

Proposals for FLEGT and EUTR to be merged with EU “deforestation-free” regulations

The EU is considering the introduction of new forest and climate policy measures which would reshape timber trade relations with tropical countries. In some ways, the proposed measures build on the existing policy framework contained in the FLEGT Action Plan. However, they also raise questions about the future of existing instruments such as the EU Timber Regulation (EUTR) and FLEGT licensing systems.

The potential far-reaching implications of the on-going policy discussions were highlighted in a presentation by Hugo Schally of the European Commission’s Environmental Directorate (EC DG ENV) to a webinar hosted by FERN, the Brussels based environmental NGO, on 17 March 2021 which brought together a range of policy makers and civil society stakeholders for presentations and discussions on the theme “Enforcing Due Diligence regulation for forest risk commodities”¹.

Mr Schally’s presentation provides an insight into the EC’s latest thinking on international forestry-related issues at a time when the EU has committed - referenced in three separate policy instruments; the European Green Deal, the EU Biodiversity Strategy for 2030 and the Farm to Fork Strategy - to present, in 2021, a legislative proposal to avoid or minimize the placing of products associated with deforestation or forest degradation on the EU market.

This commitment follows the 2019 EU Communication on “Stepping up EU Action to Protect and Restore the World’s Forests”. It was also reinforced in October last year when the European Parliament adopted MEP Delara Burckhardt’s report, ‘An EU legal framework to halt and reverse EU-driven global deforestation’.

Burckhardt’s report calls on the Commission to ensure companies are obligated to conduct due diligence on deforestation and human rights before placing “forest risk” goods on the EU market. It also suggests financial institutions conduct due diligence before providing money to companies that harvest, extract, produce, process or trade forest- and ecosystem-risk commodities and derived products. It further calls for traceability obligations to be placed on EU market traders of these products.

The European Parliament’s decision pre-empted the EC’s on-going impact assessment of regulatory options to “decrease the risk of imported deforestation and forest degradation”. The impact assessment, the results of which have yet to be published, is being undertaken by EC DG ENV drawing on insights from a public consultation held in the last quarter of 2020.

This impact assessment will also take account of the results of the on-going Fitness Check, also led by EC DG ENV, of the FLEGT and EUTR regulations, the two key legal instruments of the EU FLEGT Action Plan. Supported by a public consultation undertaken early last year and an external study (not yet published), the fitness check is looking at the effectiveness, efficiency, coherence, relevance and EU added value of both regulations in contributing to the fight against illegal logging globally.

Extending EU deforestation regulations to farm commodities increases market leverage

Presenting to the FERN webinar under the heading “EU Action on Deforestation: State of Play”, Mr Schally began by explaining some of the EU thinking behind a new regulatory approach focused on agricultural commodities in addition to timber products, implying this gave greater market leverage.

“[The FLEGT and EUTR regulations] have to be seen in the policy context of the early 2000s...and the way the problem was seen at that point in time, namely that the major driver and the main problem was identified as commercial logging, and therefore the focus was on timber trade”.

“And, of course, when we did the impact assessment on the new timber regulation, it was clear that international trade in timber and derived products, was when you look at overall sizes of the markets and of the economies, was a fairly marginal issue economically.... when you talk about the proposal that is in the making [for due diligence

¹ <https://www.youtube.com/watch?v=zuaEQgFXCE> – Mr Schally starts speaking at around 1hr 15 minutes into the webinar.

regulation], this is radically different, it deals with a broad range of agricultural commodities, I think we go into a different ballpark figure”.

As background to this new regulation, Mr Schally mentioned some of the EC’s preliminary conclusions from their ongoing Fitness Check of the EUTR, noting both positive results and continuing challenges, particularly for smaller operators.

“Now I think that we all agree that when the results of the fitness test will be handed out that there has been a positive result with regard to incentivizing companies to keeping supply chains clear, however, we have come across a number of major challenges which is that infractions under the EUTR are difficult to prove and substantiate in court, which undermines its dissuasive power.”

“And I think that one main complaint that the member states’ competent authorities have is we’re dealing with complex supply chains with a lot of small and medium sized enterprises, which leads to high costs for companies, perhaps too high in that regard (we’re still checking on that), that when you look at the situation over the years, the imports of timber from some high risk countries where we can be fairly sure that there is a good proportion of illegal timber involved has actually increased”.

Mr Schally also elaborated on some specific challenges of legal interpretation that makes prosecution difficult in the EUTR, *“The term negligible or non-negligible risk is subjective. The legal system in the member states, very often have no clear understanding and no long standing tradition in dealing with the concept of due diligence.....We have seen some member states where this has almost paralysed prosecution and enforcement and made it really hard to apply any sanctions to governments in question”.*

EC questions value of FLEGT licensing

Moving on to FLEGT regulation, Mr Schally questioned the value of the legality licensing approach which has been a core component of the VPA process to date.

