

Response to the European Commission's Interim Findings on the Fitness Check of Illegal Logging Rules

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1. Introduction and our key messages

In the third meeting of the Expert Group/Multi-Stakeholder Platform with focus on implementation of the EUTR and FLEGT Regulation, which took place on 24 February 2021, DG Environment highlighted certain interim findings based on the Open Public Consultation ('OPC')¹, conducted as part of the fitness check of illegal logging rules, as well as interim findings from the fitness check more generally ('Interim Findings').

Mindful that these are interim findings and not yet the final results of the fitness check, ClientEarth wishes to address a number of concerns raised in the Interim Findings and also point out potential solutions to bring to the attention of the European Commission ('the Commission'). In particular, the Commission should:

- Address lack/incompleteness of data and its reliability by improving the current reporting scheme;
- Harmonise obligations throughout the supply chain, by making the obligations imposed on traders consistent with those imposed on operators;
- Address the significant inconsistencies in enforcement policies so that non-compliant operators/importers are deterred from cherry-picking Member States depending on the strength of their enforcement practices;
- Improve the accuracy/quality of checks conducted by Competent Authorities as well as the understanding of operators, authorities and courts by introducing a set of minimum mandatory elements of a check that Competent Authorities are obliged to perform;
- Harmonise and coordinate transparent information-sharing and reporting between Member States' authorities and the Commission by creating a centralised registry accessible to the public with data on compliance checks, substantiated concerns and subsequent enforcement measures;
- Clarify EUTR provisions by addressing the difficulties that prosecutors face in EUTR cases, including by adopting a legal definition of 'substantiated concerns' and common criteria for scrutinising the evidence provided by third parties, and by allowing those to challenge decisions of Competent Authorities;
- Improve the quality of inspections by requiring the use of the best technology available to identify illegal timber and detecting related activities;
- Promote sustainable and transparent forest governance and broaden its political and financial support to FLEGT-VPAs by leveraging the power of the EU market, and deepening its cooperation with other large timber markets;
- Ensure the coherence of any future legislation on forest-risk commodities with the requirements of the EUTR and the FLEGT Regulation (and the licenses developed thereunder), including the need for a deforestation-free requirement to be met by operators and traders to place timber and other commodities on the EU market.

¹ DG Environment, Presentation of 24 February 2021 at the Third meeting of Expert Group/Multi-Stakeholder Platform with focus on implementation of EUTR and FLEGT Regulation ('the Interim Findings').

2. Our general comments in response to the Commission's interim findings

At the outset, we note that the Interim Findings report little to no information about the positive results achieved by the EUTR and the FLEGT Regulation. While the Interim Findings do point at sensitive areas in the interpretation and enforcement of both the EUTR and FLEGT Regulation, they fall short of proposing possible options to address these concerns. In our view, this hinders any further meaningful contribution from stakeholders or discussion regarding developments to consider for both Regulations.

Considering this, ClientEarth would like to emphasise the following points:

1. It is essential for the Commission to **consider all the information** already submitted in the OPC in full and use it to assess the potential solutions to the shortcomings identified in the legislation².
2. While we acknowledge that the Fitness Check is being conducted for both the EUTR and FLEGT Regulation jointly, we consider that any comparison between the two Regulations must be seen in the light of, and properly informed by, the different stages of implementation of the EUTR and the FLEGT licensing scheme. This means that any such comparison should **not be overly simplified** to a mere scoring exercise³.
3. The Commission should closely consider the strong relationship and **inter-dependence between the EUTR and the FLEGT Regulation**. In particular, proper EU implementation and strong enforcement of the EUTR is a fundamental signal to encourage third countries to fully engage in establishing FLEGT-VPA licencing schemes. Inadequate implementation/enforcement of the EUTR conversely erodes the incentive to establish FLEGT/VPAs, as third countries importers see little to no advantage in going to the effort of acquiring a VPA licence. Therefore, inadequate implementation/enforcement of the EUTR becomes a major obstacle to the effectiveness of the FLEGT Regulation. Missing or disregarding this causal link undermines the evaluation of the interplay between the two Regulations.
4. The Commission should act on their worrying statement concerning the **incompleteness of data** (*'Data from the literature on the costs of implementing the EUTR and FLEGT are incomplete'*⁴) surrounding timber flows, EUTR implementation and enforcement (particularly with regard to the actual costs). While data does exist regarding both Competent Authority enforcement generally (WCMC Reports) and timber flows internationally (UN COMTRADE data), it is indeed striking that no data seems to be collected with regards to costs (of timber prior and after EUTR/FLEGT entry into force, and of enforcement generally).

