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Was it produced legally?

Part 1: Understanding the legality requirement in the EU Deforestation Regulation

ClientEarth

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Part 1

Understanding the legality requirement

This is Part 1 of a larger briefing published by ClientEarth in April 2025.[1]

This part provides an explanation of the legality requirement in the EU Deforestation Regulation and principles for how it should be interpreted. It offers an analysis of the types of laws and activities that fall within the scope of the legality requirement, as well as how operators should approach due diligence on the legality requirement.[2] This should also inform how competent authorities check compliance with the legality requirement.

Part 2 provides commentary on considerations for approaching due diligence on the legality requirement and an analysis of laws that should be considered for products originating in Brazil, Côte d'Ivoire, Ghana and Indonesia.

1 Available on the ClientEarth website.
2 This analysis has been informed by an independent expert legal opinion from Sir Nicholas Forwood K.C., who served for 15 years as a Judge of the General Court of the Court of Justice of the European Union, including two terms as President of the Court. This opinion is available on the ClientEarth website at https://www.clientearth.org/latest/documents/expert-legal-opinion-on-the-eudr-legality-requirement/.

Executive summary

The EU Deforestation Regulation ("**EUDR**") requires that the commodities and products to which it applies have been produced in accordance with local laws – known as the '**legality requirement**'. EU companies must conduct due diligence on their supply chains to ensure that their products satisfy the legality requirement.

Understanding the legality requirement:

- The scope of the legality requirement is not entirely clear and requires interpretation to clarify its meaning. Interpreted according to the EUDR's objects and purpose, the legality requirement should be seen as including all laws applicable in the country of production that affect the legal status of activities undertaken to produce the relevant commodities and products.
- **This includes pre-production and post-production activities** necessary for commodity production and the commercialisation and trade of the resulting products. It also includes the **direct and indirect effects** of those activities on the relevant "plot of land" or "establishment" **and the surrounding "area of production" – the area directly or indirectly affected by the production activities**.
- The local laws that are included in the legality requirement will vary from jurisdiction to jurisdiction. However, those laws **must either relate in some way to the topics listed in the EUDR as being relevant or must contribute to the Regulation's objectives or purpose**.

Contextualising the legality requirement for each producer country:

- Understanding which laws fall within the scope of the legality requirement is fundamental to a company's ability to comply with the EUDR's due diligence procedure. This is necessary for assessing any risks that relevant products do not satisfy the legality requirement. It will be impossible to complete the due diligence process without first identifying the relevant laws applicable in the area of production and understanding how they may affect the legal status of production activities.
- Each producer country will have different laws and legal institutions. While there may be similarities across legal systems and commodity sectors, due diligence investigations will need to consider local political, legal, cultural and sectoral dynamics. Understanding these local dynamics will help determine the level of diligence that is 'due' in a particular case. This briefing explores the key legal and sectoral considerations in Brazil, Côte d'Ivoire, Ghana and Indonesia for cattle, cocoa, palm oil and soy production.

Due diligence on legal compliance:

- There are likely to be challenges to gathering the necessary information and investigating the legal compliance of specific production activities in most countries, both inside and outside the EU. **Companies should therefore anticipate common challenges and design their due diligence systems to overcome them**. Adapting due diligence procedures to overcome any practical challenges to investigating legal compliance as well as customising investigations to address contextual and supply chain-specific risk factors is necessary to complete the due diligence process.
- In addition to official sources of information, it will usually be necessary to consult with local legal experts and non-governmental stakeholders to identify the relevant local laws and to understand the 'reality on the ground' regarding their implementation and enforcement. **This should be regarded as standard practice for companies completing due diligence under the EUDR**.
- Due diligence on specific supply chains should be tailored to investigate whether general risks of legal non-compliance apply to specific production activities. **Understanding the dynamics of commodity production in the relevant jurisdiction will be necessary to verify information that gives an appearance of legal compliance**. Official documentation and third-party certificates should not simply be taken at face value – information must be verified and supported by evidence.

Recommendations

Several key recommendations for approaching due diligence when assessing commodity production activities against the EUDR legality requirement can be drawn from the research and analysis in this briefing.

- Invest in a comprehensive, independent and authoritative analysis of the applicable laws in the country of origin and how they apply to commodity production activities.
- Catalogue contextual information regarding levels of legal implementation, compliance and law enforcement, as well as trends in non-compliance and the reasons behind them.
- Consult local experts on both points above.
- Investigate the current and *historical* circumstances of commodity production activities, including advice from non-government local stakeholders.
- Do not rely on official records or third-party certification alone – consult a range of local stakeholders, especially where contextual information indicates general risks of legal non-compliance within the sector or raises concerns about the reliability of official data and records.
- Speak to locals: consult local community and civil society stakeholders (such as labour unions, workers' associations, community organisations and NGOs) to verify the reality 'on the ground', including whether any sectoral risks apply to the specific supply chain and whether local rights holders are being unlawfully impacted.
- Competent authorities should require companies to demonstrate that they have consulted appropriate experts and a variety of local stakeholders as described above to identify the full spectrum of applicable laws and their implementation – in general and in specific production areas.
- Competent authorities should require companies to convince them, by explaining the company's assessment of non-compliance risks, that the information they gathered is reliable and adequately conclusive that there is no reason to be concerned that their relevant products were not produced in compliance with all applicable legal requirements.