“Now, on the FLEGT regulation. I think that we need to make the distinction of what has worked and what hasn't worked, and I think that the positive story of the FLEGT VPAs, is that where we have VPA processes we see positive results in terms of enhanced stakeholder participation in policymaking and the national level improvements in forest governance and administration and some enforcement.”

“However, when we look at it - and I think it's not surprising because we're dealing with illegal logging - there is no hard evidence that VPAs have contributed to reducing illegal logging in partner countries, or the consumption of illegally harvested wood in the EU.”

“That's partially due to the fact that since 2005 when we started with that regulation, only one country out of the 15 with whom we have engaged has an operating licencing system in place. And when you look at the overall trade pattern, only one VPA country is among the top 10 EU trading partners, which is Indonesia again.”

“So I think that from our perspective, the part where we are not confident has made its proof is the licencing system, and the timber legality assurance system in partner countries”.

While questioning the specific role of legality licensing, Mr Schally did, however, emphasise the continuing value of partnership agreements: *“But I think that one thing that we absolutely need under all costs to be maintained, is the support mechanism to enable partner countries to comply with requirements without the elements that do not work.”*

But he also stressed that the EU’s intent will be to change the scope and focus of these agreements, to include a wider range of forest-risk commodities, mentioning beef, palm oil, soy, rubber, cereals, cocoa, and coffee alongside wood. He suggested that *“it's very clear we're moving from legality to sustainability”* and that *“there would not be added value in a dual system for legality on the one hand and sustainability on the other hand”.*

Rather than focusing on illegal logging, Mr Schally said *“it is clear that we need to deal with agricultural production and agricultural expansion, and we actually need to move from a system that rewards effort and announcement to a system that rewards performance and effect.”*

Moving on to consider the legislative instrument to be introduced in the EU, Mr Schally noted four specific objectives: *“to minimise the risk of placing on the EU market commodities associated with deforestation and forest degradation; to make sure EU consumers and citizens are aware of the impact; thereby, to promote the demand for and consumption of commodities and products that are not associated with deforestation and forest degradation; and to incentivize investment and financial interest in sustainable production systems”*.

EC “deforestation free” criteria for farm and forest commodities

Mr Schally identified *“one of the cornerstones”* of the new initiative as the *“deforestation free criteria, including forest degradation”*, which he said *“needs to be based on solid science”*. He referenced various relevant sources including the FAO definition of deforestation, the UNFCCC and REDD+, and High Carbon Stock Approach. He suggested that under the new proposed legislation products from plantations would still be allowed to be placed on the EU market, but this may be subject to a cut-off date for conversion yet to be determined, mentioning that the European Parliament report said this should be no later than 2015.

In relation to the specific obligations placed on wood and agricultural commodity traders, and despite having highlighted some of the challenges of the EUTR due diligence approach, Mr Schally noted that *“in the end, a variety of due diligence is what works best because with all stakeholders, we can actually build on experiences that they have had with implementing due diligence requirements”*.

However, he also suggested mechanisms be introduced to ensure due diligence does not overburden competent authorities and economic operators. *“We really feel that [due diligence] needs to be complemented by some benchmarking country assessments, possibly also by a system by which public certification systems in third countries and EU member states would be recognised.*

“That would mean we would arrive at a tiered system of due diligence with more requirements for some and less requirements for others, depending on the fact whether there is mandatory public certification or benchmarking”.

Mr Schally suggested, however, that a specific *“deforestation free requirement”* for forest-risk commodities placed on the EU market would be a *“nuclear option”* and likely very challenging to implement *“because that's a very linear application of the EUTR system to trade in agricultural commodities”*. He concluded, *“we're still assessing [the deforestation-free requirement] but I think that probably whatever we do an element of due diligence will be important”*.

Potentially significant change in EU policy on tropical timber trade

While Mr Schally's comments are preliminary and views may alter before any official EU policy is announced, some of the observations relating to the perceived lack of effectiveness of the EUTR and FLEGT licensing system in removing illegal wood from EU trade imply that the EC is considering a significant change in policy direction.

At this stage it is impossible to foresee the impacts of such a change in policy direction; however it is possible that EUTR may be rolled into the broader regulation covering all *“forest risk”* commodities and including deforestation free requirements. As for the VPAs, after a period of 15 years when the EU has been actively encouraging tropical countries to adopt FLEGT licensing systems for timber products through these legally binding trade agreements, the focus of future negotiations may change significantly.

