March 2022

Due diligence on forest-risk commodities

ClientEarth's submissions to the UK Government's public consultation

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Introduction

Between 3 December 2021 and 11 March 2022 the UK Government held a public consultation on 'Implementing due diligence on forest risk commodities'. This consultation was carried out to inform the UK Government's development of secondary legislation to implement Schedule 17 of the Environment Act 2021, adopted in November 2021, which established a framework to ensure that forest risk commodities used in UK commercial activities are not linked to illegal deforestation. Many of the crucial details that will determine the scope, impact and effectiveness of the Schedule 17 framework will be set in secondary legislation.

ClientEarth's responses to this public consultation are set out below.

About you

Question 1

What is your full name?

Answer:

Michael Rice

Question 2

What is your email address?

Answer:

mrice@clientearth.org

Question 3

What country are you based in?

Answer:

Belgium

Question 4

Would you like your response to be treated as confidential? If yes, please state why.

Answer:

No.

Question 5

Are you responding:

Answer:

On behalf of an organisation

About your organisation

Question 6

What type of organisation are you responding on behalf of?

Answer:

A non-governmental organisation

Question 7

Please provide your organisation's name.

Answer:

ClientEarth, registered in England and Wales, company number 02863827, registered charity number 1053988, registered office 10 Queen Street Place, London EC4R 1BE

Questions 8 – 20

Not answered (for business respondents).

Implementing the due diligence requirements

Question 21

Should we lay secondary legislation at the earliest opportunity? If you ticked no, please state why.

Answer:

Yes

Question 22.

What should we take into account when considering how long businesses have to prepare for regulation before it comes into effect?

Answer:

Secondary legislation should be proposed and enacted without delay as a matter of urgency, and should become effective no later than 12 months after adoption. The scale and urgency of the problem of global deforestation, and the significant risks it creates for our society and economy, should be the over-riding consideration in designing and enacting the secondary legislation.

The UK Government has been signalling its intention to take bold action to tackle global deforestation for at least a decade, and the private sector has had ample time to prepare for legislative intervention. The failure by some businesses to prepare for legislative intervention should not delay Government action on a problem which the Prime Minister himself has described as “urgent”.

On 2 November 2021, just one week before the UK Parliament adopted the Environment Act, Prime Minister Johnson addressed the Leaders’ Action on Forests and Land Use event at the COP26 World Leaders Summit as part of the UK’s Presidency of the 2021 UN Climate COP in Glasgow. He said: “it is central to the ambition of the UK’s COP Presidency that we act now, and end the role of humanity as nature’s conqueror, and instead become nature’s custodian. And there is no more urgent task in fulfilling this mission than to stop the devastating loss of our forests. […] if we want to keep that Paris goal of 1.5 degrees in sight […] we must protect and restore the world’s forests.”

On the same day, the UK Government launched the Glasgow Leaders’ Declaration on Forests and Land Use, which has now been endorsed by 141 world leaders. As a lead author and signatory of that declaration, the UK Government recognised “that to meet our land use, climate, biodiversity and sustainable development goals, both globally and nationally, will require transformative further action.”

However, while the imperative to halt global deforestation remains urgent, this is not a new commitment by the UK Government. Indeed, the UK Government has made numerous

commitments to take action to halt global deforestation, none of which have been met or resulted in domestic legislative action by the UK Government.

For example, in October 2012, almost ten years ago, the UK Government committed to "working towards achieving 100% sourcing of credibly certified sustainable palm oil by the end of 2015" in the Sustainable Production of Palm Oil, UK Statement. That statement included a range of prominent UK business and industry associations who were working to achieve that 2015 goal. Unfortunately, that 2015 goal was not achieved.

On 7 December 2015 the UK Government signed The Amsterdam Declaration "Towards Eliminating Deforestation from Agricultural Commodity Chains with European Countries" in which the UK Government recognised "the need to eliminate deforestation in relation to agricultural commodity trade" and reiterated the "objectives to support and help meet the private sector goal of eliminating deforestation from the production of agricultural commodities such as beef and leather, palm oil, paper and pulp, soy and other commodities such as cocoa and rubber by no later than 2020, recognizing that many companies have even more ambitious targets as for example expressed in the 'New York Declaration on Forests'." On the same day, the UK Government signed The Amsterdam Declaration in Support of a Fully Sustainable Palm Oil Supply Chain by 2020" in which the UK Government committed to "promote the goal of a fully sustainable palm oil supply chain" as described in a private sector commitment towards 100% sustainable palm oil supply chains in Europe by no later than 2020 signed by, amongst other, the UK Food and Drink Federation.

We emphasise that both the UK Government and UK businesses have been working towards deforestation-free supply chains since at least 2012, with an initial goal of achieving deforestation-free supply chains by 2015, then 2020. It is now March 2022 and 'deforestation-free' is still the isolated exception, not the rule. We therefore challenge the proposition that business is not prepared for legislative intervention on this topic. Important to note is that consumers overwhelmingly want deforestation out of their supermarkets, with over 99% of respondents to the Government's 2020 consultation on 'due diligence on forest risk commodities' supporting the introduction of legislation to reduce all deforestation linked to forest risk commodity products.

However, these are not the only commitments the UK Government has made on the topic. In signing the Glasgow Leaders' Declaration on 2 November 2021, the UK Government reaffirmed its commitment to the Sustainable Development Goals ("SDGs"), adopted by the UN General Assembly (including the UK) in September 2015. They include targets to:

- ensure the conservation, restoration and sustainable use of forests in line with obligations under international agreements by 2020 (target 15.1);
- to halt deforestation and promote the implementation of sustainable management of all types of forests by 2020 (target 15.2); and
- take urgent and significant action to reduce the degradation of natural habitats, halt the loss of biodiversity and, by 2020, protect and prevent the extinction of threatened species (target 15.5).

One year prior to the adoption of the SDGs on 23 September 2014, the UK Government endorsed the New York Declaration on Forests. In that declaration the UK Government committed to do its part to achieve the following outcomes:

- at least halve the rate of loss of natural forests globally by 2020 and strive to end natural forest loss by 2030; and

- support and help meet the private-sector goal of eliminating deforestation from the production of agricultural commodities such as palm oil, soy, paper and beef products by no later than 2020.

Regrettably, none of these 2020 commitments have been met.

Nor is the Glasgow Leaders' Declaration the only iteration of the current UK Government's commitment to act on deforestation. On 11 January 2021 the UK Government and other signatories to the Amsterdam Declarations signed the 'Amsterdam Declarations Partnership Statement of Ambition 2025' in which the UK Government renewed its commitment "to promote sustainability in agriculture by eliminating deforestation in relation to agricultural commodities", to take action "to achieve sustainable and deforestation-free agricultural commodity supplies" and to "support policies and measures to strengthen European markets for sustainable and deforestation-free agricultural commodities, including … due diligence management".

On 21 May 2021, under the current UK Government's Presidency of the G7, the G7 climate and environment ministers, including the respective UK Government ministers, published a communique in which they recognised "that deforestation, forest degradation and ecosystem conversion are global threats to our climate, biodiversity, food security and livelihoods and are driven by the expansion of agriculture, mining, logging and infrastructure projects" and committed to "urgent action to conserve, protect and restore natural ecosystems including forests" including to "enhance supply chain transparency and traceability".

These are just some of the public commitments specifically in relation to commodity-driven deforestation that the UK Government has made over the past ten years. In the intervening years, many non-binding commitments to end deforestation have been made by governments and businesses alike. However, no binding measures have been introduced and global deforestation rates have remained at alarmingly high levels. Instead of 2020 marking a turning point in the fight against deforestation, primary rainforest deforestation increased by 12% compared to 2019 levels (https://research.wri.org/gfr/forest-pulse). Addressing this problem is indeed an "urgent task" as the Prime Minister acknowledged in Glasgow on 2 November 2021.

Indeed, the urgency and scale of the problem cannot be under-stated: continuing inaction from major consumer markets like the UK contributes to the global impact of agriculture on forests, biodiversity and the climate. Agricultural expansion is responsible for almost 80% of global deforestation (FAO State of World's Forests Report 2020: http://www.fao.org/3/ca8985en/CA8985EN.pdf) and commercial agriculture accounts for at least 80% of tropical deforestation (Drivers of Deforestation and Forest Degradation: A Synthesis Report for REDD+ Policymakers: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/fi

le/65505/6316-drivers-deforestation-report.pdf), with large-scale agribusiness, mainly cattle, soy and palm oil operations, being the biggest drivers. Agriculture expansion is the largest threat to terrestrial biodiversity, putting at risk 80% of all terrestrial species of animals, plants and insects (UNEP: https://www.unep-wcmc.org/news/earths-biodiversity-depends-on-the-worlds-forests; WWF: https://www.worldwildlife.org/habitats/forest-habitat), and undermining the livelihoods of 1.2 billion of the world's most vulnerable people (International Climate Fund Business Case: https://aidstream.org/files/documents/BioCF-and-FCPF-Business-Case.pdf). Deforestation and natural ecosystem conversion also create significant costs for our societies, estimated at almost $12 trillion a year (FOLA Growing Better Report: https://www.foodandlandusecoalition.org/wp-content/uploads/2019/09/FOLU-GrowingBetter-GlobalReport.pdf) and represents a significant business risk for sectors exposed to forest-risk commodities (CDP 2016 Forests Report: https://www.cdp.net/en/research/global-reports/global-forests-report-2016). Deforestation is also one of the leading causes of CO2 emissions. Emissions from land-use and land-use change, mostly due to deforestation, are the second biggest cause of climate change after burning fossil fuels, accounting for around 12% of global greenhouse gas emissions (WRI: https://www.wri.org/insights/forests-ipcc-special-report-land-use-7-things-know).

It should be emphasised that many of the deforestation commitments mentioned above have been made with the participation or leadership of the private sector: the 2012 Sustainable Production of Palm Oil, UK Statement included commitments from a long list of UK industry and business associations; the largest international consumer goods businesses have endorsed the New York Declaration on Forests; 800 UK businesses have endorsed the SDGs (via the UN Global Compact); the 2015 Amsterdam Declarations supported private sector deforestation commitments (including by the UK Food and Drink Federation); and countless more businesses have made voluntary no-deforestation commitments (https://forest500.org/rankings/companies; https://www.reutersevents.com/sustainability/csr-cheat-sheet-2020-deforestation-targets-be-missed).