Background

Adopted on 31 May 2023, the EUDR aims to promote the use of deforestation-free products to reduce the EU's impact on the world's forests, thereby reducing the EU's contribution to global climate change and biodiversity loss.

The commodities and products covered by the law are: cattle, cocoa, coffee, oil palm, soy, rubber and wood – and specific products listed in Annex I of the EUDR that "contain, have been fed with or have been made using" these commodities – defined as "**relevant commodities**" and "**relevant products**" respectively.

It establishes two fundamental requirements that relevant commodities and relevant products must satisfy to be imported into, traded in, or exported from the EU:

- They must be "**deforestation-free**"; and
- They must have been **produced legally**.

To ensure these requirements are respected, the EUDR requires EU companies who import, trade and export relevant products to complete a mandatory "due diligence" process on their supply chains.

At the core of this process are requirements to:

- **Identify** the area where the product originated
- **Check** the land was not deforested after 2020; and
- **Ensure** the production of the product was conducted legally**.**

This "due diligence" process – and the information EU companies rely on to complete it – will be the primary mechanism for demonstrating, checking and verifying compliance with the law's requirements.

These new rules are a significant evolution of an existing EU law which prohibits trade in illegal timber – the EU Timber Regulation ("**EUTR**") – which requires timber importers to trace supply chains to the point of origin and check the legal compliance of the timber harvesting activities.

In this regard, the EUDR's supply chain traceability and legal compliance requirements are not new. However, they have been extended to agricultural commodities and products derived from them.

1. What is the 'legality requirement'?

Article 3 of the EUDR establishes three cumulative criteria that relevant commodities and products must satisfy before they can be placed on, made available on or exported from the EU market.

They must be:

- "Deforestation-free" (as defined in Article 2(13));
- **Produced in accordance with the relevant legislation of the country of production**; and
- Covered by a "due diligence statement" (as described in Article 4(2)).

This briefing explains and analyses the second requirement, referred to as '**the legality requirement**'.

Aerial view of a riverbank barge being loaded with timber harvested from the heart of the Amazon rainforest

3 This analysis has been informed by an independent expert legal opinion from Sir Nicholas Forwood K.C., who served for 15 years as a Judge of the General Court of the Court of Justice of the European Union, including two terms as President of the Court. This opinion is available on the ClientEarth website at https://www.clientearth.org/latest/documents/expert-legal-opinion-on-the-eudr-legality-requirement/.

2. The legality requirement in context

As stated in Article 3, the legality requirement applies to both **commodities and products**. However, understood in the broader context of the law, it focuses on activities undertaken in the country where the relevant commodity was produced – the "country of production".

In some, but not necessarily all cases, the relevant product will also have been produced in the "country of production". If so, the production of the relevant product will also be subject to the legality requirement.

Under the EUDR, "**operators**" and large (i.e. non-SME) "**traders**" are required to carry out due diligence to ensure the products they import, export, buy and sell comply with the EUDR requirements.[4] These are the companies importing, exporting and "placing" relevant products on the EU market for the first time – or buying and selling products already on the EU market.

The legality requirement forms part of this mandatory due diligence procedure, which includes minimum information gathering, risk assessment and risk mitigation requirements described in Articles 8 to 12.

Most importantly, operators are required under **Article 9(1)(h)** to collect, as part of the minimum information that must be collected for each shipment of relevant products:

> "adequately conclusive and verifiable information, accompanied by evidence, that the relevant commodities have been produced in accordance with the relevant legislation of the country of production, including any arrangement conferring the right to use the respective area for the purposes of the production of the relevant commodity".

The information must be "accompanied by evidence" (Article 9(1)) and must be 'verified and analysed' as part of the risk assessment process required under Article 10.

This process requires that operators:

- Consider the specific risk assessment criteria listed in Article 10(2), which includes risks that the information collected is unreliable, false or fraudulent, or is tainted by risks of corruption or a weak law enforcement;
- Assess supply chain-specific risk, including the complexity of the supply chain, the stage of processing and risks of mixing with products of unknown origin;
- Assess contextual risks in the country of production, including the existence of Indigenous Peoples and land rights claims, corruption, document falsification, weak law enforcement, and violations of human rights; and
- Mitigate any risks to a "negligible" level (as described in Article 2(26)).

4 See Articles 4 and 5 EUDR. Article 5 provides that "traders that are not SMEs" (called 'non-SME traders') are subject to the same obligations as "operators". Therefore, subsequent references to 'operators' in this briefing should be understood to include non-SME traders.

3. Which laws could fall within the scope of the legality requirement?

Relevant commodities and products need to be "produced in accordance with the relevant legislation of the country of production" (Article 3(b)).