As part of the Competent Authorities' role in the implementation of EU legislation and of the Commission's duty to ensure that EU laws meet their purpose and objectives, ClientEarth raises the need for a **more complete and effective reporting** scheme between Member States and the

² See [ClientEarth's submissions](#) in the context of the Open Public Consultation for additional information.

³ Slide 5 of the Interim Findings: *'Majority suggested together Regulations have had a 'moderate' effect of on illegal logging and on illegal timber entering EU market. Interestingly, combined scored similar to EUTR alone and overwhelming majority noted that illegal logging continued to be an issue'* (emphasis added) and slide 5 of the Interim Findings: *'A mixed response on effects, but in general less impact compared to EUTR: majority suggested impact on illegal logging also limited (less than EUTR) [...]'* (emphasis added).

⁴ Slide 4 of the Interim Findings.

Commission. This reporting should thus, from now on, include all aspects that the Commission considers are currently missing with regard to costs. This could be an opportunity for the Commission to assess the relevance and quality of the information gathered at Member State level, and potentially seek to amend and strengthen the content of the reporting obligations imposed on Member States.

Moreover, the Commission must carefully **verify the reliability** of the information provided by operators⁵ and ensure that unverified and unreliable information is not taken into consideration in the Fitness Check.

5. The Commission should **consider all the benefits and positive effects** resulting from the implementation of the EUTR and FLEGT Regulation and not just benefits that can be quantified and facilitate the Commission's desire for a '*direct comparison between monetised benefits and costs*'⁶. Additionally, if the Commission believes that such quantification of benefits is not currently possible, then the Commission should again consider amending and strengthening the content of the reporting obligations imposed on Member States in order to be able to better and more accurately quantify the benefits and positive results linked to the EUTR and FLEGT Regulation.

A. Regarding the EUTR more specifically

The Commission summarised the main Interim Findings on the EUTR as follows: '*EUTR shows positive results with companies focusing on keeping their supply chains clean, however:*

- *Difficult to prove in the courts, undermining the dissuasive power (MS authorities complaining). Complex supply chains = high costs for companies (especially SMEs) and authorities (checking). Imports of illegal timber increasing from some countries: Unfair to companies that comply by investing in clean supply chains.*
- *Way forward: Improved due diligence complemented by other measures, covering gaps.*⁷

As to the impact/challenges of EUTR due diligence requirements, the Commission stated that '*Key challenges identified as significant by majority of respondents were: verification of information, difficulties in achieving successful prosecutions (challenges with the notion of negligible risk) and elements related to MS implementation and enforcement (e.g. lack of: consistency across MS, information sharing, skills and capacity to undertake checks)*'⁸.

In this regard, ClientEarth points out that:

- a. The dissuasive power of the system set up by the EUTR could be enhanced by **strengthening the obligations imposed on traders**. These should be subject to obligations at least equivalent to those imposed on operators, in order to ensure that the trader's role is not used as a way to evade the obligations imposed on operators.

⁵ Slide 4 of the Interim Findings: '*For the EUTR, data is available for cost to operators – [...] the total costs for operators (EUR 4-6bn pa) [...]*'.

⁶ Slide 4 of the Interim Findings: '*Many benefits have been noted in the literature, but lack of quantification limits the potential for direct comparison between monetised benefits and costs*'.

⁷ Slide 8 of the Interim Findings.

⁸ Slide 6 of the Interim Findings.

- b. The allegedly high **costs of compliance** related to the complexity of supply chains are not a problem of the EUTR in itself. Those allegedly high costs merely relate to the choice of operators and traders in favour of one supplier (engaged in a complex supply chain) instead of another. Currently, the EUTR ensures a bare minimum of transparency through the supply chain. If anything, the EUTR does encourage economic operators to choose a more transparent supplier, able to duly and promptly ensure compliance with its due diligence obligations, over another. Where conducting risk assessment and risk mitigation in compliance with its EUTR obligations becomes an issue for an operator, the Commission's Guidance is quite clear that the Operator must "refrain from placing this/these timber or timber-product(s) on the EU market"⁹.
- c. The Commission should address **the inconsistent implementation of the EUTR across Member States** – including the proper involvement of competition, tax, and customs authorities to thoroughly analyse national fact patterns – and establish a solid information-sharing mechanism. The Commission should also address **enforcement policies**, which must be perceived as clear and credible, with penalties properly enforced in Member States.¹⁰ The dissuasive power of the system set up by the EUTR would therefore be appropriately enhanced.
- d. **Minimum uniform requirements:** the Commission should introduce a set of **minimum mandatory elements of a check** that Competent Authorities are obliged to perform. This would provide for a uniform understanding for all parties of the factors relevant to determining and assessing compliance with EUTR obligations, namely the factors that determine the finding of an infringement.