It should also be noted that the retail business community has welcomed the development of binding legal requirements on imported deforestation without making any distinction between commodities. In October 2020, 22 of the UK's largest retail food businesses called on the UK Government to increase the ambition of its deforestation proposal, and specifically called on the Government to ensure that the new framework would "set a level playing field where sustainable commodities are the norm throughout the UK" and to "facilitate an enabling environment" for companies of all sizes to engage with their suppliers to deliver deforestation-free supply chains (https://www.retailsoygroup.org/wp-content/uploads/2020/10/Letter-on-due-diligence-consultation_final.pdf). Indeed, there are already well-developed traceability systems in the palm oil, soy, beef, coffee and cocoa sectors which address requirements arguably more complicated than legality (such as environmental and social impacts).

Countless non-binding commitments and voluntary initiatives already exist, yet they have not led to the necessary change in business practices. As Lord Goldsmith put it in the House of Lords Committee Stage debate on 12 July 2021: "We need radical change. This is the biggest problem in the world. We need action."

Urgent action is also what the Global Resource Initiative ("GRI") Taskforce recommended in its report to the Government in March 2020. The GRI Taskforce recommended that the Government

"urgently introduce a mandatory due diligence obligation for companies that place commodities and derived products that contribute to deforestation on the UK market" as well as a legally binding target to end deforestation within UK agricultural and forestry commodity supply chains by no later than 2030.

The IPCC's Sixth Assessment Report (the first part of which was published in August 2021 (https://www.ipcc.ch/report/sixth-assessment-report-working-group-i/) and second part of which was published in February 2022 (https://www.ipcc.ch/report/ar6/wg2/) also underlines the urgent need for bold action to mitigate climate change and recognised the "large potential to reduce emissions by halting deforestation and degradation". Likewise, the 2021 Dasgupta Review on the Economics of Biodiversity commissioned by the UK Government highlighted that "[c]ontinuing down our current path – where our demands on Nature far exceed its capacity to supply – presents extreme risks and uncertainty for our economies". The Review concludes that our "consumption and production patterns will need to be fundamentally restructured".

The warnings from scientists about the risks of further inaction are serious and escalating rapidly. After all this time, there is no excuse for further delay, especially for a basic requirement like ensuring products consumed in the UK are produced without breaking local laws.

As the only legislative mechanism to address the UK's contribution to illegal deforestation, the secondary legislation to implement Schedule 17 of the Environment Act should be developed as a matter of urgency and should become effective no later than 12 months after adoption.

This would align with similar proposals being developed in the EU (the proposal for an EU regulation on deforestation-free products) and the US (the proposed US FOREST Act (S. 2950)), the substantive provisions of which are due to become effective 12 months after adoption.

Forest risk commodities

Identifying key commodities in scope

Question 23

Can you provide any further evidence on commodities that drive deforestation? Please provide detail here.

Answer:

There is already a wealth of scientific, peer-reviewed research and data clearly linking the production of a very short list of commodities to significant and often illegal deforestation (eg. Pendrill et al., 2019, https://iopscience.iop.org/article/10.1088/1748-9326/ab0d41). The UK Government's own research identifies seven commodities as responsible for the majority of recent and ongoing global deforestation and for 65% of the annual tropical deforestation risk associated with UK supply chains: cattle (beef and leather), oil palm, soy, maize, coffee, cocoa and rubber (in that order) (https://hub.jncc.gov.uk/assets/709e0304-0460-4f83-9dcd-3fb490f5e676).

The secondary legislation should include these seven commodities as a minimum - simultaneously and as a matter of urgency (ie. not in a 'sequenced' manner).

The effectiveness of the Schedule 17 framework will be directly proportionate to the scope of commodities to which it applies. It should be noted that equivalent proposals going through the legislative process in the EU (the proposed EU regulation on deforestation-free products) and US (the proposed US FOREST Act (S. 2950)) would apply to cattle (with beef and leather treated as derived products of the single commodity 'cattle'), cocoa, coffee, palm oil and soy (as well as timber products with respect to the EU proposal, with several MEPs and Member States advocating for the inclusion of rubber and maize) within one year of enactment.

Adopting a narrower product scope, and deliberately allowing large volumes of commodities known to have significant illegal-deforestation risks to continue circulating in the UK economy would directly undermine the policy impact and effectiveness of the Schedule 17 framework. This partial approach would also create an uneven playing field, result in discriminatory treatment of commodities with equivalent illegal-deforestation risk, and undermine the efforts and leverage of companies trading in excluded commodities to engage with their suppliers towards greater supply chain transparency and sustainability.

There is ample evidence of illegal deforestation risk associated with the seven commodities listed above. Excluding any of them would leave a significant portion of the UK's illegal deforestation footprint out of scope. Given the objective of Schedule 17 is to tackle the UK's contribution to illegal deforestation, excluding any of these seven commodities should only be allowed with clear and convincing justification (which has not been provided).

Legislative sequencing

Question 24

Which of the following factors do you think should be considered to determine legislative sequencing? Please tick all that apply and state your reasons.

- the commodity's impact on global deforestation
- the UK's role in this global deforestation
- ability to deliver effective regulation
- other (please specify)

Answer:

- The commodity's impact on global deforestation
- The UK's role in this global deforestation

- Other: The scale and urgency of the problem of global deforestation, and the significant risks it creates for our society and economy, should be the over-riding considerations in designing and enacting the secondary legislation.

Please state your reasons:

We do not agree that a sector's readiness for regulation should determine the Government's willingness to enact effective legislation. Legislation should be designed according to identified policy objectives to effectively drive sectoral transformation, particularly where adequate economic incentives do not exist, not the other way around. The legislative agenda should not be captive to industry 'readiness' and should not be used merely to rubber stamp existing industry practices. Instead, the secondary legislation should both set the goalposts and define the boundaries for industry behaviour.

In our answer to Question 22 we emphasise that numerous UK business and industry associations as well as individual businesses have held commitments to achieve deforestation-free supply chains for years, some for almost a decade. Yet market forces alone have been insufficient to drive industry change. Rather than more time to 'get ready', a clear and imminent legal deadline – a legislative 'cliff edge' – is needed to drive industry change. To be effective and really catalyse a change in business practices, this legal deadline needs to be in the immediate term, rather than the medium term of three to five years. As noted in our responses to Questions 22 and 23, similar proposals going through the legislative process in the EU and US will apply to cattle (including beef and leather products), cocoa, coffee, palm oil and soy (as well as timber products and potentially rubber and maize with respect to the EU proposal) from 12 months after adoption.

Given the urgency of the problem, it is imperative that robust measures for the seven commodities representing the majority of the UK's overseas land footprint and deforestation risk (listed in our answer to Question 23) are enacted as quickly as possible while keeping to a minimum the total time it would take to apply the Schedule 17 framework to the broadest possible scope of commodities.

In this regard, we question the need to develop requirements 'tailored to specific commodity supply chains' and question the proposition that it would take up to four years to include more than two commodities in the scope of the secondary legislation. Instead, the secondary legislation should establish clear and commodity-agnostic requirements that can be applied equally to all forest risk commodities (noting especially that the core requirement under Schedule 17 is the basic requirement of compliance with a sub-set of applicable local laws). If necessary, commodity-specific aspects of supply chain due diligence (if any) could be elucidated in guidance. However, there is nothing commodity-specific about legal compliance: while the laws that may fall within the definition of "relevant local laws" will vary between jurisdictions and commodities, whether "relevant local laws" have been complied with will be an objective question of fact in every case.

Question 25

What data sources or information should be used to consider the proposed factors?

Answer:

See the sources referenced in our response to Questions 22 and 23.

Question 26

Do you have any further comments regarding the order in which we introduce key forest risk commodities?

Answer:

Given the urgency of halting global deforestation, the Government's numerous and over-due commitments on deforestation, the intervening years of legislative inaction, and the catastrophic consequences of not addressing the climate and biodiversity crises, the Schedule 17 framework should come into effect as soon as possible and cover at least cattle (beef and leather), palm oil, soy, maize, coffee, cocoa and rubber from commencement.

In light of the UK Government's repeated acknowledgements of the scale of this problem and its multiple commitments for over a decade to the essential importance of properly addressing it, Government resourcing constraints should not be a justification for delaying the urgent and necessary action that is required in the national interest.

We urge the Government to list all seven identified commodities as forest risk commodities with the secondary legislation becoming effective within 12 months of enactment in a consistent manner with legislative proposals in the EU and US. We challenge the proposition that the proposed sequencing options presented in the consultation are the only options available.

There is ample evidence that all commodities considered are driving illegal (and legal) deforestation and conversion. Excluding any of them would leave a large part of the UK's illegal deforestation and conversion footprint out of scope. Any proposed exclusions should be justified with a clear and convincing rationale and reasons (which have not been presented).

First round of secondary legislation

Option 1: introduce 2 commodities in the first round of secondary legislation Officials estimate this would take 18 to 24 months to come into effect, including a minimum period of 6 months for businesses to prepare for regulation.9 During that time, we would continue to work on how other commodities can be introduced in subsequent rounds, which could follow swiftly.

Option 2: introduce 3 to 4 commodities in the first round of secondary legislation Officials estimate this would take 3 to 4 years to come into effect, including a minimum period of six months for businesses to prepare for regulation. As with Option 1, we would continue exploring how to introduce other commodities in subsequent rounds.

Option 3: introduce 5 to 7 commodities in the first round of secondary legislation Officials estimate this would take 4 to 5 years to come into effect, including a minimum period of six months for businesses to prepare for regulation. We could then start work to assess other forest risk commodities for inclusion in scope, including those which may become key drivers of deforestation in the next five years.

Question 27

Which option for the first round of secondary legislation do you recommend? Please state your reasons.

- option 1
- option 2
- option 3

Answer:

We do not recommend any of these options.

As emphasised in our response to Questions 22 and 24, the scale and urgency of the problem of global deforestation, and the significant risks it creates for our society and economy, should be the over-riding consideration in designing and enacting the secondary legislation.