The term "relevant legislation of the country of production" is given a specific meaning in Article 2(40) of the EUDR:

> *'relevant legislation of the country of production' means the laws applicable in the country of production concerning the legal status of the area of production in terms of:*
>
> *(a) land use rights;*
>
> *(b) environmental protection;*
>
> *(c) forest-related rules, including forest management and biodiversity conservation, where directly related to wood harvesting;*
>
> *(d) third parties' rights;*
>
> *(e) labour rights;*
>
> *(f) human rights protected under international law;*
>
> *(g) the principle of free, prior and informed consent (FPIC), including as set out in the UN Declaration on the Rights of Indigenous Peoples;*
>
> *(h) tax, anti-corruption, trade and customs regulations.*

Woman collecting latex from a rubber tree

This definition sets the scope of laws that are relevant for the EUDR's legality requirement. Given that relevant commodities and products can theoretically originate in any country on Earth, the EUDR does not list which countries' laws must be complied with, instead defining categories of laws that must be considered.

Identifying the "relevant laws" applicable to the production of particular commodities and products therefore **requires a case-by-case investigation** of the legal framework and laws in the jurisdiction where the commodities and products were produced. This is an implicit and essential first step in the due diligence process.

Understanding the scope of the legality requirement is fundamental to properly completing the due diligence procedure. It is therefore also fundamental to an operator's ability to reach a conclusion about the compliance of their products with the EUDR.

3.1 All "laws", not just legislation

Firstly, it is important to note that the definition in Article 2(40) refers to "laws" as opposed to legislation. This is significant because "legislation" refers to laws adopted by a legislature, such as a national parliament, while "laws" in general can be created in other ways. The official EUDR guidance document ("**Guidance**") uses these terms, 'legislation' and 'laws', interchangeably.[5]

While legislation is often the main source of law in a legal system, there can be many other kinds of laws and sources of law.

For example, relevant laws may include legal instruments adopted by the executive government (such as ministerial or presidential decrees or ordinances) as well as laws established by other institutions with law-making authority (such as laws established by courts or other judicial bodies).

Most legal systems include these different types of laws, with specific rules governing how they are made, interpreted and enforced. Some legal systems may also explicitly recognise multiple sources of law, such as state-made law and customary law.

This diversity often also exists at sub-national levels, with laws made by sub-national parliaments, governments and courts.

> While legislation is certainly a relevant source of law, other non-legislative sources of law are also likely to be relevant.

Therefore, the legality requirement should be understood as encompassing *all kinds of laws* that may be "applicable in the country of production" and apply to the process of producing the relevant commodities and products in question. .

3.2 Laws 'concerning the legal status of the area of production'

Article 2(40) includes an important limitation on the scope of laws that may fall within the legality requirement: they must be laws "concerning the legal status of the area of production".

The precise meaning of this phrase is not clear: the terms "**legal status**" and "**area of production**" are not defined in the EUDR and their literal meaning is not obvious. Therefore, some interpretation is needed to clarify their meaning.

5 For example: "...only the applicable laws concerning the legal status of the area of production constitute relevant legislation pursuant to Article 2(40) of the EUDR". European Commission (2024), 'Commission Notice – Guidance Document for Regulation (EU) 2023/1115 on deforestation-free products (C/2024/6789)', published on 2 October 2024 though dated 13 November 2024, para. 6(a). Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52024XC06789.

3.2.1 Interpreting EU legal provisions

The principles to be applied when interpreting EU legislation have been clearly established by the case law of the Court of Justice of the European Union ("**CJEU**").[6]

The CJEU has clarified that where the wording of a law is so clear and precise as to be "absolutely plain",[7] its literal meaning should prevail. But where the words are merely "concise and general", reference to the context, objectives, and the purpose pursued by the law may be needed.[8]

Any interpretation that would deprive a legislative provision of meaning – or limit its effectiveness – should be rejected, **with priority given to the interpretation that results in the greatest effectiveness of the relevant law**.[9]

As noted above, the terms "legal status" and "area of production" are not defined in the EUDR. In our view, their meaning is not so clear and precise as to be "absolutely plain", and their meaning should therefore be determined with reference to the context, objectives and purpose of the EUDR. The Guidance also confirms that Article 2(40) should be read "in the light of the objectives of the EUDR … meaning that legislation is also relevant if its contents can be linked to halting deforestation and forest degradation in the context of the Union's commitment to address climate change and biodiversity loss".[10]

3.2.2 Meaning of "legal status"

First, it is clear that "legal status of the area of production" should not be interpreted narrowly to only refer to the formal legal classification of land and formal legal interests in land. This would be inconsistent with the *explicit* inclusion in Article 2(40) of categories of law that are unlikely to have any role in regulating the formal legal status of land in a strict sense, such as laws relating to labour rights, human rights, and to tax, anti-corruption, trade and customs regulations. The term 'legal status' should therefore be interpreted in a way that gives the fullest effect to the inclusion of these categories of law within the scope of the legality requirement.[11]

When reading Article 2(40) in its legislative context and with reference to the EUDR's objectives (stated in Article 1) and the purpose it serves, it must be noted that the purpose of the EUDR, as described in its recitals, is not only to prevent the further loss of primary or naturally regenerating forest.

