> *"waste' means any substance or object which the holder discards or intends or is required to discard'*

This exemption applies to

- timber products of a kind covered by the Annex which are manufactured outside the EU from material that would otherwise have been discarded as waste (e.g. timber retrieved from dismantled buildings, or products made from waste wood) , which is then imported into the EU; and

- timber products of a type covered by the Annex which are manufactured in the EU from waste timber products of a kind not covered by the Annex.

Secondly, and more importantly, Article 2(b) exempts from the scope of the Regulation:

> *"The supply on the internal market of timber products derived from timber or timber products already placed on the internal market".*

This exemption applies to:

- products made from material previously placed on the market in the EU. There is no requirement here that the re-used material should have completed its lifecycle and would otherwise have been discarded as waste.

This exemption **does not** apply to:

- by-products from a manufacturing process involving material which had not previously been placed on the EU market.

Scenarios:

Will wood chips produced as a by-product of sawmilling be subject to the Regulation?

Yes, if they or the material from which they are derived have not been placed on the market before, except if they are made from material which has completed its lifecycle and would otherwise be discarded as waste.

Will imports of furniture made from timber recovered from demolition of houses outside the EU be subject to the Regulation?

No, the material in these products has had a previous use so comes within the description of recycled material. However documentation that the material is in fact recycled should be made available.

What does "placing on the market" mean?

Article 2(b) of the EU Timber Regulation provides that:

> *"placing on the market" means the supply, by any means …. of timber or timber products for the first time on the internal market for distribution or use in the course of a commercial activity, whether in return for payment or free of charge."*

The precise meaning of this definition is uncertain, especially in respect of what it means to "supply" timber or timber products. It is however clear that in all cases "supply" must be

- **on the internal market** - so the timber must be physically present in the EU, either harvested here or imported AND cleared by customs for free circulation; and
- **in the course of a commercial activity** – so the Regulation does not impose requirements on non-commercial consumers.

Only the Courts will be able to provide a definitive interpretation, but it is considered that: placing on the market' should be understood as occurring when timber or timber products are **made available** for distribution or use (either by another person or by the supplier himself) on the EU market in the course of the supplier's commercial activity.

The provisions of the Regulation concerning "operators" therefore apply to:

- companies which harvest timber within the EU, for the purpose of processing or for sale to commercial or non-commercial consumers
- companies which import timber and timber products into the EU, for the purpose of processing or for sale to commercial or non-commercial consumers, and
- companies which import timber into the EU exclusively for use in their own business.

Under this interpretation, a business which imports into the EU timber products for use in its own organisation would need to implement a due diligence system and would commit an offence if any of its imports contained timber which had been illegally harvested. This interpretation would also not require the timber to be sold or physically transferred to a specific person: the timber would be covered by the Regulation as soon as a supplier made it available for distribution or use in the EU.

The position under the Regulation of 'agents' who act as middle men, sourcing products for others and not merely acting as shipping agents, will need to be determined by reference to the particular facts of each case and the applicable contractual arrangements. An 'agent' who purchases and imports stock to meet anticipated orders from buyers will be an "operator" in his own right, unlike a true agent who acts only on behalf of another party and at no point takes actual legal ownership of products himself.

Scenarios outlining how this interpretation would work in practice are attached at Annex A. As scenario 7 illustrates, there is nothing in the Regulation which requires that an operator must be legally established in the EU. However all operators, whether EU or non-EU based, must comply with the prohibition on placing illegally harvested timber on the market and the obligation to exercise due diligence. A possible penalty for failure to comply with these requirements would be seizure of the products concerned.

How would this interpretation apply in practice?

The following scenarios outline situations in which a company/individual would be considered an operator under the EU Timber Regulation.

Scenario 1

Supplier A buys timber in a third country outside the EU and imports it through customs into a EU Member State, where he transfers possession of it to EU manufacturer B for processing into furniture and re-export to Supplier A. Manufacturer B never takes ownership of the timber; however, he receives payment from supplier A for his processing services:

- supplier A becomes an operator when he makes the timber available for distribution or use on the EU market (i.e. when he imports it).

Scenario 2

Manufacturer C buys paper in a third country outside the EU and imports it into an EU Member State, where he uses the paper to make exercise books. He then sells the exercise books to retailer D inside the EU. Paper is a product covered by the Annex to the EU Timber Regulation:

- manufacturer C becomes an operator when he imports the paper for use in his own business.

Scenario 3

Energy company E purchases wood chips directly from a third country outside the EU and imports them into the EU, where it uses them to produce energy which it then sells to the National Grid. Although the wood chips are within the scope of the EU Timber Regulation the final product, energy, which the company sells is not:

- energy company E becomes an operator when it imports the woodchips for use in its own business.

Scenario 4

Timber merchant F purchases wood chips directly from a third country outside the EU and imports them into the EU, where he sells them on to energy company E. Energy company E then uses these wood chips in the EU to produce energy, which it sells to the National Grid:

- timber merchant F becomes an operator when he imports the woodchips into the EU for distribution through his own business.