We cannot afford to wait another five years for the “radical change” Lord Goldsmith described on 12 July 2021 during the House of Lords’ Committee Stage debate on Schedule 17. Legislative intervention is desperately needed to confront the so-called ‘economic externalities’ of the forest risk commodities we consume and drive the fundamental restructuring of consumption and production patterns that the Dasgupta Review on the Economics of Biodiversity concluded is imperative if we are to avoid "extreme risks and uncertainty for our economies”. Given that about eight million hectares of land is required every year to meet the UK’s demand for beef and leather, soy, palm oil, cocoa and rubber (https://www.wwf.org.uk/riskybusiness), delaying coverage of commodities with significant illegal (and legal) deforestation risk would be to deliberately allow the loss of millions of hectares of forests and other important ecosystems.

Nor do we consider that commodity-specific requirements are needed and we therefore question the time required to include each additional commodity within the Schedule 17 framework: the further provisions about the due diligence system, information gathering requirements, risk assessment criteria and risk level – which should be included in the secondary legislation (see our response to Question 45) – can and should be common for all forest risk commodities. Indeed, in practice the information which operators will need to gather to comply with the Schedule 17, and the tools they use to gather that information, are likely to be the same or very similar regardless of the commodity in question.

We strongly question the proposition that it would take three to four years to apply the Schedule 17 framework to more than two commodities, do not agree that a sector's 'readiness for regulation' should determine the Government's willingness to legislate, and question the need to develop commodity-specific due diligence obligations or enforcement requirements. Due diligence, as an approach, is inherently responsive to the context in which it is being applied. Companies would remain free to choose the means and methods most appropriate to their circumstances to undertake due diligence, subject to meeting certain mandatory minimum requirements that guarantee the quality and rigour of the due diligence process, which should be specified in the secondary legislation and apply regardless of the particular supply chain or commodity in question (this is addressed further in our response to Question 45). Companies trading in forest risk commodities, rather than the Government, should be left to 'operationalise' these mandatory minimum requirements and, in so doing, resolve the specific challenges and risks, if any, in their supply chains. Such an approach should be developed, in addition to an efficient and effective enforcement regime, in alignment with the similar legislative proposals in the EU and US, before the end of 2022 (and we would be happy to support DEFRA to achieve this).

Businesses in scope

Turnover definition

Question 28

Should businesses fall in scope of the requirements if they exceed the turnover threshold in the previous financial year?

Answer:

Yes

Regulating UK based businesses that have operations in the UK

Question 29

Should we use UK turnover as the metric to capture UK based businesses?

Answer:

No

Regulating non-UK based businesses that have operations in the UK

Question 30

Which of the following metrics should be used to regulate the UK operations of businesses that are based outside of the UK under due diligence legislation? Please state your reasons.

- option 1: turnover related to UK activity
- option 2: global turnover
- other (please specify)

Answer:

Other (please specify): We do not support including formal loopholes or exemptions in the form of turnover thresholds in product-based legislation. Instead, we submit that all companies using forest risk commodities in their UK commercial activities should be subject to the Schedule 17 requirements without exemption.

Please state your reasons:

We do not support including formal loopholes or exemptions in the form of turnover thresholds in product-based legislation. Instead, we submit that all companies using forest risk commodities in their UK commercial activities should be subject to the Schedule 17 requirements without exemption. This would ensure uniform application across the business community, standardisation of due diligence practices, increase leverage of small and medium-sized businesses to engage with their supply chain, and maximise the policy impact of the Schedule 17 framework.
This would also align with the approach taken under the UK Timber Regulation (which applies to all companies placing the covered products on the UK market regardless of their size or trade volumes), and the proposals being developed in the EU and US. Schedule 17 does not require the Secretary of State to adopt a turnover threshold to limit the definition of “regulated person” and no justification has been presented to limit application to “large businesses” only. We question the logic of this approach: the risk that commercial activities in the UK are linked to illegal deforestation does not correspond to the size of the company as such, and are more directly linked to the nature of its business activities and supply chains.

If Defra concludes that a turnover threshold is indeed necessary to limit the application of the Schedule 17 (which has not been justified and which we contest), using global turnover would be preferable to reflect the actual size of the company and ensure that multinational companies operating in the UK that are associated with significant illegal deforestation cannot avoid the application of UK law by shifting revenue to related entities in other jurisdictions. However, this approach has significant implementation and enforcement challenges. Even if global revenues are used, how will UK authorities monitor global turnover of companies when they may not report their global turnover in the UK or in any other jurisdiction, when UK enforcement agencies may lack authority to access financial reports filed in third countries, and when UK enforcement agencies may lack authority to compel companies to disclose their global company turnover in the UK?

Question 31

Can you provide any data or information that will help identify potential businesses in scope based outside the UK? Please provide details for your answer.

Answer:

As mentioned in our response to Question 30, we consider that all companies using forest risk commodities in their UK commercial activities should be in scope irrespective of their size, turnover in the preceding year, trading volumes (see Question 38 below), or their jurisdiction of registration, residence or head office.

We consider that clever and targeted reporting measures can and should be included in the secondary legislation to facilitate the identification of businesses subject to the Schedule 17 framework. For example, requirements that can be established under Part 2 of Schedule 17 (in particular paragraph 8 on general powers for enforcement and paragraph 11 on requirements to provide records or other information to an enforcement authority) as well as under the annual reporting requirement (the details of which should be specified in the secondary legislation pursuant to paragraph 4 of Schedule 17 – see our response to Question 55).

Turnover threshold level

Question 32

Which of the following factors should be considered when setting the turnover threshold level? Please tick all that apply and state your reasons.

- policy impact
- burden on business
- deliverability
- other (please specify)

Answer:

- Policy impact
- Other (please specify): The scale and urgency of the problem of global deforestation, and the significant risks it creates for our society and economy, should be the over-riding consideration in designing and enacting the secondary legislation.

Please state your reasons:

No turnover threshold or only a nominal turnover threshold (eg. £1) should be adopted such that Schedule 17 applies to all regulated persons using forest risk commodities in their UK commercial activities. There should be no loopholes for forest risk commodities flowing into the UK to avoid application of Schedule 17. There is no justification for exemptions based either on company turnover or annual trade volumes. To include such exemptions would directly undermine the efficacy of the new law and efforts by industry to improve the sustainability of their supply chains.

We do not support limiting the application of the Schedule 17 framework according to business turnover (see our response to Question 34 below). The priority should be policy impact, not ease of implementation – especially given the primary obligation under Schedule 17 is limited to the basic requirement of compliance with "relevant local laws" only. By 'policy impact', we mean the policy impact of halting the UK's role in illegal deforestation through its own commodity consumption. All businesses trading in forest risk commodities in the UK collectively drive the UK demand for these commodities and contribute to our illegal deforestation footprint and all businesses should collectively be subject to obligations created by Schedule 17.

Paragraph 7(1) of Schedule 17 does not require the Secretary of State to adopt a turnover threshold in the secondary legislation. This is a discretionary limb to the definition of "regulated person" (a person (other than an individual) who carries on commercial activities in the UK and meets such conditions in relation to turnover "as may be specified in regulations"). In this regard we emphasise that adopting a turnover threshold to limit the definition of "regulated person" would introduce an arbitrary loophole into the Schedule 17 framework: annual turnover is not a reliable indicator of potential risks of (illegal) deforestation, land use or land conversion. Schedule 17 establishes product-based requirements: the central obligation is not to use forest risk commodities that have been illegally produced. The focus of this prohibition and the supporting due diligence obligation is the legality of the forest risk commodities being used in UK commercial activities. The size of the regulated person using those commodities has no bearing on their legality. Nor does the level at which the regulated person trades in those commodities in the course of a year. The illegality risk of a forest risk commodity remains the same whether a large or micro business is using it in their commercial activities, and whether it is traded in small or large volumes.

Adopting a turnover threshold would likely mean that illegally produced forest risk commodities continue to be imported into and consumed in the UK economy without ever being subject to the Schedule 17 framework. Indeed, it would be an unfair and discriminatory system if some businesses are allowed to trade in forest risk commodities without restriction while others are subject to legal obligations regarding the exact same commodities. This would also create considerable confusion for consumers as to whether or not particular commodities are required to be checked for illegal deforestation, which are not, and what claims companies make regarding the sustainability of their products are based on compliance with the Schedule 17 framework.

This should be the primary consideration in determining policy impact: extending application of the Schedule 17 framework to 100% of UK consumption of each forest risk commodity. In this regard, the UK Timber Regulation is a directly relevant precedent: it regulates trade in a forest risk commodity and products derived from it; it establishes a prohibition on using those products if they were harvested in contravention of applicable local laws; and it requires UK operators to carry out

due diligence on the timber products in their supply chains to ensure they were produced legally. We strongly recommend the UK Government follow the UK Timber Regulation approach and do not limit coverage of the designated forest risk commodities based on the characteristics of the entity introducing them to the UK market.

This is also the approach proposed in the equivalent EU and US legislative proposals, both of which contain no exceptions to the primary substantive obligations (noting that this can be combined with a differentiated approach for other procedural or administrative obligations, such as reporting). This is also consistent with best practice under authoritative international supply chain standards, such as the UN Guiding Principles on Business and Human Rights – regarded as the authoritative international standard for responsible business conduct, and the OECD Guidelines for Multinational Enterprises, to which the UK Government is a signatory. Both apply explicitly to all businesses / multinational enterprises irrespective of their size, turnover or trading volumes.

We also question the proposition that 'burden on business' is a relevant consideration in this respect. Research suggests that the costs of implementing supply chain due diligence requirements is very low for businesses of all sizes. The Impact Assessment projects these costs at 0.17% of annual turnover for large companies (turnover of £36 million/year) with no due diligence systems in place. Studies of the compliance costs of a variety of due diligence regimes do not identify a disproportionate economic burden for SMEs (eg. OECD, "Quantifying the Costs, Benefits and Risks of Due Diligence for Responsible Business Conduct: Framework and Assessment Tool for Companies", 2016, https://mneguidelines.oecd.org/Quantifying-the-Cost-Benefits-Risks-of-Due-Diligence-for-RBC.pdf). Rather the cost of compliance is very low for businesses of all sizes. In fact, a similar study conducted by the European Commission which assessed the costs of implementing a much more comprehensive supply chain due diligence obligation (that included risks of environmental and social impacts) shows that even for SMEs, the costs of carrying out mandatory supply chain due diligence appears to be relatively low compared to the company's revenue: the additional recurrent company-level costs, as a percentage of company revenue, amount to less than 0.14% for SMEs ("Study on due diligence requirements through the supply chain", 2020, https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en).