The Recitals clarify that the purpose of the EUDR is also to:

- Maintain the environmental, economic and social benefits and essential environmental services that forests provide;
- Protect Indigenous Peoples, environmental human rights defenders, and local communities;
- Promote alternative and sustainable agricultural practices; and
- Encourage sustainable consumption and production patterns, amongst other purposes.[12]

This means the broader context of commodity production patterns and practices – and their direct and indirect social and environmental impacts – are particularly important.

6 Most recently in Joined Cases C-611/22P and C-625/22P *Illumina/Grail v. Commission* ECLI:EU:C: 2024:677, judgement of 3 September 2024, in particular paragraphs 116 and 126-7. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:62022CJ0611.
7 See *Vysočina Wind*, C-181/20, EU:C:2022:51, paragraph 39, and *Gmina Wieliszew*, C-698/20, EU:C:2022:787, paragraph 83.
8 *Illumina/Grail v. Commission* at paragraph 128.
9 Case C-437/97 EKW and Wein & Co. [2000] ECR I-1157, paragraph. 41, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61997CJ0437.
10 Guidance, paragraph. 6(a).
11 A narrow interpretation would also be contrary to the broader legislative context, in which the EUDR is explicitly intended to "maintain the obligation to ensure the legality of relevant products" established under its predecessor, the EUTR (EUDR, Recital 80), which also included compliance with trade and customs laws.
12 See for example recitals 1, 4 – 7, 13, 14, 18, 20 - 22, 27, 28, 57, 59, 69 and 85.

> It is precisely because the principal cause of deforestation to date has been the conversion of land, *usually unlawfully*, for commodity production that the EUDR includes a requirement that commodity production must be legal.

However, the inclusion of categories of laws unrelated to commodity production – such as environmental protection, third parties' rights, labour rights, human rights, free, prior and informed consent ("**FPIC**"), and tax, anti-corruption, trade and customs regulations – clearly indicates that the legality requirement should not be limited to the commodity production process in isolation.

Laws that regulate wider impacts on the environment, workers, third parties and Indigenous Peoples are likely to impose important limits on the unsustainable expansion of commodity production – and ensuring compliance with applicable laws regulating those impacts – would not only serve the objectives of the EUDR but the broader purposes that it pursues.

> Therefore, the term "legal status" can refer to both the legal *treatment* of the commodity production process and also the legal status of its *impacts* in the "area of production.

This would include laws regulating the legal classification of the underlying land – such as legislation on land transfers and land lease transactions (the examples given in the Commission's Guidance[13]) – and laws that assess **the legal status of the direct and *indirect* impacts of commodity production on the surrounding.**

Aerial view of a large coffee plantation in Brazil.

13 Guidance, paragraph. 6(a).

3.2.3 Meaning of "area of production"

The term "**area of production**" can be interpreted as encompassing an area larger than the land used to produce the relevant commodities – not least because that area is already defined by other terms: "plot of land" and "establishment".[14]

Indeed, most – if not all – laws in the categories listed in Article 2(40) will be applicable across the whole of each country or at least to defined parts that are considerably larger than one single 'plot of land' or 'establishment'.

The decision to use the phrase "area of production" instead of "plot of land" recognises that laws applicable to the production of commodities will not only be relevant to individual farms, but to a much wider area, possibly the whole country of production.

As noted above, this is important because the effects of commodity production are rarely confined exclusively to the land on which production takes place, yet the lawfulness of those effects – whether on the environment, local communities, workers or other third parties – will usually affect the legality of the production activities. For example, the contamination of drinking water in a nearby village may make the use of fertiliser on a particular farm unlawful.

> The "area of production" should be understood as encompassing the broader area impacted or effected by commodity production.

Ensuring the legal compliance of commodity production beyond the "plot of land" or "establishment" would also serve the broader purpose of the EUDR, in particular the prevention of deforestation or degradation of primary or naturally regenerating forest in the vicinity of existing areas of commodity production.[15]

This ensures that not only laws within the categories listed in Article 2(40)(a)-(h) are complied with on the specific land used for commodity production, but also that there are no unlawful impacts, deforestation or forest degradation in the wider area.

3.2.4 Meaning of "concerning" the legal status of the area of production

It is important to note that Article 2(40) is not limited to laws governing or regulating the legal status of the area of production, but its scope is broader and also includes laws "concerning" the legal status of the area of production "in terms of" the topics listed in Article 2(40).

> For a law to meet this standard, it is sufficient for the law's content to simply relate to one of the topics listed in Article 2(40) in some way – or for its application to influence the legal status of production activities or their effects in "the area of production" in a way that would serve the EUDR's objectives or purpose.

14 "Plot of land", defined in Article 2(27), for cocoa, coffee, oil palm, rubber, soya and wood, and "establishment", defined in Article 2(29), for cattle.
15 See in particular recitals 1 to 15 and their reference to the need to 'combat' further deforestation and forest degradation..