Scenario 5

Retailer G purchases till rolls in a third country outside the EU and imports them into the EU, where he uses them in his stores:

- retailer G becomes an operator when he imports the till rolls into the EU for use in his own business.

Scenario 6

EU timber merchant H buys particle board online from a supplier based outside the EU. Under the contract, ownership transfers immediately to timber merchant H while the particle board is still outside the EU. The particle board is transported to the EU and brought through customs by shipping agent J, who delivers it to timber merchant H. [3] Timber merchant H then sells the particle board to builder K:

- timber merchant H becomes an operator when his agent J imports the particle board into the EU for distribution or use in H's business.

Scenario 7

EU timber merchant H buys particle board online from supplier L, who is based outside the EU. Under the contract, ownership only transfers when the particle board is delivered to timber merchant H's yard in the EU. Shipping agent J imports the board on behalf of supplier L and delivers it to timber merchant H's yard:

- supplier L becomes an operator when his agent J imports the particle board into the EU for distribution in the course of L's business.

Scenario 8

EU retailer M imports timber products into the EU and sells them directly through his shop to non-commercial consumers:

- retailer M becomes an operator when he imports the timber products into the EU for distribution through his own business.

[3] Shipping agent J is merely acting as a 'postman'; as an agent, he is merely transporting goods on behalf of timber merchant H and so does not place them on the market himself.

How about composite products?

Article 6(1)(a) of the Regulation requires due diligence systems to contain:

> *"measures and procedures providing access to the following information concerning the operator's supply of timber or timber products placed on the market:*
>
> *- description, including the trade name and type of product as well as the common name of tree species and, where applicable, its full scientific name,*
>
> *- country of harvest, and where applicable*
>
> *(i) sub-national region where the timber was harvested; and*
>
> *(ii) concession of harvest,*
>
> *. . ."*

Therefore, when fulfilling this 'access to information' obligation for composite products or products with a composite wood-based component, the operator should attempt to get information on all virgin material in the mix, including the species, the location where each component was harvested, and the legality of origin of those components.

It is often difficult to identify the precise origin of all components of composite timber products. This is especially true for reconstituted products such as paper, fibre-board and particle board, where identifying species may also be difficult. In such cases the operator should make best efforts to characterise the components of a supply.

What is CITES?

Timber and timber products of an endangered tree species with an appropriate CITES permit/certificate will be considered to have been legally harvested for the purposes of the EU Timber Regulation. See here for more information on CITES.

See: http://www.cites.org/eng/disc/how.php

What is a Monitoring Organisation

Monitoring Organisations' role is to maintain and regularly evaluate due diligence systems, which will be available to operators to use to show and ensure that due diligence, is correctly applied.

The use of a Monitoring Organisation is an optional and operators can choose to implement their own due diligence system.

Monitoring Organisations shall be legally established within the EU and will be subject to checks, they are yet to be established in the UK.

1. A monitoring organisation shall:

(a) maintain and regularly evaluate a due diligence system and grant operators the right to use it;

(b) verify the proper use of its due diligence system by such operators;

(c) take appropriate action in the event of failure by an operator to properly use its due diligence system, including notification of competent authorities in the event of significant or repeated failure by the operator.

2. An organisation may apply for recognition as a monitoring organisation if it complies with the following requirements:

(a) it has legal personality and is legally established within the Union;

(b) it has appropriate expertise and the capacity to exercise the functions referred to in paragraph 1; and

(c) it ensures the absence of any conflict of interest in carrying out its functions.

3. The Commission, after consulting the Member State(s) concerned, shall recognise as a monitoring organisation an applicant that fulfils the requirements.

The decision to grant recognition to a monitoring organisation shall be communicated by the Commission to the competent authorities of all the Member States.

4. Monitoring organisations will be checked by the competent authorities at regular intervals to verify that the monitoring organisations continue to fulfil its functions and comply with the requirements. Checks may also be carried out when the competent authority of the Member State is in possession of relevant information, including substantiated concerns from third parties or when it has detected shortcomings in the implementation of the due diligence system established by a monitoring organisation.

5. If a competent authority determines that a monitoring organisation either no longer fulfils the functions or no longer complies with the requirements, it shall without delay inform the Commission

What is the liability of a Monitoring Organisation?

Under Article 8(1) a monitoring organisation (MO) must:

- verify the proper use of its due diligence system by operators, and

- Take appropriate action in the event of failure by an operator to properly use its due diligence system, including notification of competent authorities in the event of significant or repeated failure by the operator.

Appropriate action could take the form of prescribing corrective actions that the operator must take, with deadlines for their completion followed by re-inspection.

“Significant or repeated failure” might include:

- Failure to implement an aspect of the due diligence system, despite having been issued a request to take corrective action for the same issue more than once
- Knowingly continuing to stock high-risk timber and place it on the market after having been warned of the likelihood that it is from illegal harvests

A competent authority may carry out checks on a MO, including if it detects shortcomings in the implementation by operators of the MO’s due diligence system (Article 8(4)). Failure by a MO to take appropriate action against operators misusing its due diligence system can lead to the MO having its recognition as a MO withdrawn by the Commission (Article 8(5) and (6)).