It should also be noted that there are significant differences in the volumes of forest risk commodities used in the UK and the actors using them. In many cases, there may be smaller businesses importing or using low-margin materials (eg. rubber) at much greater volumes than larger companies. It is important to ensure that all companies that import, use, or trade forest risk commodities are included in scope, regardless of their annual turnover. This will be vital to ensure that no companies operating in the UK use related entities outside the UK to avoid the turnover (or volume) thresholds and avoid UK law.

Moreover, from an efficacy and policy impact perspective, bringing all businesses handling forest risk commodities into scope would facilitate efficient implementation, policy impact and sector transformation. As the Impact Assessment suggests, if smaller companies handling forest-risk commodities are excluded from the Schedule 17 framework, they will nevertheless need to provide information and evidence to their customers that are in scope of the legislation. However, those customer-specific requirements and associated costs would be dependent on the relevant

business's position in the market and customer base, potentially rendering them subject to diverse and varying requests for information from different customers, with the commercial incentive of satisfying those customer demands being the primary consideration for compliance. On the other hand, including small businesses in the Schedule 17 framework will give them clarity on their obligations, greater leverage to engage with their customers and suppliers, and increase their agility in the marketplace by facilitating a standardised approach across their operations and with all their customers.

Likewise, application to all businesses using forest risk commodities in their UK operations will also make enforcement easier, clearer and more consistent, without enforcement action being subject to the annual accounting cycle or completion of company accounts to determine whether a company did or did not fall within the turnover threshold for the preceding financial year.

Question 33

Not answered.

Question 34

Do you have any further comments regarding businesses in scope?

Answer:

As expressed by the UK NGO Forest Coalition in recent workshops with the DEFRA policy team, ClientEarth is concerned that this consultation and Question 33 in particular does not propose options to include all businesses in the scope of the legislation, let alone include large businesses with a turnover of less than £50 million. ClientEarth strongly advocates that the Schedule 17 framework should apply to all businesses using forest risk commodities in their UK commercial activities (as outlined in our response to Question 32).

We question the rationale for adopting any turnover threshold for the following reasons:

- All businesses trading in forest risk commodities collectively drive the UK demand for these commodities which results in illegal (and legal) forest loss.
- The UK Timber Regulation, a directly comparable regime, applies to all operators and traders regardless of the size of their business, annual trading volumes or annual turnover. This is also the approach proposed under similar proposals going through the legislative process in the EU and US and is consistent with international corporate due diligence standards such as the UNGPs and OECD Guidelines.
- Even if the company scope is restricted to 'large companies', many smaller businesses are still likely to be required to carry out supply chain due diligence in order to pass data and documents on to larger businesses they supply that are in scope of the turnover threshold (as noted in section 4.1 of the Impact Assessment), yet the quality and content of their due

diligence will be determined by the requests of their customers rather than clear, certain and uniform legal standards.

- Incorporating a turnover threshold to exclude small and medium sized companies from the regime would not deliver a system that is fair to all businesses trading in forest risk commodities. The proposed regime would lead to unfair trading situations where a small company trading in exactly the same volume of a particular commodity as a larger company is not subject to any due diligence requirements, while the larger company has to comply with the Schedule 17 requirements. This would give the smaller companies an unfair competitive advantage over larger companies by being allowed to place cheaper, illegally grown commodities on the UK market. To achieve a 'level playing field' across businesses handling forest risk commodities (as recommended by the 2020 GRI Taskforce Report), all businesses should be subjected to the same minimum standards, regardless of size.

- Incorporating a turnover threshold to exclude small and medium sized companies would also result in significant volumes of illegally grown commodities still being brought into the UK market by small and medium sized businesses (see the paragraphs below in this regard). In the absence of any requirements to identify forest risk on packaging or product information, consumers would not be able to distinguish between products on the consumer market that have been checked for illegal deforestation and those that may have been produced illegally.

- There are inherent benefits for UK businesses in having a supply chain due diligence process, both in reducing supply chain risk, improving compliance performance, in brand and reputation enhancement, and in engaging with suppliers.

As of 2021, small- and medium-sized companies with a turnover under £50 million account for approximately 99.9% of UK companies (https://www.gov.uk/government/statistics/business-population-estimates-2021/business-population-estimates-for-the-uk-and-regions-2021-statistical-release-html). Although this is not specific to companies handling forest risk commodities, a £50 million turnover threshold would still only cover a portion of the 0.01% of UK companies (7,700 companies) that are categorised as 'large' under the Companies Act. No convincing justification has been presented to exempt 99.9% of UK companies from the Schedule 17 framework.

Furthermore, SMEs account for 52% of UK turnover across all industries with wholesale and retail trade being the sector with the highest share of SME turnover (ibid). As such, there are significant risks associated with a £50 million turnover threshold, including:

- Small and medium-sized companies can continue to trade commodities even if it is proven that the commodity has been produced illegally, including as a result of illegal deforestation and habitat conversion.

- Large global companies whose subsidiaries may not fall within the UK's threshold will be excluded (based on UK turnover).

- Shell companies can be set up to avoid the threshold.

- The UK's illegal deforestation and conversion footprint would not be adequately addressed.

An assessment by Global Witness based on JNCC and other data shows that the single largest commodity from a given country responsible for the UK's deforestation footprint is beef from Brazil. The second is palm oil from Indonesia. According to analysis from Earthsight, 17 companies are known to have imported beef from Brazil into the UK in 2021. It is concerning to note that the Government has put forward turnover threshold options in the consultation that, if applied, would result in none of these 17 companies being subject to the Schedule 17 framework (ie. a turnover threshold of >£200million, UK turnover only). This would exclude company groups that Global Witness and many others have linked to thousands of hectares of deforestation, such as Marfrig and JBS. Earthsight outlines that only one of these Brazilian beef importers has UK revenues in excess of £100 million and many have UK revenues below £50 million. Even larger companies have global turnover just below £50 million.

Earthsight also points to similar concerns for companies importing palm oil from Indonesia. They note that the options proposed in the consultation would exclude some of the largest UK importers of Indonesian palm oil, including global agri-trader ADM (as its UK subsidiary's reported turnover is £26m and would not be covered by the legislation even at the lowest proposed turnover threshold) and palm oil giant Olam (as its UK subsidiary's reported annual turnover is £20 million). They also highlight that using global turnover would still exempt many major importers - with one of the top seven largest palm oil importers to the UK having a global turnover of £3m and another with a turnover less than £1m.

The Environmental Investigation Agency have also analysed companies importing palm oil into the UK. They have raised similar concerns that many of the regular palm oil importers into the UK would be excluded if only large companies are in scope. In this regard, we understand Earthsight has also questioned the conclusions and methodology of the study conducted by Efeca to assess the number of UK businesses trading in certain commodities at different annual turnover thresholds (presented on pp. 13 and 28 of the Impact Assessment). No information is given about the methodology used to ascertain these figures.

Moreover, from an efficacy perspective, bringing all businesses handling forest risk commodities into scope would facilitate efficient implementation, greater policy impact and enhance sector transformation – both in the UK and in supply chains connected to the UK market.

As also recommended in the 2020 GRI Taskforce report, the financial sector should be covered by a similar mandatory requirement to exercise due diligence in order to ensure their lending and investments do not fund deforestation.

Exemption

Exemption threshold

Question 35

Not answered.

Calculating volumes of commodities used

Question 36

Should businesses be able to use conversion factors to estimate the volumes of commodities used in the supply chain to understand whether they can be exempt from due diligence requirements? Please state your reasons.

- Yes
- No

Answer:

No.

Exemptions, whether based on annual turnover, trade volumes or otherwise, will introduce loopholes that will directly undermine the efficacy and impact of the new law. Such exemptions are not required under Schedule 17 – they are a discretionary matter for the Secretary of State. No justification for adopting such exemptions has been presented. See our response to Question 38 in this regard.

Question 37

Should we use the proposed approach for businesses to understand whether they could be exempt? Please state your reasons.

The proposed approach is to give businesses the freedom to choose which methodology they use to calculate volumes, to provide information on recommended methodologies in guidance, and to require in secondary legislation that the methodology should be reasonable.

- Yes
- No
- Do not know

Answer:

No.

Exemptions, whether based on annual turnover, trade volumes or otherwise, will introduce loopholes that will directly undermine the efficacy and impact of the new law. Such exemptions are not required under Schedule 17. No justification for adopting such exemptions has been presented. See our response to Question 38 in this regard.

In general, legislative requirements to use a "reasonable" approach or methodology are not sufficiently clear and would therefore create difficulties both for businesses complying with the requirement and for the agency enforcing it.

Exemption threshold level

Question 38

Which of the following factors should be considered when setting the exemption threshold level? Please tick all that apply and state your reasons.

- policy impact
- burden on business
- deliverability
- other (please specify)

Answer:

- Policy impact
- Other (please specify): The scale and urgency of the problem of global deforestation, and the significant risks it creates for our society and economy, should be the over-riding consideration in designing and enacting the secondary legislation.

Please state your reasons:

Any exemptions, whether based on annual turnover, trade volumes or otherwise, will introduce loopholes that will directly undermine the efficacy and impact of the new law. Such exemptions are not required under Schedule 17 and no justification for adopting such exemptions has been presented. Such exemptions would also make the Schedule 17 framework unnecessarily complicated and burdensome for businesses, particularly when considering derived products.

Paragraph 5 of Schedule 17 empowers the Secretary of State to determine a "prescribed threshold" by regulations made for the purpose of creating an exemption from the obligations in Part 1 of Schedule 17. There is no requirement that the Secretary of State prescribe such a threshold or create such an exemption. We oppose the adoption of any volume-based exemption as this would create a loop-hole in the Schedule 17 framework that would directly undermine its

impact and knowingly allow illegally-produced forest risk commodities to be freely traded on the UK market in direct competition with legally produced products on which due diligence has been conducted. Indeed, such an exemption could allow for different legal treatment of the exact same product with the exact same risk of illegal deforestation, based only on the relevant company's trading volume across the year.

We question the rationale for adopting any exemptions (including in the form of a turnover threshold). As noted in our response to Question 32, studies of the compliance costs of a variety of due diligence regimes do not identify a disproportionate economic burden for small or medium companies. Rather the cost of compliance is very low for businesses of all sizes and represents a fraction of a percent of annual turnover.

Indeed, where companies trade in comparatively small volumes of forest risk commodities, they are likely to have fewer suppliers and fewer supply chains, resulting in a proportionately smaller due diligence burden with relatively smaller costs.