For example, it would include laws that refer to:

- The ways in which landowners or occupiers may use land for the production of relevant commodities such as laws concerning tenure classification and the rights associated with different categories of tenure, as well as laws that regulate agricultural and forestry activities.
- Preserving the environment and other natural resources, such as air, water and soil quality.
- Protected areas and endangered species, forest protection and management and agroforestry and afforestation regulations.
- Social and economic development, for example, the recognition of Indigenous or community rights regarding land ownership, use or access.
- Labour rights, worker health and safety, protecting against forced labour and child labour.
- Protection of the human rights of people present in the area of production. For example, the rights to self-determination, FPIC, food, water, an adequate standard of living, culture, property, a clean and healthy environment, safety, and to life. These laws are relevant because the violation of human rights is known to be a contributing factor to deforestation or forest degradation.

3.3 National and sub-national laws

The EUDR makes no distinction between types or sources of laws. This means laws applicable at both national and subnational levels may apply if they fall within the scope of Article 2(40). This is particularly important given that, in many countries, jurisdiction over issues like land rights, land administration, resource allocation, business licensing, land-use permits, environmental protection, forest conservation, business and property taxes, trade and anti-corruption may be regulated at the sub-national level by the province/state, district or local government authorities.

3.4 Customary laws

In some countries, there may be more than one applicable legal system. Such systems are known as "plural" legal systems to reflect that there is more than one law-making authority, typically the state and one or more other political institutions. In such jurisdictions, there may be laws within the scope of the legality requirement that exist under distinct legal systems.

For example, in some producer countries there may be laws that are governed, regulated and enforced through the customs and traditions of a distinct social group.

An example of this would be an Indigenous community which recognises and observes its own system of customary law.


Coffee farm in Minas Gerais, Brazil

This may be particularly relevant in relation to laws concerning the use of and access to land, water, natural resources, protection of the environment and human rights, especially the rights of Indigenous Peoples, including rights to FPIC.

Whether a customary system of law exists – and whether that customary system includes laws that fall within the scope of Article 2(40) – will need to be assessed on a case-by-case basis. This may require more rigorous due diligence given that, in most cases, customary laws are not written, published or collected in digests.

In such cases, it is important to recognise that simply because a law is not documented in a conventional way, it is not any less legally binding.

3.5 Human rights laws

The legality requirement includes "laws applicable in the country of production concerning… (f) human rights protected under international law".

This means domestic laws that 'ratify' and/or implement human rights recognised in international law should be considered, as well as human rights protected under international law **if the relevant international law is "applicable" in the country of production**. This will depend on the status given to international law under the legal system of the country of production.

3.5.1 When are human rights laws 'applicable in the country of production'?

International law may become "applicable in" the domestic legal system of producer countries in several ways.

Customary international law includes unwritten international legal principles that have been established over time, in particular *jus cogens* norms,[16] which are regarded as being universally applicable. They can apply domestically in some states even without any national legislation incorporating or giving effect to those obligations. Such states are known as "**monist**" states.

16 Jus cogens, or peremptory norms of international law, are fundamental rules of international law (most commonly derived from customary international law) that are binding in international law and cannot be derogated from by states.

In some states, the state's constitution, a general law or judicial precedent may provide that international law obligations which the state has formally accepted and international legal obligations under customary international law are automatically incorporated into national law.

In so-called "**dualist**" states, international laws do not usually create automatic obligations in the domestic legal system. A new domestic law must first be adopted to implement the international law in the state's legal system. This is usually apparent from the terms of the state's constitution.

National and sub-national governments may also be free to recognise international human rights within domestic laws voluntarily, without the state needing to sign an international treaty.

3.5.2 Which human rights should be considered?

Article 2(40) refers generally to "human rights protected under international law" without singling out particular rights. However, reading Article 2(40) in context, there should be some connection to "the legal status of the area of production", or the objectives or purpose of the EUDR.

For example, the following human rights, amongst others, are likely to be relevant:

- the rights of Indigenous Peoples and some non-Indigenous local communities (such as communities constituted around shared traditional, cultural or tribal norms and customs) to the lands, territories and natural resources they have traditionally used or occupied;
- the right to self-determination;
- the right to health;
- the right to food;
- the right to free, prior and informed consent (also explicitly mentioned in Article 2(40)); and
- the right to a clean, healthy and sustainable environment.

These rights are protected by long-standing international treaties that have been ratified by a majority of the international community[17] and which are explained by substantial bodies of jurisprudence and commentary.[18]

In dualist states, due diligence should include an assessment of whether the state is a signatory to international human rights instruments and, if so, what steps have been taken to ratify them in domestic law. Given the broad international support for most human rights treaties and the corresponding international recognition of those rights, they arguably form part of customary international law and are also protected by *jus cogens* norms – and therefore automatically applicable in monist states.

For instance, the right to self-determination, and the associated prohibition of racial discrimination, are widely considered to be *jus cogens* and universally applicable under customary international law.[19] It is important to note that many of the human rights of Indigenous Peoples regarding rights to land, water, natural resources, cultural heritage, customary knowledge, language and traditions have their foundations in the right to self determination.

