



Background Memorandum:

“The European Timber Regulation: Only One Month To Go”,

4 February 2013

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1. Introduction

On 20 October 2010, the European Parliament and the European Council adopted the EU Regulation laying down the obligations of operators who market timber and timber products (hereafter: 'Timber Regulation')¹ The Timber Regulation will come into force in March 2013 in all EU countries and will impose direct obligations on companies.

In 2011, the Center for Sustainability of Nyenrode Business University ('Nyenrode') and the Dutch Ministry of Economic Affairs organised two consultative Working Conferences about the Timber Regulation for companies and other market players.²

Presently, companies only have a few weeks to complete the preparations in order to meet the requirements of the Regulation. In order to address any remaining questions, Nyenrode and the Ministry of Economic Affairs have organised a follow-up Working Conference. The title is: "The European Timber Regulation: Only One Month To Go". The seminar will be held on 4 February 2013 at Nyenrode University in Breukelen, the Netherlands.

This background memorandum has been compiled to inform the participants about the Timber Regulation and its consequences. It includes: (i) a brief overview of this new regulation; (ii) an overview of the legislative process, (iii) a brief discussion on the main obligation of companies, that is to perform 'due diligence', and (iv) information on the implementation process in the Netherlands.

2. EU Timber Regulation: What is it About?

The Timber Regulation aims to combat the trade in illegally logged timber. It intends to complement and reinforce the existing EU policy framework on this important topic. The Regulation is part of the 'EU Action Plan on Forest Law

¹Regulation (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, L 295/23, (Timber Regulation).

² For more information, please see:

<http://www.nyenrode.nl/FacultyResearch/LSE/CS/International%20Sustainable%20Business/conferences/Pages/Default.aspx>.

Enforcement, Governance and Trade in Forestry' (FLEGT), which was initiated by the European Commission in May 2003. The aim of FLEGT is to reduce the worldwide activities of illegal logging. How? By excluding illegally harvested timber from the European internal market, improving the supply of legal timber and increasing the demand for responsible wood products.

The Timber Regulation contains two main elements: (1) it prohibits the placing of illegal timber and related products on the EU market, and (2) it requires of EU traders who place timber products on the EU market for the first time (the 'operators') to introduce and apply a 'due diligence' system. The term 'operators' includes timber companies which import timber or conduct timber trade, producers of timber in the EU (forests owners) and also wholesale and retail companies which sell products that contain timber.

In total, there are three main elements that together fill in the 'due diligence' concept.³ An operator has to:

(1) undertake measures and set up procedures that give access to information concerning the timber and its origin, e.g. trade name, the country of harvest, quantity, name of supplier and other information;

(2) establish risk assessment procedures enabling the operator to analyse and to evaluate the risk of illegally harvested timber or timber products being placed on the market; and

(3) if any risks are identified which are not negligible, then the operator is required to conduct risk mitigation procedures.

The timber traders, who have to set up the 'due diligence' system, also have a choice to use services of so-called 'monitoring organizations' to help them with it.

The Regulation stipulates for the establishment of 'Monitoring Organizations'. Any independent private entity can qualify and register as a Monitoring Organization provided it fulfils certain requirements. The requirements are: the

³ Regulation (EU) No 995/2010, Article 6.

organization has to be a legal entity, possess the necessary expertise and has no conflict of interests in carrying out these functions.⁴

A Monitoring Organization aims to assist operators to set up a 'due diligence' system. According to Article 4(3) of the Regulation, the operator has a choice either to maintain and evaluate the 'due diligence' system himself, or to delegate this task to the Monitoring Organization.⁵ Importantly, even when the operator chooses to use a Monitoring Organization's 'due diligence' system, the ultimate responsibility and obligations to set up a 'due diligence' system and to place only legal timber on the market still lie with the operator and not with the Monitoring Organization.⁶

3. History: Overview of the Legislative Process

Since the Timber Regulation was introduced in 2010, many questions emerged. For example about the specific characteristics of the 'due diligence' system, the role of the Monitoring Organizations, the sanctions, etc. These questions were the subject of secondary legislation adopted by the European Commission in 2012: an Implementing Regulation⁷ and a Delegated Regulation.⁸

The Implementing Regulation (7 July 2012) lays down detailed rules regarding: (i) the 'due diligence' system for companies; and (ii) how the competent authorities of each Member State must control and check the work of the Monitoring Organizations.

The Delegated Regulation (27 April 2012) lays down detailed requirements and a procedure concerning the recognition of Monitoring Organizations and the withdrawal of recognition.

⁴ Regulation (EU) No 995/2010, Article 8 (2).

⁵ Regulation (EU) No 995/2010, Article 4 (3).

⁶ Article 4 of the Regulation (EU) No 995/2010.

⁷ Commission Implementing Regulation (EU) No 607/2012.

⁸ Commission Delegated Regulation (EU) No 363/2012.