Question 39

Not answered.

Question 40

Please provide reasons for the scale selected for each commodity in Question 39.

Answer:

We do not support the adoption of any annual volume-based exemptions and have therefore not selected any of the options under Question 39. As noted in our response to Question 38, it is a discretionary matter for the Secretary of State whether to adopt a volume-based exemption for any commodity – there is no requirement that such an exemption is adopted for any commodity. No justification for adopting such exemptions has been presented.

Given that any volume-based exemption will, by its very nature, allow forest risk commodities of unknown origin and unknown illegality risk to enter and circulate in the UK market in competition with the same forest risk commodity traded in larger volumes by other companies, the introduction of any volume-based exemption will directly undermine the policy impact of the Schedule 17 framework, build-in unnecessary loopholes, and will likely result in unfair competition between legally and illegally produced commodities that undermines the uptake of legally (and sustainably produced) commodities.

Regardless of the level at which an annual trade volume threshold is set, there is a risk that importers trading in volumes above the threshold will seek to exploit it as a loophole by establishing shell companies to spread their imports in order to fall under the threshold, whatever it may be.

Earthsight has undertaken a preliminary analysis that suggests that, even with a minimum 1 tonne annual trading volume threshold, a majority of UK trade in all considered commodities would be exempted from the Schedule 17. Their assessment indicates that:

- For beef importers, the highest proposed threshold (1,000 tonnes) would mean that only three of the top 17 importers would be covered: JBS, Princes and Weston (Marfrig). While those three companies represent around 90% of total beef imports by weight, this would result in a failure to capture 10% of beef imports. Noting that beef imports constitute the largest share of the UK's agri-commodity deforestation footprint, 10% of which represent an annual overseas land footprint of almost 400,000 ha (based on figures from WWF and RSPB: https://www.wwf.org.uk/riskybusiness).

- For palm oil, there is no trade data available to identify the annual trading volumes for any UK importers, though it is likely that the main trading companies, such as ADM, AAK and probably also Cefetra import more than 1,000 tonnes/yr. However, a large proportion of the nearly 100 firms importing raw palm products would not be covered if the upper threshold were to be chosen (1,000 tonne/year) as they almost certainly import less than that threshold.

We note that the assessments presented in the Impact Assessment do not include projections of the proportion of UK imports or trade in the targeted forest risk commodities at the annual trading volume thresholds considered. On that basis, it seems that DEFRA is itself unclear on what portion of UK trade in beef, soy, palm oil, etc would be covered if even a 1 tonne annual trade volume threshold was adopted. In this regard, the Impact Assessment presents many potential impacts for businesses in terms of potential costs, but fails to assess the potential policy impact and benefits to forests and natural ecosystems worldwide of the various options being considered (or even more ambitious options that should be considered, such as the absence of any turnover or trade volume exemptions). This would seem to be a significant shortfall that prevents a balanced assessment of the range of potential options and their impacts.

Question 41

Do you have any further comments on the exemption?

Answer:

We do not support exemptions for the reasons provided in responses to the questions above.

Questions 42 - 44

Not answered.

Question 45

Should businesses in scope be required through secondary legislation to 'eliminate risk or reduce risk to as low as reasonably practicable'? Please state your reasons.

- Yes
- No

Answer:

No.

Reducing risk to "as low as reasonably practical" is not a sufficiently clear standard for businesses to follow. It is highly subjective language and could mean vastly different things for different companies, commodities and geographies, and could still allow a significant amount of risk of illegal deforestation. It would also undermine enforcement because of the difficulty in establishing what "as low as reasonably practicable" means in a given situation. Businesses should be required to reduce the risk of illegal deforestation in the supply chains to a "negligible level" as under the UK Timber Regulation – with further clarification of what a "negligible level" means.

In this regard, to ensure a uniform, consistent and low level of illegality risk across commodity sectors and across the companies implementing the Schedule 17 framework, we recommend clarifying in the secondary legislation that: a forest risk commodity or product derived from a forest risk commodity will be taken to satisfy the requirements in paragraphs 2(1) and 2(2) of Schedule 17 respectively where the application of the due diligence system in relation to that commodity indicates no more than a negligible level of risk. A negligible level of risk means that a reasonable person, equipped with all the information of which the regulated person was or should have been aware, would conclude that there is no cause for concern that any relevant local laws were not complied with in relation to the commodity.

In addition to prescribing the level of acceptable risk, the secondary legislation should set out clear, comprehensive and commodity-agnostic provisions detailing the requirements of the due diligence system. This is of critical importance. Experience from implementation and enforcement of the EU Timber Regulation (including in the UK under the UK Timber Regulation) shows that enforcement authorities face significant practical and legal barriers to enforcing the prohibition on placing illegally harvested timber on the market for timber products produced in third countries. One important reason is because it is very time and resource intensive to investigate the legality of particular products and gather the necessary establishing illegality to the requisite standard of proof to warrant prosecution. Instead, for imported products the vast majority of enforcement actions have been based on compliance with the due diligence obligation. However, because the due diligence obligation is described in brief and somewhat ambiguous terms, requiring only that risk is mitigated to a negligible level, prosecution of non-compliance is often only pursued and only successful in respect of the most obvious violations (see the 2021 EU Timber Regulation Fitness Check for an overview of these challenges: https://ec.europa.eu/environment/forests/pdf/SWD_2021_328_1_EN_EUTR-FLEGT%20Reg%20fitness%20check.pdf).

The effectiveness of the entire Schedule 17 framework depends on strong and clear due diligence requirements. These requirements should be specified in as much detail as possible in the secondary legislation. These minimum due diligence requirements should apply uniformly to all regulated persons using forest risk commodities in their UK commercial activities and must require operators to:

- obtain information, supported by evidence, that allows them to: trace their forest risk commodities to "the land on which the source organism was grown, raised or cultivated"; verify whether that land has been subject to deforestation; identify the actors involved in the production process; identify all "relevant local laws" and the legal requirements they impose; and determine whether the "relevant local laws" have been complied with;

- consider specific risk assessment criteria that ensure a reasonable assessment of the risk that the "relevant local laws" were not complied with, and to undertake risk mitigation measures if the objective risk of non-compliance is not nil or negligible; and

- continuously review their due diligence system, regularly update their due diligence assessments, and review their risk assessment whenever they become aware of new information that indicates a risk that their forest risk commodities were not produced in compliance with the "relevant local laws".

The use of certification or other third-party verification schemes should only be allowed as complementary information in the due diligence investigation process and must not absolve operators of their due diligence obligations.

Given the central importance of the "due diligence system" described in paragraph 3 of Schedule 17 to the implementation of the prohibition on using illegally produced commodities, and the importance of clearly specifying the requirements of that due diligence system for operators and enforcement agencies alike, it is disappointing to see only one question in this consultation regarding requirements of the due diligence system (this question).

Paragraph 3(1) of Schedule 17 provides that regulated persons using forest risk commodities or derived products in their UK commercial activities "must establish and implement a due diligence system" in relation to those commodities. Paragraph 3(2) defines "due diligence system" in general terms by reference what a due diligence system is for (identifying and obtaining information, assessing risk that relevant local laws were not complied with in relation to the relevant commodities, and mitigating that risk). However, paragraph 3 does not provide any detail on what a due diligence system must do, how it should be implemented or, most importantly, the outcome that an effective due diligence system must produce.

Paragraph 3(3) of Schedule 17 empowers the Secretary of State "to make further provision" about the due diligence system requirements, in particular the information that should be obtained, the criteria to be used in assessing risk, and the ways in which risk may be mitigated. In particular, the secondary legislation should specify that a regulated person must exercise due diligence using their due diligence system before using a forest risk commodity or a product derived from that commodity in their UK commercial activities to ensure that the use of the relevant commodity or product will not contravene paragraphs 2(1) or 2(2) of Schedule 17. It should also specify the

requirements for each aspect of the due diligence system as well as the acceptable level of risk with as much detail as possible. We strongly recommend that further provision about the due diligence system requirements is included in the secondary legislation.

Given operators will have a legal obligation to establish and implement a due diligence system under paragraph 3(1), the specification of the due diligence requirements in the secondary legislation should provide operators with clarity and certainty regarding their legal obligations. Clear due diligence requirements identifying minimum mandatory elements of the due diligence system that can be specifically checked will also enable easier monitoring and enforcement and the efficient use of enforcement resources.

The secondary legislation should include specific requirements regarding the due diligence system as set out below.

1. INFORMATION GATHERING

Operators should be required to identify, obtain and verify Information, supported by evidence, that relevant local laws were complied with. Pursuant to paragraph 3(3)(a) of Schedule 17, the secondary legislation should specify that in conducting due diligence, a regulated person must identify and obtain the following information, supported by evidence, in relation to the relevant forest risk commodity or derived product:

- Its common, trade and scientific names;
- the quantity (expressed in net mass, volume, or number of units) of the relevant consignment, shipment or supply of the commodity or product;
- the legal and trading names, registered address and contact details of the entity from which they have acquired the relevant consignment, shipment or supply and, if different, the entity which first placed the relevant commodity or product on the UK market;
- the legal and trading names of all other suppliers in the supply chain;
- details of the import of the relevant commodity or product into the UK, including the date of arrival, date of customs clearance, vessel of shipment, port of arrival, and port of origin of the relevant consignment, shipment or supply and the legal and trading names of the importer;
- the country of origin and sub-national jurisdiction where the source organism was grown, raised or cultivated;
- the geo-localisation coordinates, latitude and longitude of the land on which the source organism was grown, raised or cultivated;
- the date or time range in which the source organism was grown, raised or cultivated;
- the use of the land on which the source organism was grown, raised or cultivated before it was put into agricultural use for the purpose of growing, raising or cultivating the relevant

source organism, in particular whether the land was previously forest, and the date on which it was put into agricultural use;

- adequate and verifiable information identifying the status of the land in terms of environmental protection, land use rights, including any arrangement conferring the right to use the land to grow, raise or cultivate the source organism, and third parties' rights, in particular any registered or unregistered claims of tenure rights in relation to the land, including claims on the basis of custom, tradition or a special attachment to the land and rights of free, prior and informed consent;

- adequate and verifiable information demonstrating that the land is not subject to any claims on the basis of indigenous, customary or other legitimate tenure rights or subject to any dispute regarding its use or ownership;

- the relevant local laws, including statutes, regulatory instruments, executive decrees, jurisprudence, and any other legal obligations applicable in the jurisdiction of production, the particular requirements which they impose, and the requirements with which compliance has been verified; and

- adequate and verifiable information demonstrating that the relevant local laws were complied with.