17 Such as the *International Convention on Civil and Political Rights, International Convention on Economic Social and Cultural Rights, International Covenant on the Elimination of All Forms of Racial Discrimination, and International Covenant on the Elimination of All Forms of Discrimination Against Women.*

18 See e.g. Human Rights Committee, *Poma Poma v Peru*, Communication No. 1457/2006, 24 April 2009, CCPR/C/95/D/1457/2006; Human Rights Committee, *Billy v Australia* CCPR/C/135/D/3624/2019, 22 September 2022, CCPR/C/135/D/3624/2019; CESCR, General Comment No. 24 on State obligations in the context of business activities, 23 June 2017, E/C.12/GC/24; General Comment No. 26 on land and economic, social and cultural rights, 22 December 2022, E/C.12/GC/26; CESCR, General Comment No. 7 on forced evictions, 16 May 1997; CERD, General Comment No. 23 on the Rights of Indigenous Peoples; CERD, *Ågren et al v Sweden*, 18 December 2020, CERD/C/102/D/54/2013); CEDAW Committee, General Recommendation No. 39 on the Rights of Indigenous Women and Girls, 31 October 2022, CEDAW/C/GC/39; CEDAW Committee, *Matson v Canada*, Communication No. 68/2014, 11 March 2022, CEDAW/C/81/D/68/2014.

19 See Hectór Gros Espiell (1980), *The right to self-determination: implementation of United Nations resolutions*. Study prepared by the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/405/Rev.1, paragraphs 70ff; International Law Commission (2022), Draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), A/77/10, Conclusion 23 and Annex; J Crawford (2012), *Brownlie's Principles of Public International Law* (8th ed), pp 594-6.

4. What activities does the legality requirement cover?

4.1 The entire process of commodity production

The legality requirement requires relevant commodities and products entering or leaving the EU market to be "produced" in accordance with the relevant legislation of the country of production (Article 3(b)).

The term "produced" is defined in Article 2(14) as the process by which relevant commodities are "grown, harvested, obtained from or raised on relevant plots of land or, as regards cattle, on establishments".

> In principle, this definition covers all aspects of commodity production, from the application for the necessary permits and approvals, to the acquisition and occupation of the land, to the extraction and marketing of the final commercial product.

The specific requirement under Article 9(1)(h) to collect adequately conclusive and verifiable information about "any arrangement conferring the right to use the respective area for the purposes of the production of the relevant commodity" confirms that Article 2(40) should not be limited to the activities of growing, harvesting, obtaining and raising relevant commodities, but should consider the broader process of 'production'.

Consideration of the whole process of production would also be consistent with the objectives and purpose of the Regulation. Notably, the EUDR aims to influence global patterns in the production of relevant commodities, promote sustainable agricultural practices, and support efforts to protect forests as well as the local communities and Indigenous Peoples that rely on and defend them.

Compliance with laws that serve these objectives should be assessed in the broader "area of production", paying particular attention to the indirect effects of commodity production, as opposed to an isolated assessment of the activities undertaken in a specific "plot of land" or "establishment".

4.2 Trade in relevant products

Article 3(b) states that the legality requirement applies to the production of both relevant commodities *and products*. The scope of the legality requirement therefore extends to the process of producing relevant products – to the extent this takes place "in the country of production" of the relevant commodity.