Furthermore, the European Commission has published a 'guidance document' that also provides explanations regarding the Timber Regulation and the two regulations mentioned in this paragraph.

4. Due Diligence: Compliance with the Regulation

Operators have an obligation to set up a 'due diligence' system. The Implementing Regulation provides more information on the 'due diligence' requirement. Article 2 states:

'operators shall apply the due diligence system to each specific type of timber or timber product supplied by a particular supplier within a period not exceeding 12 months (...).'

The Implementing Regulation also explains how an operator should organise its timber supply, risk assessment, mitigation procedures and supply records. The issue concerning the role of 'third-party certification' is addressed in Article 4 of the Implementing Regulation on risk assessment and mitigation. This provision states that certification or other third-party verified schemes may be taken into account in the risk assessment and risk mitigation procedures under certain conditions, which are provided in the same provision.

In addition to the Implementing Regulation, the guidance document further elaborates on different aspects of 'due diligence'. For example, it includes more information on risk assessment criteria and the definition of negligible risk. An example of risk assessment criteria in the form of questions is provided.

The guidance document also explains the term 'complexity of the supply chain'. This term is used as one of the risk assessment criteria under (Article 6(1)(b) of the Timber Regulation). Therefore, this element is relevant to the risk assessment and risk mitigation part of 'due diligence'. The guidance document offers a list of exemplary questions in order to evaluate the 'complexity of the supply chain', e.g.: Are there several steps in the process of treating the materials and making the products in the supply chain before the placing of a particular timber product on the EU market?

One of the most important clarifications in the guidance document concerns the requirement posed in the Timber Regulation to comply with 'applicable legislation of the country of the harvest' in deciding upon the legality of timber. As explained in the document:

*'the rationale behind this obligation is that in the absence of an internationally agreed definition of legally harvested timber the basis for defining what constitutes illegal logging should be the legislation of the country where the timber was harvested.'*⁹

Compliance with applicable legislation in the country of harvest must be seen as a part of the 'due diligence' obligation. However, as the guidance document suggests, the collection of documentation should not be seen as a separate requirement, but rather as a part of the risk assessment procedure.

The Timber Regulation and the other regulations do not provide a concrete list of required legislation of the country of harvest. The European Commission took a flexible approach towards compliance with this applicable legislation requirement, by prescribing five legislative areas that should be examined without listing specific laws. The document provides some examples of necessary documents. However, this is illustrative and should not be seen as exhaustive. The competent authorities of each Member State can provide support by indicating which necessary documents must be obtained by the operator in order to comply with laws in the country of harvest.

Despite clarifications offered in the Delegated Regulation and the guidance document, the stakeholders may still have questions about implementing the Timber Regulation.

The Working Conference on 4 February 2013 will offer an opportunity to exchange information with other stakeholders, Monitoring Organizations and the Dutch government. The programme covers the most challenging areas related to the requirements of the Timber Regulation.

⁹The guidance document developed by the European Commission, 2012.
See:http://ec.europa.eu/environment/forests/pdf/guidance_document.pdf

5. Enforcement of the Timber Regulation in the Netherlands

On 7 December 2012, the Netherlands has adopted the 'Decision concerning Implementing Regulation (EU) Nr. 995/2010' (Decision Implementing European Timber Regulation). The Netherlands appointed the Netherlands Food and Consumer Product Safety Authority (*Nederlandse Voedsel- en Warenwet Autoriteit*, hereafter: *NVWA*) as the 'designated competent authority' as required by the Timber Regulation. NVWA is an independent agency of the Ministry of Economic Affairs. NVWA has to supervise the compliance of the Timber Regulation¹⁰ and act as special investigating agency in the context of the Act on Economic Offences (*Wet Economische Delicten*).

Sanctions were clarified in Dutch legislation as well. An infringement of the prohibition requirement laid down in the Timber Regulation will be classified as an 'economic offence' on the basis of Article 1a(2) of the Act on Economic Offences in conjunction with Article 18(1) of the Flora and Fauna Act.¹¹ Depending on the gravity of the offences, they can be punished with imprisonment of maximum 2 years, a work sentence, or a fine of the fourth category (€19,500 maximally). If the value of the illegally logged timber exceeds €4,875 a fine of the fifth category (maximally €78,000) and other penalties may be imposed.

6. Concluding remarks

The goal of this background memorandum was to provide basic information on the most important themes of the Working Conference on 4 February 2013. Considering that the Timber Regulation will enter into force in less than a month, it is important to clarify the new rules for the companies. An important element thereof, and the main focus of this memorandum, is on the 'due diligence' obligation. Furthermore, the implementation of the Timber Regulation in the Netherlands is outlined.

¹⁰ Under the general basis of Article 104 of the Flora and Fauna Act.

¹¹ On the basis of Article 1a(2) of the Act on Economic Offences in conjunction with Article 18(1) of the Flora and Fauna Act.