To support businesses to identify all the "relevant local laws" with which they should verify compliance, we recommend including a non-exhaustive list of categories of laws that could fall within the definition of "relevant local laws" in the secondary legislation. For example, this could clarify that, for the purpose of a regulated person's information gathering requirements, "relevant local laws" could include various kinds of law (such as primary and secondary legislation, executive decree, and judicial precedent) from various sources (such as national and sub-national legislatures, judicial bodies and executive agencies) on various topics (such as laws on environmental protection, permit approvals and allocation, agricultural activities, social and environmental safeguards related to agricultural production and transactions in agricultural products, Indigenous and customary land tenure, land administration, environmental approvals, planning and zoning controls, stakeholder consultation, land-use and maximum landholding restrictions, business license and registration requirements applicable to agricultural production, and tariffs and duties on agricultural production whether applied at the individual production unit or aggregate production level).

The secondary legislation should also specify that due diligence is an ongoing process, that the application of the due diligence system to a particular commodity or product must be reviewed at least on an annual basis, and that the due diligence undertaken in relation to a commodity or product must be reviewed if the regulated person becomes aware of any new information that indicates a risk that the relevant commodity was not produced in compliance with relevant local laws.

The secondary legislation should also require operators to keep the information obtained for five years and make it available to the relevant authority upon request.

2. RISK ASSESSMENT

Operators should then be required to verify, analyse and assess the information they have obtained against clear and relevant risk assessment criteria. Pursuant to paragraph 3(3)(c) of Schedule 17, the secondary legislation should provide that, after identifying and obtaining the information specified above, a regulated person must verify and analyse the information obtained and assess the risk that relevant local laws were not complied with in relation to the relevant commodity or product, taking special account of the following risk assessment criteria:

- the presence of forest in the area of and surrounding the land on which the source organism was grown, raised or cultivated and the proximity of forest to that land;
- the prevalence of deforestation in the country and the sub-national region in which the source organism was grown, raised or cultivated;
- the source, reliability, validity, and completeness of the information obtained, the evidence supporting it and the availability of corroborating information;
- concerns in relation to the relevant country and sub-national jurisdiction, such as: level of corruption; prevalence of document and data falsification, incompleteness or irregularities; prevalence of undocumented or overlapping tenure claims; lack of law enforcement; armed conflict or sanctions imposed by the United Nations Security Council or the United Kingdom; and industry practices, such as purchasing and pricing practices, that undermine the capacity of producers to comply with relevant local laws;
- the complexity of the relevant supply chain, in particular difficulties in connecting the commodity to the land on which the source organism was grown, raised or cultivated;
- the risk of mixing with commodities or products of unknown origin, produced in areas where deforestation has occurred or is occurring, or where relevant local laws are not uniformly complied with or are unevenly enforced; and
- any relevant information suggesting non-compliance with relevant local laws in relation to any actor involved in the production of the relevant commodity or the growing, raising or cultivation of the source organism, including third-party reports indicating non-compliance with relevant local laws, deforestation, social conflict, community protest or grievances, violence, or threats to land and environmental defenders, and information indicating that the rights of indigenous peoples and local communities, including where relevant the right to free, prior and informed consent, have not been respected.

The efficacy of the entire Schedule 17 framework hinges on operators having a clear and precise understanding of the result that their due diligence system needs to achieve in terms of acceptable risk. In order to ensure the efficacy of the Schedule 17 framework, the standard of acceptable risk should be specified in the secondary legislation as proposed above (ie. A “negligible level” of risk with an accompanying definition).

The secondary legislation should also require regulated persons to maintain records sufficient to demonstrate how the information obtained was assessed against the risk assessment criteria,

how the regulated person determined the level of risk, how any decision on risk mitigation measures was taken and how those measures were implemented. Regulated persons should be required to keep these records for five years.

3. RISK MITIGATION

The secondary legislation should specify a clear obligation to undertake adequate risk mitigation where a non-negligible risk is identified. The secondary legislation should specify that, unless the application of the due diligence system indicates no more than a negligible level of risk (as defined above), a regulated person should be required to undertake risk mitigation measures that are adequate to reduce the risk to a negligible level.

The secondary legislation should include a non-exhaustive list of possible risk mitigation measures, including: obtaining additional information; undertaking independent surveys or audits; adequate and timely consultation with local stakeholders and rights-holders; and other appropriate measures to effectively reduce the risk of non-compliance to a negligible level.

The secondary legislation should specify that companies must monitor their risk mitigation measures and the results and clarify that, even where risk mitigation measures are undertaken, the relevant commodity or product must not be used in UK commercial activities unless and until the risk of non-compliance is reduced to a negligible level (as defined above).

Finally, in order to ensure a consistent standard of due diligence across industry and across businesses of all sizes, the secondary legislation should specify that a regulated person must have in place adequate and proportionate policies, controls and procedures to effectively mitigate and manage any non-negligible risks that are identified. This should specifically include a requirement to establish, implement and maintain model risk management practices, internal checks and controls on the performance of the due diligence system, and record-keeping, reporting and compliance management procedures, including the appointment of a responsible staff member at management level.

Guidance on the due diligence system

Question 46

Which of the following should we provide information on in guidance to support businesses to establish effective due diligence systems? Please tick all that apply and state your reasons.

- what is required of eligible business to comply with regulations
- examples of best practice to support businesses in improving their systems
- metrics and indicators to help assess where there are low, medium, or high risks of illegal land use and ownership
- methods that businesses may use to assess and mitigate risk
- available resources to help understand legal frameworks in producer countries

- other (please specify)

Answer:

- what is required of eligible business to comply with regulations
- examples of best practice to support businesses in improving their systems
- metrics and indicators to help assess where there are low, medium, or high risks of illegal land use and ownership
- methods that businesses may use to assess and mitigate risk
- available resources to help understand legal frameworks in producer countries
- other (please specify): It would also be useful for guidance to be included on the following:

- Human rights abuses are deeply concerning in and of themselves and are also often indicators of illegality - including environmental crime, corruption and a lack of law enforcement. Guidance should ensure that monitoring, identifying and responding to human rights concerns is outlined as a key pillar to effective due diligence. The UK already has various obligations to uphold human rights as a signatory to UN and other international treaties and under the OECD Guidelines on Multinational Enterprises, as well as being a signatory to many international declarations and pledges regarding responsible business conduct and the importance of recognising and protecting human rights in service of international environmental and climate goals. The 2020 GRI Taskforce report also emphasized the importance of the Government taking human rights, particularly the rights of Indigenous Peoples and local communities, into account in a due diligence legislation. The UN IPCC has also highlighted the centrality of respecting Indigenous Peoples' rights as key to achieving sound environmental and climate outcomes.

- Guidance on "relevant local laws" tailored to specific commodities and the main jurisdictions in which they are produced. Noting, however, that we recommend including in the secondary legislation (not in guidance) a non-exhaustive list of categories of laws that may fall within the definition of "relevant local laws" (eg. laws on environmental protection, permit allocation, agricultural activities, Indigenous and customary land tenure etc) and types of laws (eg. statutory instruments, executive decrees, judicial precedent etc). See our response to Question 45 in this regard.

- A due diligence checklist for businesses to use in implementing their due diligence system that corresponds with the requirements set out in the secondary legislation (see our response to Question 45 in this regard).

- Guidance on how due diligence should be enhanced for commodities from high-risk areas.

Please state your reasons:

As stated above in our response to Question 45, due diligence obligations need to be clear and unambiguous in order to support both compliance and enforcement. The proposed guidance to support businesses to establish effective due diligence systems is welcome and should be as comprehensive as possible, covering all of the information listed above. Companies need clear,

pragmatic and practical guidance and supporting materials to ensure they meet due diligence requirements.

However, guidance is no substitute for clear and unambiguous legal requirements. It is important that much of the detail on what is required of businesses is set out as clear legal obligations in the secondary legislation, with additional guidance providing an explanation of how businesses could comply with those requirements.

Certification schemes and standards

Question 47

Should we set out in guidance how businesses may use existing certifications and standards to help meet the due diligence requirement? Please state your reasons.

- Yes
- No
- Do not know

Answer:

No.

Schedule 17 creates unequivocal obligations on regulated persons to ensure that the forest risk commodities and derived products they use have been produced in compliance with relevant local laws. Guidance needs to be clear that businesses are ultimately responsible for their own due diligence and compliance with Schedule 17 and that they cannot outsource this responsibility to third parties. Creating even the impression that businesses can outsource their due diligence to third parties would risk undermining the efficacy of the Schedule 17 framework.

Schedule 17 does not impose any limitation on the information or services which businesses can use in completing their due diligence. As such, businesses will remain at liberty to use third party certification and assurance schemes to support their due diligence. However, guidance should emphasise that businesses should not unduly rely on third party certification or verification schemes, not least because no such schemes are designed or intended to verify compliance with "relevant local laws".

While businesses may use various tools (including third party services) to supplement their own due diligence, guidance should clarify that businesses rely on third-party assurances at their own risk and will remain accountable for compliance with Schedule 17 despite any assurance by a third party about compliance with relevant local laws. In reality, no third-party schemes claim to satisfy their users' legal obligations and none provide any guarantee of legal compliance. Indeed, there is a wealth of evidence that third party certification schemes have significant governance and enforcement weaknesses. For example, a 2021 Greenpeace report provides detailed

information documenting how several key forest risk commodity certification standards have significant gaps and how the governing bodies are failing to enforce their own standards (https://www.greenpeace.org/international/publication/46812/destruction-certified/).

We are concerned that creating guidance illustrating how businesses can use third-party schemes to comply with their legal obligations may undermine due diligence outcomes, compliance incentives and enforcement by creating an implicit loophole that allows businesses to escape accountability. In this regard we note that certification bodies are not independent and that they are typically accountable to their business members and / or financially dependent on the businesses that use (and pay for) their services. Serving the interests of their members/clients is an unavoidable part of their funding and business model, which creates unavoidable moral hazard in the enforcement of their standards and conflicts of interest in their governance structures.