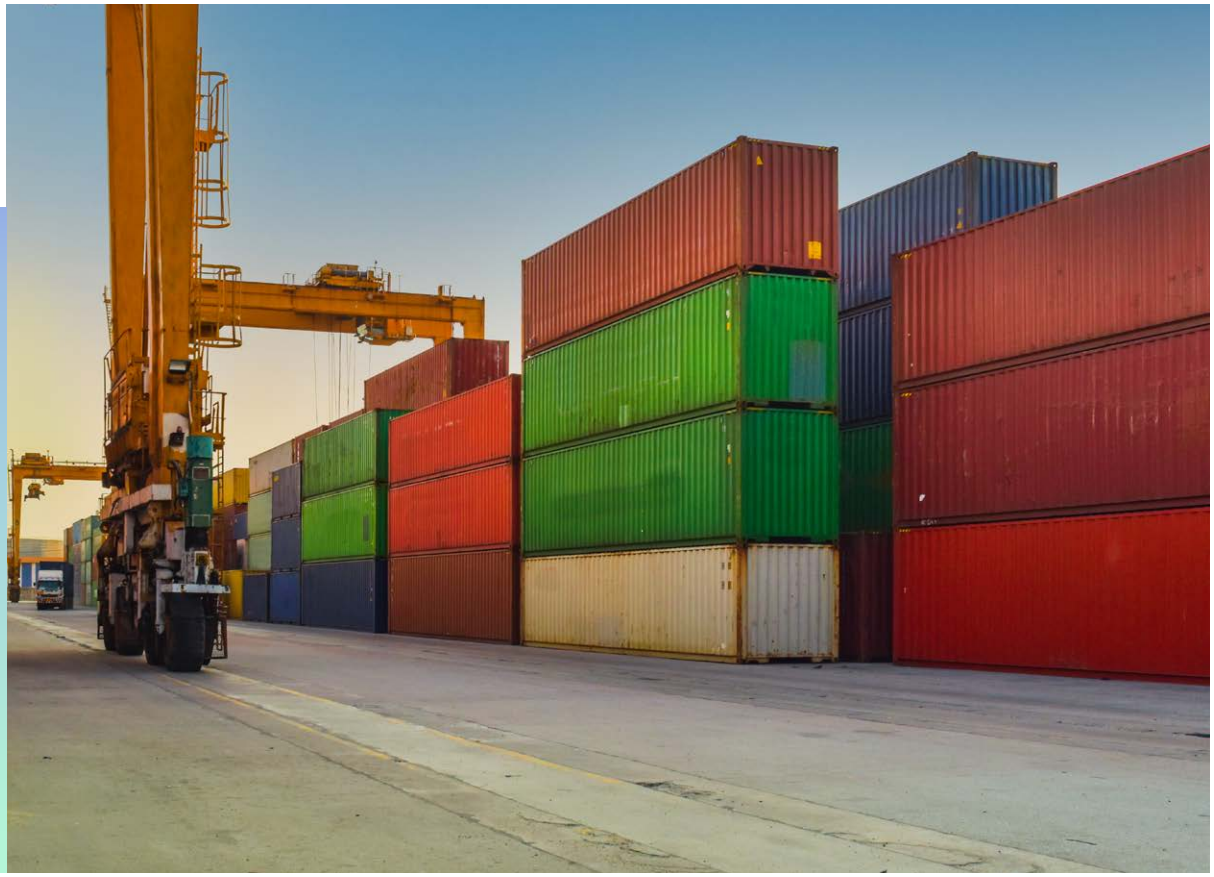
This is demonstrated in the list of relevant laws in Article 2(40), which includes laws applying to the post-production stage of trading products as commercial goods, including their import and export – tax, anti-corruption, trade and customs regulations.

> Looking at the legality requirement in the broader context of the EUDR, compliance with tax, trade, anti-corruption and customs regulations is fundamental to the EUDR's supply chain traceability and due diligence obligations.

They require operators to trace back, through the entire supply chain, the origin of all relevant commodities used in the production of products. This is the main mechanism to ensure compliance with the EUDR's product requirements – the "deforestation-free" and legality requirements – and to achieve its objectives and purpose.

Ensuring laws regulating international trade have been complied with, and ensuring proof of compliance with those laws is reliable (and not affected by corruption) is integral to the supply chain traceability requirement that sits at the centre of the EUDR framework.

> Accordingly, the legality requirement should be understood as applying to the process of producing relevant products within the "country of production", including the commercialisation, trade and export of those products.



5. Approaching due diligence on the legality requirement

In addition to understanding the scope of the legality requirement, how the requirement is implemented will be key to its effectiveness.

Most importantly, operators must ensure there is no more than a negligible risk (as defined in Article 2(26)) that their products do not satisfy the legality requirement before placing them on the market, importing or exporting them (and in the case of non-SME traders, buying and selling them) (Article 10(1)).

This is done through completion of the mandatory due diligence process described in Articles 8 to 13.

5.1 What information is relevant?

Articles 8(2)(a) and 9(1) of the EUDR require operators to collect information, documents and data demonstrating that the relevant products comply with Article 3, including the legality requirement.

> Article 9(1)(h) specifically requires operators to collect and organise:
>
> *adequately conclusive and verifiable information* that the relevant commodities have been produced in accordance with the relevant legislation of the country of production, including any arrangement conferring the right to use the respective area for the purposes of the production of the relevant commodity. (emphasis added)

This information must be "accompanied by evidence" and kept for five years (Article 9(1)).

However, the information which operators must collect and consider is not limited to that described in Article 9, which defines the general information to be collected.

> Article 10(1) states that operators must:
>
> verify and analyse information collected in accordance with Article 9 and *any other relevant documentation*. (emphasis added)

> Article 10(2)(m) also states that operators must take account of:
>
> any information that would point to a risk that the relevant products are non-compliant (emphasis added).

Information should be seen as relevant if it could shed light on the legal status of any activity undertaken during the production process, its effects in the surrounding area, and the trade in the resulting products.

5.2 What sources of information are relevant?

The EUDR does not specify the sources of information, documents, data and evidence that operators should collect and consider.

In particular, the **information gathering obligation is not limited to government sources or 'official' government records**. It should therefore include 'non-official' sources where that information is relevant to the due diligence process, such as "any information that would point to a risk" of non-compliance, as mentioned in Article 10(2)(m).[20]

20 This is also confirmed by the Guidance, which provides examples of relevant kinds of information in section 6(b).

This is particularly important in jurisdictions with Indigenous Peoples or other tribal or customary communities with collective rights to land. These groups are frequently excluded from formal government processes and/or are persecuted by government authorities. Their rights may be ignored or even denied by government agencies, despite their existence under the formal legal system, the community's customary legal system and/or under international law.