This would improve the accuracy/quality of checks conducted by Competent Authorities as well as the understanding of operators, authorities and courts as to which factors contribute to establishing a breach of the EUTR. This would also make information sharing between Competent Authorities easier, and would enable SMEs to comply with their obligations more easily.

- e. **Coordination:** Information-sharing and -reporting should be harmonised and coordinated between Member States' authorities. This could be facilitated by the creation of a centralised registry of the information collected by authorities. Such a tool would better facilitate proper information-sharing between authorities (including EUTR Competent Authorities,¹¹ tax and customs authorities), which would have a database of up-to-date information at their disposal to correctly enforce the EUTR. Keeping the information in a centralised repository would allow authorities to analyse patterns, track movements of illegally harvested timber, its origins, the scale of illegal operations, and other information, which would feed into the evidence available for prosecutions. These results would be further enhanced by the sharing of best practices and resources, such as skill- and competence-based trainings.
- f. **Transparency:** Member States should **disclose information** on EUTR enforcement **regularly and transparently**, possibly in the form of public registers or dedicated websites with data on

⁹ Expert Group on EUTR Guidance Document - Risk Mitigation Measures: <https://ec.europa.eu/environment/forests/pdf/Guidance%20-%20Risk%20mitigation%20measures.pdf>

¹⁰ See: National EUTR penalties: are they sufficiently effective, proportionate and dissuasive? (ClientEarth, 2018), available at <https://www.clientearth.org/media/cuxibicg/national-eutr-penalties-are-they-sufficiently-effective-proportionate-and-dissuasive-ce-en.pdf>. See also [ClientEarth's submissions](#) in the context of the OPC for additional information.

¹¹ Most of this information is already gathered by (or must be made available to) authorities pursuant to Article 11 EUTR and Articles 3 and 5 of Commission Implementing Regulation 607/2012.

compliance checks, substantiated concerns and subsequent enforcement measures. Alternatively, this could also be done via the same centralised repository mentioned above (paragraph d.).

The fact that this information is made publicly accessible would also allow the public and third countries to provide the authorities with additional information (which is not yet known to the Competent Authorities) on illegal activities as well as on non-compliance by operators who were not subject to enforcement action because of, e.g., insufficient information. In this way, the enforcement action carried out by the authorities would benefit from input from the public, making it possible to collect information from different sources at once, potentially providing sufficient evidence to establish e.g. proof of substantiated concern. The resulting information could be verified and shared more efficiently, improving accountability of all actors in the system and the industry players' understanding of which types of conduct are sanctioned.

- g. **Uniform definitions:** Any efforts to clarify EUTR provisions should consider the specific difficulties that prosecutors say that they have faced in bringing forward EUTR cases, on the basis of their direct contact with prosecutors. Moreover, in order to place substantiated concerns on an appropriate legal footing in the EUTR, the Commission should adopt a proper **legal definition** of a 'substantiated concern' and **common criteria** for scrutinising the evidence of infringements provided by third parties. In addition, provisions should be made to facilitate an appropriate process for third parties to **challenge decisions** of Competent Authorities who dismiss the evidence provided in the substantiated concerns mechanism.
- h. **Technology:** the **quality of inspections** is determined by the level of use of the best technology available to identify illegal timber. Results of inspections conducted with the use of scientific tools (e.g., timber tracking, forensic methods, satellite imagery, genetic testing or camera traps) constitute solid evidence to underpin further enforcement action.¹²
- i. All of the above contributes to the uniform implementation and enforcement of the EUTR, reducing the likelihood of **unfair treatment** of industry players on the basis of, e.g., different interpretations or application of the EUTR provisions, different and uncoordinated enforcement systems, different probability of achieving a successful prosecution.