An MO is not directly liable for the actions of operators using its due diligence system, so could not be prosecuted under the prohibition provision in Article 4(1) if an operator using its due diligence system was found to have placed illegally harvested timber on the market (unless on the facts of the case the MO had deliberately acted so as to be implicated in the commission of that offence).

However, Article 19 requires Member States to establish “effective, proportionate and dissuasive” penalties applicable for infringements of the Regulation. Recital (27) makes clear that such penalties should apply to MOs as well as operators and traders. So MOs may be liable for fines for failing to comply with the requirements of the Regulation as well as the sanction of having their recognition withdrawn by the Commission.

What is a Competent Authority

The EU has defined a system for implementation. As part of this system each EU Member State will assign one “*Competent Authority*” which will be responsible for the implementation of the regulation.

1. In addition companies and organizations may apply to become “Monitoring Organizations” (MOs) which have the responsibility to:
   (a) maintain and regularly evaluate a due diligence system and grant operators the right to use it;
   (b) verify the proper use of its due diligence system by such operators;
   (c) take appropriate action in the event of failure by an operator to properly use its due diligence system, including notification of competent authorities in the event of ***significant*** or repeated failure by the operator

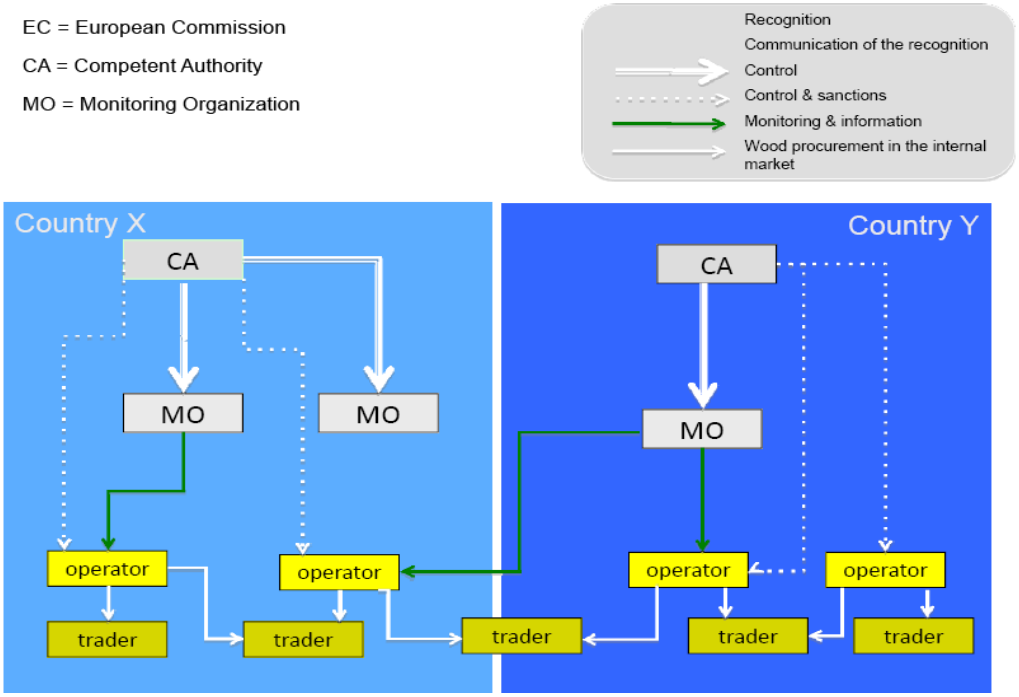
The competent authorities will carry out checks at regular intervals to verify that the monitoring organizations fulfill the functions and requirements. Operators (companies) may also choose to implement their own system if they want.

The implementation of the EUTR will be carried out through different bodies as illustrated below:

EC = European Commission

CA = Competent Authority

MO = Monitoring Organization



(Source: Proforest)

Who is the Competent Authority in my country?

Each Member State has one or more Competent Authorities responsible for the application of this Regulation. See here for an overview of the nominated competent authorities for each member state. **Note**: some Member States have on-going lengthy internal procedures necessary to designate their Competent Authorities and have, therefore, provided provisional information on the Competent Authorities only. Once the procedures are over the Commission will update the list of competent authorities accordingly**)**

What will the control and penalties be?

Competent authorities will carry out checks to verify if Monitoring Organisations, Operators and Traders comply with the requirements set out in the Regulation.

The Member States shall lay down the rules on penalties applicable to infringements of the provisions of this Regulation and shall take all measures necessary to ensure that they are implemented. They must be effective, proportionate and dissuasive and may include, inter alia:

a) 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,
b) seizure of the timber and timber products concerned,
c) immediate suspension of authorisation to trade.