The objective may be to finalise agreements covering all *“forest risk”* commodities, as defined in the new EU regulation, and to develop procedures for *“benchmarking country assessments”* and *“public certification”* to demonstrate that their trade does not contribute to deforestation or forest degradation. There may also be a

greater emphasis in the agreements on monitoring the impacts of agricultural commodity trade on forest carbon stocks.

This would align with another anticipated EC policy measure, to introduce a border carbon levy for which a detailed proposal is expected in June. This levy is expected to help finance NextGenerationEU, the €750 billion (\$888 billion) economic recovery instrument now being rolled out across the EU while also contributing to the EU target of cutting emissions by 55% compared to 1990 levels by 2030 on the way to making the EU climate neutral by 2050.

Mr Schally's comments on the limitations of EUTR and FLEGT licensing raise immediate questions about the future of the EU's existing FLEGT VPAs ratified with seven tropical timber producing countries – Cameroon, Central African Republic, Republic of Congo, Ghana, Indonesia, Liberia, and Viet Nam – plus the two agreements still awaiting ratification with Guyana and Honduras.

High stakes for Indonesia

The stakes are particularly high for Indonesia which has been issuing FLEGT licenses now for nearly five years and has successfully applied its timber legality assurance system (TLAS) and SVLK certification to all wood product exports and is looking to the EU to follow up on specific commitments made in the VPA *“to promote a favourable position in the Union market”* for FLEGT licensed products, including specific *“efforts to support: (a) public and private procurement policies that recognise a supply of and ensure a market for legally harvested timber products; and (b) a more favourable perception of FLEGT-licensed products on the Union market”*.

This implies continued commitment to the “green lane” for FLEGT licensed products in the EUTR, which at least before the onset of the COVID-19 pandemic was beginning to pay dividends in terms of rising market share for Indonesian wood products in the EU. It also implies further efforts to communicate the benefits of FLEGT licensing, of the sort described in the 2020 report by the Center for International Forestry Research (CIFOR) *“Collecting Evidence of FLEGT-VPA Impacts for Improved FLEGT Communication”*.

The CIFOR report, which draws on research in Cameroon, Ghana and Indonesia, concludes that *“globally, the VPA process has contributed positively towards a decrease in illegal logging rates particularly illegal industrial timber in export markets, notably derived from production forests being mandated to have management plans.*

“At the country-level this held true across Cameroon, Ghana, and Indonesia as the share of legal timber in export markets had gone up with direct attribution to VPAs. In Indonesia, the share of national timber production exploited with a legally obtained permit has also gone up. Further, across each country, the ultimate goal of SFM was being better achieved through more thorough implementation of forest management plans”.

CIFOR stress that *“the VPA process has contributed positively to a more coherent legal and regulatory framework with sanctions being more regularly enforced and more credible due to the VPA, and to greater transparency in the forestry sector”*.

Indonesian civil society calls on EU to promote VPA benefits

Following on from Mr Schally's comments, and a similar presentation delivered by the EC on 25 February to the “Multi-stakeholder platform with a focus on Deforestation and Degradation”², an invitation-only group of mainly European trade associations and NGOs, a joint response was issued by Indonesia's Civil Society Organization (CSO) Coalition working in monitoring the implementation of TLAS-SVLK.

The Indonesian CSOs state that *“Without clearly understanding the research method applied to obtain the data, whether the data source has been validated and to what extent the partner countries were consulted, the stakeholders felt that the European Commission was too early in concluding that the VPAs have not contributed to*

² Slides of the presentations of this meeting are available at <https://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupMeeting&meetingId=23741>

reducing illegal logging in partner countries and did not capture other detailed information related to the impact of FLEGT VPA”.

The statement highlights that “since the implementation of SVLK, the number of illegal logging cases declined from nearly 1800 cases in 2006 to 80 cases in 2020” and “since the implementation of FLEGT licence in 2016, Indonesia’s timber product export value increased from USD 9.84 billion in 2016 to USD 11.05 billion in 2020. Meanwhile, furniture export in 2019 rose 14.5% and in 2020 (during the Covid-19 pandemic) continued to increase by 12.2% (USD 2.18 billion)”.

“Furthermore that during VPA implementation, legal timber and timber products administrative system (logging, distribution, processing, trade) in Indonesia experienced an improvement, which reduced the space for illegal logging and timber distribution. In the wood chip processing industry, SVLK implementation had a positive impact on reducing indications of illegal timber entering the supply chain”.

Finally the Indonesian CSO statement “underlined the issue of market uptake, in which the EU has not fully support[ed] and promote[d] FLEGT-licenced timber from Indonesia, as mandated in the VPA text.”