B. Regarding the FLEGT Regulation more specifically

The Commission summarised the main Interim Findings on the FLEGT Regulation as follows: '*FLEGT Regulation shows positive results in stakeholders' participation and governance, however:*

- *No evidence that VPAs have contributed to reducing illegal logging in the partner countries and the consumption of illegally-harvested wood in the EU. Slow and very costly processes. After 20 years of negotiations, only one country (out of 15) has an operating licensing system in place. Among the top 10 EU trading partners, there is only one VPA country.*

¹² Albeit technological advances are an indispensable tool in verifying origins of timber, only 6 Member States reported using scientific methods in checks in 2019. See: Background analysis of the 2017-2019 national biennial reports on the implementation of the European Union's Timber Regulation (European Commission, 2020), available at <https://ec.europa.eu/environment/forests/pdf/EUTR%20Analysis%202017-2019.pdf>.

- *Possible way forward: Alternative support mechanisms to enable partner countries to comply with requirements (Forest partnerships), without the elements which do not work (licencing in a trade agreement).*¹³

On the effects of the FLEGT Regulation, the Commission stated that:

'Majority suggested increased awareness of illegal logging, higher transparency in exporting countries and stakeholder participation were key benefits; also reduced DD costs (but only in one country)

Majority of respondents suggested following were key challenges for FLEGT Regulation: main trade partners not covered by VPAs, only one country licencing, time and cost to negotiate VPAs, TLAS system being too complex for countries with weak institutions, and corruption

*In addition, a number of barriers remain once VPA countries begin issuing licences. The most prominent are confusion over the products covered, difficulties in communicating with licencing authorities and a lack of implementation and enforcement guidance*¹⁴.

In this regard, ClientEarth points out that:

- a. The fact that the FLEGT Regulation resulted in reduced due diligence costs 'only' in one country is an irrelevant finding. The FLEGT Regulation has been fully implemented **only in one country**. Therefore, the functioning and the effects of the FLEGT system as a whole can only be assessed in relation to that one country, which should be taken as an example. This example is the proof that, if fully implemented, the FLEGT system successfully helps to reduce due diligence costs. The problem relating to the fact that the FLEGT Regulation has been fully implemented in *only* one country must be considered separately – *i.e.* this does not affect the effectiveness of the system once it is fully and correctly implemented.
- b. In developing countries, legal uncertainty is one of the underlying causes of illegal logging and trade in illegal timber. In contributing to law and policy reform, FLEGT-VPAs tackle illegal logging. In all of the geographies in which ClientEarth focuses its work (Côte d'Ivoire, Ghana, Liberia and the Republic of Congo), legal reforms have been identified as a prerequisite to FLEGT licensing due to the gaps identified in legality matrices.
- c. Law reform, conducted with the meaningful participation of stakeholders, and particularly of CSOs and community representatives, has gone beyond addressing inconsistencies and gaps in pre-existing forest laws. In some cases, it has achieved a stronger recognition of LCIPs' substantial and procedural rights¹⁵. **FLEGT-VPA processes have therefore contributed to systemic changes** in forest governance and their impact must be assessed in light of their wider influence on LCIPs rights over forests and not just in terms of '*monetised benefits and costs*'.
- d. The technical complexity and scope of FLEGT-VPA, in particular as it provides for capacity-building, multi-stakeholder processes and encompasses all timber produced and transited through a country, seem to have been underestimated. Accordingly, it would be unreasonable to expect legal and policy reforms in forest governance to be a quick process. On the other hand, the positive results

¹³ Slide 8 of the Interim Findings.

¹⁴ Slide 7 of the Interim Findings.

¹⁵ For example, the new Forest Codes in Cote d'Ivoire and Republic of Congo, and Legislative Instrument 2254 in Ghana.

for forest governance systems achieved by FLEGT-VPA processes, with the direct involvement of civil society and communities, should be taken into account irrespective of the fact that the Commission considers that such benefits cannot be easily quantified.

- e. In line with point 3 in Section 2 above, third countries negotiating or implementing a FLEGT-VPA may not regard easier access to the EU market as a strong incentive to make significant progress, especially given the clear weaknesses and deficiencies in the implementation and enforcement of the EUTR at EU level.
- f. In assessing the ways forward, the Commission should consider any potential adverse effects on partner countries' engagements to tackle illegal logging in the future as evidence shows that international trade is a driver of deforestation and forest degradation¹⁶. It is, therefore, important that the EU leverage the EU market to promote sustainable and transparent forest governance and broaden its political and financial support to FLEGT-VPAs. The EU should also deepen its cooperation with other large timber markets.

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¹⁶ Hoang, N.T., Kanemoto, K. Mapping the deforestation footprint of nations reveals growing threat to tropical forests. *Nat Ecol Evol* (2021).