Question 48

Which of the following criteria should we set out in guidance to support the use of existing certification schemes and standards? Please tick all that apply and state your reasons.

- proof of legality
- chain of custody
- robustness
- transparency
- other (please specify)

Answer:

Other (please specify): As set out in our response to Question 47, guidance needs to be clear that businesses are ultimately responsible for their own due diligence and compliance with Schedule 17 and that they cannot outsource this responsibility to third parties or use third-party certification or assurances as a proxy for compliance with their own legal obligations. Creating even the impression that businesses can outsource their due diligence to third parties would risk undermining the efficacy of the Schedule 17 framework.

Please state your reasons:

Guidance should emphasise that businesses should not unduly rely on third party certification or verification schemes for a range of reasons, particularly because no such scheme verifies compliance with “relevant local laws”. While businesses may use various tools or services to supplement their own due diligence, guidance should clarify that businesses rely on such third-party assurances at their own risk. Indeed, there is a wealth of evidence that third party certification schemes have significant governance and enforcement weaknesses, as noted in our response to Question 47.

Further evidence to inform due diligence system requirements

Question 49

Not answered.

Question 50

Can you provide any evidence on the cost of carrying out due diligence? Please provide details including how this relates to business size.

Answer:

See our response to Question 32 above.

Question 51

Not answered.

Question 52

Can you provide any evidence on the benefits to businesses of conducting due diligence for specific commodities? Please provide details about your answer.

Answer:

A robust due diligence process will ensure a company is able to comply with the prohibition on using illegally produced commodities / products in paragraph 2 of Schedule 17, leading to a tangible reduction in the UK's overseas illegal deforestation footprint, and in turn reducing exposure to legal risks and risks of supply chain disruption and increasing supply chain resilience. It will also contribute significantly towards businesses' ability to meet and verify their own voluntary commitments to deforestation-free and conversion-free supply chains.

In addition, other potential benefits include reduced supply chain risk, improved relationships with key stakeholders (eg. customers, suppliers, other business partners, government, financiers), reduced costs from conflicts, improved corporate reputation, increased brand valuation, enhanced consumer loyalty, increased product demand, evolution of common industry tools and resources, increased supply chain traceability and more incentives to innovate within companies and across sectors. Research has shown that there is a positive correlation between the extent to which a company implements environmental and social policies and economic performance in terms of profitability, such that the high-level benefits of a robust due diligence system are operational, reputational and financial.

Further information of the benefits of conducting due diligence can be found in the OECD's report 'Quantifying the Costs, Benefits and Risks of Due Diligence for Responsible Business Conduct: Framework and Assessment Tool for Companies' (https://mneguidelines.oecd.org/Quantifying-the-Cost-Benefits-Risks-of-Due-Diligence-for-RBC.pdf), WWF-UK and 3Keel 's report on business implementation of due diligence (https://www.wwf.org.uk/what-we-do/due-negligence-report), and WWF's report 'A Blueprint for Responsible Global Business' (https://www.wwf.org.uk/sites/default/files/2020-08/WWF%20-%20A%20blueprint%20for%20responsible%20global%20business.pdf).

A further benefit to note here is the knock-on effect that robust due diligence will have in strengthening supply chain standards in third countries and in supply chains where transparency is poor and availability of segregated and/or identity-preserved certified materials is limited. Strong UK legislation will also help drive improvements towards urgently-needed (but still lacking) guarantees around indigenous and customary tenure rights, land-use change, and uncontrolled land conversion to agricultural production.

Question 53

Not answered.

Question 54

Can you provide any evidence on the costs to consumers of businesses conducting due diligence? Please provide details about your answer.

Answer:

Surveys show that there is considerable consumer demand for deforestation-free products and in particular, for better product information to enable consumers to make ethical choices. For example, over 99% of respondents to the Government's 2020 consultation on 'due diligence on forest risk commodities' supported the introduction of legislation to reduce all deforestation, recent research found that 87% of European consumers are demanding deforestation-free products (https://www.foodnavigator.com/Article/2019/07/17/Start-taking-bold-action-Food-companies-urged-to-step-up-deforestation-efforts) and a recent WWF-EU poll found that 7 in 10 EU citizens want confidence that their groceries are not linked to deforestation or biodiversity loss (https://www.wwf.mg/?4933816/7-in-10-Europeans-want-deforestation-off-the-EU-market---new-poll). See also 'The benefits of Fairtrade', Friends of the Earth, https://friendsoftheearth.uk/sustainable-living/benefits-fairtrade.

Considering the costs of undertaking due diligence are likely to be very low for most businesses as a proportion of annual turnover (see our response to Question 32 above), any costs that could be passed on to the consumer are also likely to be low by extension.

Annual reporting

Question 55

What should businesses be required to report on to enable a regulator to identify areas for further scrutiny?

Answer:

Secondary legislation should require that annual reports detail the action taken to establish and implement the due diligence system in relation to each commodity, as well as each application of the due diligence system and the results in each instance. This should include:

- the commodities and products to which the due diligence system was applied and when;
- volumes of each commodity and derived product (expressed in total volume and volume of embedded forest risk commodity using verifiable product-specific data or recognised conversion coefficients) used during the reporting period expressed in total aggregated volumes, volumes per source country and volume for each application of the due diligence system;
- legal and trading names of all direct and indirect suppliers and the buyer of each relevant commodity or product;
- country of origin and sub-national jurisdiction of production for each forest risk commodity;
- geo-location details of the land on which the source organism was grown, raised or cultivated and the date or time-range over which that land was used to grow, raise or cultivate the source organism;
- the rights relied on to use the land to grow, raise or cultivate the source organism;
- the land footprint of the regulated person expressed in aggregate total, total per forest risk commodity and disaggregated per sub-national jurisdiction per forest risk commodity;
- the “relevant local laws” and a description of the evidence relied on to determine whether they were complied with;
- the risk assessment for each application of the due diligence system, including any mitigation measures (ongoing and completed) and their results;
- percentage of each commodity or product verified to have been produced in compliance with “relevant local laws” and percentage of each commodity or product where a non-negligible risk of non-compliance was identified;
- any complaints or concerns received and the action taken in response;
- any review of the due diligence system or a risk assessment and the results.

The information companies are required to disclose in their reports, taken together, must demonstrate that their products are not linked to illegal deforestation and were produced in compliance with all "relevant local laws". Metrics used for reporting should be quantified in absolute terms (ie. number of hectares) and relative to total amounts (ie. percentage of supply chain volume at risk). Example should be taken from existing best practice standards (eg. the Accountability Framework Initiative: https://accountability-framework.org/operational-guidance/reporting-disclosure-and-claims/).

Furthermore, in addition to power to prescribe the content of annual reports, paragraph 4(3) of Schedule 17 empowers the Secretary of State to prescribe their form and the manner in which they must be provided. We therefore recommend that the secondary legislation designates a prescribed form and requires that annual reports are submitted digitally to a central information system to allow for machine-reading, automatic screening against compliance criteria and checking for indicators of non-compliance risk to focus future compliance checks.

Question 56

Should non-commercially sensitive information about businesses' due diligence exercises be made public to increase sector transparency and accountability?

- Yes
- No

Answer:

Yes.

Question 57

What information should be made public about businesses' due diligence exercises to support accountability and decision making?

Answer:

All of the information reported under the annual reporting requirements, including the information listed above in our response to Question 55, should be made public. There should be a default rule of complete disclosure and any requests from businesses to withhold information should be specific, substantiated by convincing reasons justifying an exception to the rule of disclosure, and permitted in exceptional circumstances only. The onus should be on companies to demonstrate that there is a legal requirement preventing disclosure. Claims made on the basis of commercial sensitivity should be judged against a high standard based on competition law requirements. Information that is simply sensitive from a reputational perspective should not be withheld.

Public reporting is vitally important for a number of reasons, including improving transparency and information sharing in supply chains, allowing responsible stakeholders to make informed

decisions, raising the bar for businesses in scope (as well as providing a benchmark for any businesses out of scope), and facilitating compliance and improving enforcement. Done well, it also provides operational, reputational and financial benefits for businesses.

In addition, information received by the relevant authority in annual reports could also be partially aggregated so that it is accessible, understandable and useful to both industry and the public, as well as for research purposes. Public information should provide enough detail to give actors like investors, civil society organisations, researchers and consumers sufficient insight into the activities of individual companies as well as overall UK trade in each forest risk commodity to allow them to make informed investment, purchasing and campaigning decisions. This would contribute to the monitoring and implementation of the law as well as the broader transition towards fully sustainable supply chains.

Enforcement

Designating an enforcement authority

Question 58

Which criteria should the enforcement authority fulfil? Please tick all that apply and state your reasons.

- UK-wide remit
- capacity to regulate
- capability and experience to deliver
- other (please specify)

Answer:

- UK-wide remit
- capacity to regulate
- capability and experience to deliver
- other (please specify): The enforcement authority should fulfil all the criteria listed. It should also be functionally and structurally independent to ensure it is able to fulfil its functions without bias or interference. In addition, the enforcement authority should be adequately resourced to enforce the Schedule 17 framework to its fullest.

Please state your reasons:

Without effective enforcement, the obligations established under Schedule 17 will be meaningless. Previous enforcement of the EU Timber Regulation by the UK competent authority has been undermined by insufficient resourcing and budget. Between 2015 and 2017, the authority reported a total annual budget of £750,000 for EUTR enforcement, including checks,

remedial actions, and issuance of penalties. This was reduced to £620,000 per annum between 2017 and 2019. Resourcing of the competent authority for enforcement of the upcoming due diligence legislation will need to be significantly greater, as it will be dealing with several commodities, compared to just timber, and compliance required by many more companies.

The proposals set out in this consultation with respect to sequencing of commodities suggest that there are insufficient resources earmarked for the design, implementation and enforcement of the Schedule 17 framework. It is vital this is remedied and that the relevant authority has sufficient resources to implement an enforcement regime that has capacity and expertise to proactively investigate non-compliance and provide an effective deterrent of breaches of the due diligence obligations.