Relevant information should therefore be obtained from a variety of public and private sources.

This could include:

- local and national media reports;
- local, national and international NGO reports and publications;
- statements, reports and publications from relevant Indigenous communities, leaders, associations and representative bodies, and in particular, publications which document areas over which Indigenous Peoples claim or assert territorial rights;
- statements on social media from local community members, local and national NGOs, and local and national politicians;
- reports and publications from national and sub-national public agencies with responsibilities for the production of relevant commodities or for the implementation and enforcement of laws within the scope of the legality requirement; and
- information available from public databases and registers, most notably:
  - national and sub-national court databases of pending and concluded civil and criminal proceedings; and
  - national and sub-national cadastral and land tenure databases, including databases of areas subject to Indigenous Peoples' rights recognised by the relevant government.

As noted above, **the information collected must be *accompanied by evidence*, must be *verifiable* and, taken in aggregate, must be *adequately conclusive***.

5.3 All information must be 'verified and analysed'

A core obligation under Article 10 is that operators must "verify and analyse" the information they collect under Article 9 as well as any other relevant documentation.

The Guidance specifies that "operators must be able to evaluate the content and reliability of the documents they collect and to understand the links between the different information in different documents".[21]

Operators should also consider :

- whether the different documents are in line with each other and with other information available;
- what exactly each document proves;
- on which system (e.g. control by authorities, independent audit) the document is based; and
- the reliability and validity of each document, for example the likelihood of it being falsified or issued unlawfully.

21 Guidance at section 6(b).

Similarly, the obligation under Article 10(2)(g) – to take account of any information pointing to a risk of non-compliance – makes it clear operators must consider all relevant information:

and also:

- verify that information;
- assess the reliability and credibility of the *source* of the information; and
- assess the extent to which it is supported and corroborated – or contradicted – by other relevant information.

These requirements are important for demonstrating due diligence on legal compliance where there may not be objective, independent, and conclusive information.

This is much more likely to be the case with due diligence on the legality requirement compared to the "deforestation-free" requirement, for which satellite images are likely to be the main source of evidence used to show compliance.

Aerial view of rainforest in Brazil

Indeed, in jurisdictions with relatively informal or unstable government, low transparency, weak or repressed institutions crucial for the rule of law, or cultures of informal power and corruption, so-called 'official' records may be misleading and unreliable.

Therefore, searching for and consulting a range of *independent* sources of relevant information as close to the area of production as possible to verify (or refute) information presented in government records will always be important for reliable due diligence on legal compliance.

This is particularly important in jurisdictions where corruption, document fraud and falsification, organised crime, weak law enforcement, and weak public accountability are present.

5.4 Special considerations for compliance with human rights laws

When assessing compliance with human rights laws, it is important to note that states – not companies – are the primary duty-bearers.

However, when assessing legal compliance of the process of commodity production, operators should take into account failures by state actors to apply human rights rules which may affect the overall legality of production activities.

An example of this might be the grant of an approval for commodity production by the state without following requirements to consult with potentially affected Indigenous Peoples or because the approval of the production activities impairs a local community's right to a healthy environment. State failures of this nature in the pre-production stages of the production process could affect the legality of commodity production subsequently undertaken in reliance on the state's actions, even if the business producing the commodity played no part in the illegality.

6. Obligations on competent authorities to check due diligence on legality

The fundamental obligation on competent authorities, set out in Article 16 of the EUDR, is to carry out checks to ensure the rules are being followed.

These checks must establish whether:

- operators and traders comply with their obligations under the EUDR and, in particular, their due diligence obligations; and
- the products operators and traders place on, export from or trade on the EU market comply with the Article 3 requirements (Articles 16(1)(a) and (b)).

According to Article 18, those checks must include an examination of the documentation and records that demonstrate the specific products are compliant with the deforestation-free and legality requirements.

To identify the operators and traders to check, competent authorities must take a risk-based approach based on an analysis of risks of non-compliance that builds on the information that operators must collect under Article 9 and the risk criteria operators must consider under Article 10 (Article 16(3)). This includes information about the legal compliance of the commodity production process and indicators of risks of illegality in the country of production, such as a lack of law enforcement, corruption, document fraud and violations of human rights.

> Member States therefore have a legal obligation to ensure their competent authorities are prioritising checks on products with higher risks of illegality and are checking whether due diligence has been properly completed on the legality requirement.

To do this, competent authorities will need a basic understanding of the legal requirements for the production of relevant commodities in the countries supplying their Member State with relevant products. They will also need to be aware of the common risks of illegality in relevant commodity sectors in order to analyse risks of non-compliance and develop a risk-based approach as required under Article 16.

The case studies in Part 2 provide an overview of the "relevant legislation" for the production of important commodities (cattle, cocoa, oil palm and soy) in four major producing countries (Brazil, Côte d'Ivoire, Ghana and Indonesia).

They give examples of laws that are relevant to the legality requirement and an overview of common risks of illegality prevalent across major producing countries.

Tegallalang rice terraces in Ubud, Indonesia

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