Lessons from other legislation show that a competent authority is more effective when it has access to specialist expertise on the processes and supply chains it is regulating. For example, the EUTR competent authority in the Netherlands - which is considered a leader in terms of quality of cases and sanctions for non-compliant actors - has access to specialist environmental courts. There is evidence that due diligence cases are also more effectively prosecuted when enforcement authorities have the power to take cases directly to court, as is the case for the EUTR competent authorities in the UK, Sweden and the Netherlands, rather than having to find prosecutors willing to take on cases that authorities identify. Provisions that allow authorities to proactively gather proof of infringements, rather than relying on actors like civil society organisations to bring claims to their attention, also improve enforcement. To this end, the secondary legislation should give the relevant authority sufficient capacity to carry out investigations into suspected cases of non-compliance with appropriate powers of entry, search and seizure and to require businesses to provide information upon request (as is contemplated by Part 2 of Schedule 17).

In addition, the enforcement authority should also have an advisory function and work with consumer representatives and businesses to develop best practice and promote compliance. The authority should have the capacity to carry out inspections and other activities to monitor compliance and ensure due diligence systems are fit for purpose. The authority should also have powers to impose appropriate sanctions when a breach has been identified, including monetary penalties and issuing statutory notices such as stop notices and notices of remedial action to bring businesses back into compliance with the legislation.

Overview of enforcement regime

Question 59

Should the maximum variable monetary penalty be £250,000?

- Yes
- No
- Do not know

Answer:

No.

Question 60

Do you have any further comments on the enforcement regime?

Answer:

The enforcement regime needs to be robust and well-resourced to ensure proper enforcement of the regulations and to hold companies that breach the law to account.

Paragraph 8 of Schedule 17 grants the Secretary of State a general power to make provision in secondary legislation about the enforcement of requirements imposed by or under Part 1. The secondary legislation should make the most of this general power to establish a robust and comprehensive enforcement framework based on a well-resourced and independent regulator with sufficient expertise and powers, facilitated by strong information-sharing obligations on companies as well as mechanisms for input and complaints by third parties. This enforcement regime should require transparency and the public disclosure of compliance and enforcement information to support regulatory functions. The enforcement authority needs to be transparent and publish details of their approach to enforcement and any enforcement action taken.

We provide specific recommendations below in relation to several fundamental requirements for an effective and efficient enforcement regime.

TRANSPARENCY AND PUBLIC DISCLOSURE

The enforcement authority should maintain, and make public, the following information:

- traceability datasets of supply chains, based on information received from businesses in their annual reports and targeted disclosure requirements (see below) that allow commodities and products to be traced back to the point of origin;
- complaints received (subject to complainants' requests for confidentiality) and action taken in response to them (see further below);
- information on the findings of checks and outcomes of investigations;
- details of enforcement action taken and details of operators and products found in non-compliance;
- annual reports (as outlined in our responses to Questions 55 and 57) and due diligence statements (see below);
- guidance on "relevant local laws" (see below); and

- details regarding the enforcement authority's own capacity, including budget and staff.

In addition to a general regulation-making power mentioned above, paragraph 11(b) of Schedule 17 specifically empowers the Secretary of State to make regulations requiring persons to whom the Part 1 requirements apply to provide records or other information to an enforcement authority. In this regard, we recommend that the secondary legislation requires regulated persons to submit declarations to the relevant authority when importing forest risk commodities and derived products into the UK (or otherwise when placing them on the UK market for the first time) describing the commodity/product, its point of origin including geolocation data, the direct and indirect suppliers in the supply chain, the evidence relied upon to assess compliance with relevant local laws, confirming that due diligence on the commodity has been completed and stating that the commodity or product complies with paragraph 2 of Schedule 17. The secondary legislation should specify a prescribed form for these declarations and require that they are submitted digitally to a central information system maintained by the relevant authority (for example, the same information system that receives and holds annual reports) such that the information disclosed can be automatically screened to proactively identify shipments that present a risk of non-compliance. This will immediately alert the relevant authority to risks of non-compliance and identify priority shipments for checks.

Such a requirement for companies to declare that their products comply with the Schedule 17 requirements may also simplify enforcement procedures in cases where proper due diligence is not completed (because it would be easier to prosecute for falsely declaring information than proving that the relevant commodity or product does not comply with paragraph 2 of Schedule 17). In this regard, the secondary legislation should provide that knowingly or negligently providing false information in such a due diligence declaration constitutes an offence and specify sufficiently effective, proportionate and dissuasive civil penalties (noting that paragraph 13(1)(a)(i) of Schedule 17 expressly provides that Part 2 regulations may include provision for the imposition of civil sanctions in respect of failures to comply with the Part 2 regulations).

MONITORING AND COMPLIANCE CHECKS

Paragraph 10 of Schedule 17 specifically empowers the Secretary of State to make regulations conferring functions to monitor compliance on the relevant authority. In this regard we recommend that the secondary legislation specify that the relevant authority must monitor compliance with Schedule 17 and the secondary legislation and that this should include:

- Assessing company due diligence statements (described above) and annual reports based on indicators of non-compliance risk. Statements and reports should be submitted digitally in standard forms and be screened automatically to identify companies and commodities / products warranting inspection.

- Risk-based monitoring, informed by the due diligence statements and annual reports, as well as information received from third parties (next point below), with requirements to check a minimum percentage of companies and trade volumes for each commodity.

- Operating an accessible, safe and transparent mechanism for third parties to submit complaints and concerns about potential non-compliance, including confidentially and/or anonymously. This is critical to support enforcement as well as providing some form of

access to justice for people affected by non-compliance. The secondary legislation should include clear procedural requirements that the relevant authority review and investigate complaints and respond to complainants within minimum timeframes.

- Developing and maintaining a public, searchable, online register of key information, such as due diligence statements and annual reports. This should include the names of all companies subject to the Schedule 17 framework, their due diligence statements and annual reports, information on "relevant local laws" for producing jurisdictions (see below), complaints received from third parties and their outcomes, aggregated commodity data (such as total volumes and volumes per producing area), enforcement actions, and a list of companies and commodities/products found in non-compliance.

SANCTIONS AND PENALTIES

The authority's approach should be proportionate to deal with offences in a manner which reflects their seriousness. Civil sanctions (eg. fixed monetary penalties, stop notices and enforcement undertakings) should be available for low-level or first-time offences while criminal offences with strong penalties should be available for more serious offences or repeat offenders (eg. the UK Bribery Act (2010)) includes up to 10 years' imprisonment and unlimited fines). Criminal sanctions should include an unlimited fine, a custodial sentence (or both) and any other sanctions at the courts' disposal and should be sufficiently severe to act as a robust deterrent to repeat offences by the defendant as well as non-compliance by industry peers. Personal sanctions against directors and company managers should also be considered. Critically, there also needs to be a mechanism that those harmed by deforestation and land rights violations have a form of redress and access to justice in the UK.

Penalties should be dissuasive and set at a level which is proportionate to the offence and reflective of the environmental damage and financial benefit potentially arising from an offence. The maximum variable penalty under the Ivory Act has little, if any bearing on what an effective, dissuasive and proportionate penalty in the context of illegal deforestation and the forest risk commodity industry.

In the UK, there are large numbers of businesses trading in forest risk commodities with turnovers above £50 million and significant numbers of business with turnovers over £200 million (Table 4 of the Impact Assessment). For the penalties to be dissuasive and effective in holding companies to account for breaching their obligations, the maximum penalty level should either be unlimited (as under the UK Timber Regulation) or set at a level which appropriately reflects the financial gain that could be derived from a serious breach of the regulations and provides an effective deterrent to the larger companies in scope (ie. with a turnover of over £200 million).

For that reason, we recommend stating that the maximum penalty is unlimited and should be at least 4% of annual turnover. In this regard, we note that the Data Protection Act has provision for fines of maximum £17.5Million or 4% annual global turnover, whichever is greater, and the proposed EU deforestation-free products regulation proposes maximum penalties of at least 4% of annual turnover in addition to powers to confiscate relevant products and revenue, and to exclude actors from public procurement processes.

In this regard, we note that Schedule 17 creates scope for other penalties to be used in addition to fines, including civil sanctions. Evidence from the enforcement of other legislation such as the US Tariffs Act suggests that the disruptive impact of measures such as suspension of authorisations to trade, seizure of prohibited goods and personal sanctions on company managers and directors (including imprisonment) can be more dissuasive than monetary penalties. These powers were used in 2020 to ban imports to the US of palm oil from Sime Darby Plantation due to allegations of forced labour. The proposed Dutch Child Labor Due Diligence Act will supplement fines with making company directors liable for two years imprisonment if their company gets two fines within five years.

Seizure of goods also serves to prevent goods identified as being in non-compliance with legal requirements from continuing to enter the market despite fines having been levied. A 'stop notice' or injunction on customs clearance can also be a significant deterrent due to the costs and reputational damage from being unable to fulfil contracts and the cost of storing or disposing unsold stock. Civil sanctions like this can be a powerful tool, especially since they require lower evidentiary thresholds than criminal proceedings; evidence from enforcing the EUTR is that the difficulty in proving non-compliance 'beyond reasonable doubt' for a criminal prosecution has inhibited enforcement agencies from being able to issue penalties. In the UK, the competent authority responsible for implementing the UK Timber Regulation has previously stated that a regime of civil sanctions would comprise a more flexible, proportionate, and ultimately effective approach to dealing with non-compliances.

CHARGES AND COST RECOVERY

We also strongly recommend that the secondary legislation impose appropriate charges on regulated persons subject to the Schedule 17 framework pursuant to paragraph 15(a) of Schedule 17 as a means to recover the costs incurred by the relevant authority in performing its functions, such as establishing and maintaining the digital infrastructure required to receive annual reports and due diligence statements and to manage, screen, publish and store the information they contain. We also recommend that the secondary legislation authorise a court or tribunal dealing with any matter relating to Part 1 requirements or Part 2 regulations to award the enforcement authority the costs it incurred in performing its functions in relation to that matter, as contemplated by paragraph 15(b) of Schedule 17.

GUIDANCE

While the secondary legislation should include a non-exhaustive list of the categories of law that could constitute "relevant local laws", the secondary legislation could also require the relevant authority to issue further guidance on "relevant local laws" in relation to particular commodities and sourcing jurisdictions and to consult with relevant stakeholders in identifying those laws (either under paragraph 8 or paragraph 9(3) of Schedule 17). This guidance could, for example, be published as an online database searchable by commodity, country and sub-national district, that businesses can consult as part of their due diligence and on which stakeholders could give input to expand and maintain.

ClientEarth's responses above were submitted to the public consultation at 12:51 GMT on 11 March 2022 and were given response ID ANON-CUEN-3EAT-R.

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