SUMMARY REPORT

NOTE RE EU TIMBER REGULATION DUE DILIGENCE SYSTEM

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The European Union Timber Regulation n°995/2010 of the European Parliament and Council of 20 October 2010 laying down the obligations of Operators who place timber and timber products on the market entered into force on 3 March 2013 (EUTR).

The EUTR aims to support international efforts to tackle the problem of illegal logging and associated trade. It sets out the obligations for Operators who place timber and timber products on the EU market for the first time as well as the obligations for traders.

The core element of the EUTR is the obligation for Operators to set up a due diligence system when they place timber on the market for the first time.

The due diligence system includes three elements inherent to risk management, namely, access to information, risk assessment and mitigation of the risks identified. Operators must obtain certain documents and acquire information as to the origin of the timber which is then used to conduct a risk assessment and to adopt measures to mitigate these risks. The goal is to prevent timber harvested in violation of applicable national legislation being placed on the EU market.

The purpose of this note is to shed some light on the application of the EUTR and to provide guidelines as to the application of the due diligence system.

CHAPTER 1 - EUTR FUNDAMENTAL

Chapter one will focus on a theorical description of the EUTR.

I. SCOPE OF APPLICATION

The EUTR applies to Operators, namely any natural or legal person who places timber or timber products on the market (Article 2, c) EUTR). It is forbidden for Operators to place illegal timber or timber products on the market for the first time. They also have to exercise due diligence in order to reduce the risk of placing illegal timber on the market.

The EUTR also applies to traders, namely any natural or legal person who, in the course of a commercial activity, sells or buys on the internal market timber or timber products already placed on the internal market (Article 2, d) EUTR). Traders have an obligation as to the traceability of timber and timber products.

"Placing on the market" means the supply by any means, irrespective of the selling technique used, of timber or timber products for the first time on the internal market for distribution or use in the course of a commercial activity, whether in return for payment or free of charge (Article 2, b) EUTR).

Timber and timber products are listed in Annex I of the Regulation.

In addition, Operators must be distributing or using in the course of a commercial activity, whether in return for payment or free of charge.

The EUTR applies only to timber or timber products placed for the first time on the EU market.

In addition, Operators importing timber or timber products under a Voluntary Partnership Agreements (FLEGT VPAs) do not have to take any additional due diligence action. In this specific case, timber has automatic access to the market provided that the authenticity of the authorisation or licence has been verified.

In addition, timber with a CITES licence also does not require specific due diligence action. The sole responsibility of the Operator is to verify the authenticity of the licence before placing the timber or timber products on the market.

II. OBLIGATIONS OF OPERATORS AND TRADERS

The first obligation for Operators is not to place on the market for the first time any illegally harvested timber or timber products (Article 4 EUTR). Timber is illegally harvested when it has been harvested in violation of the applicable legislation of the country of origin.

The second obligation for Operators is to develop a due diligence system (analysis follows in the next section).

Traders have one main obligation under the EUTR, namely, to identify the Operators or traders who supplied the timber and timber products and, where applicable, the traders to whom they have supplied the timber and timber products (Article 5 EUTR).

III. DUE DILIGENCE SYSTEM

Operators have the choice between adopting a due diligence system established by a monitoring organisation or establishing their own due diligence system.

A. First obligation: Measures and procedures providing access to information

The first step of the due diligence system required by Article 6§1(a) of the EUTR is the obligation to take measures and put in place procedures providing access to information regarding the supply by the Operator of timber or timber products placed on the market.

Operators, in order to respect their due diligence obligation, must collect all information regarding the timber and timber products and their suppliers.

This information is listed in a non-exhaustive list in Article 6§1, a) of the EUTR and is specified in Article 3 of the Commission Implementing Regulation. In addition, information concerning the Operator's supply must be retained for five years. (Article 5 of the Commission Implementing Regulation).

B. Second obligation : Risk assessment

The second step of the due diligence system required out by Article 6§1(b) of the EUTR consists of an obligation for Operators to put in place procedures enabling the Operator to analyse and

evaluate the risk of illegally harvested timber, or timber products derived from such timber, being placed on the market.

The "risk" referred to in the EUTR is that the timber or timber products have been illegally harvested, i.e. in violation of the legislation applicable in the country of origin.

Article 6§2, b) of the EUTR provides for a non-exhaustive list of criteria for carrying out the risk assessment. These criteria enable Operators to have a general overview and a global context as to the origin of the wood or derived products.

C. Third obligation: Risk mitigation procedures

The third and final step of the due diligence system is that if a risk has been identified in the second step, Operators must initiate risk mitigation procedures which, according to Article 6§1, c) of the EUTR, consist of "a set of measures and procedures that are adequate and proportionate to minimise effectively that risk and which may include requiring additional information or documents and/or requiring third party verification."

D. Regular evaluation of the due diligence system

Operators must self-assess their due diligence system to ensure that their management follows the applicable procedures and that the desired result is achieved. Such an evaluation should take place once a year and may be carried out by a person within the company (ideally independently of those responsible for implementing the procedures) or by an external body.

IV. MONITORING ORGANISATIONS

Article 8 of the EUTR states that monitoring organisations will control the compliance of Operators with their due diligence obligations.

Their status as monitoring organisations is recognised by the European Commission if they meet the conditions set out in Article 8 of the EUTR.

Monitoring organisations are controlled by the relevant authorities.

V. CONTROL OF OPERATORS BY RELEVANT AUTHORITIES

Pursuant to Article 10 of the EUTR, the relevant authorities must carry out checks on Operators to ensure their compliance with the requirements laid down by Articles 4 and 6 of the EUTR.

The checks shall be conducted in accordance with a periodically reviewed plan following a risk-based approach. Article 10§3 of the Commission Implementing Regulation provides a non-exhaustive list of possible control measures.

In this respect, the relevant authority will first have to set up a control plan or system by listing the Operators to be checked, the frequency of checks, the questions to be asked to the Operators and the factors to be taken into account during the check.

Following which, the relevant authority will then have to carry out the control as such.

In case the controls identify a shortfall by the Operator, the relevant authorities may inform the Operators of corrective measures to be taken or adopt provisional measures such as the seizure of the wood or the prohibition of the marketing of the wood.

VI. PENALTIES

According to Article 19 of the EUTR, the Member States shall lay down the rules on penalties applicable to infringements of the provisions of the EUTR and take all measures necessary to ensure that the said penalties are applied.

The penalties provided for must be effective, proportionate and dissuasive.

CHAPTER 2 – TIMBER LEGISLATION IN THIRD COUNTRIES

Various countries have developed laws to regulate the import of timber.

In this respect, the United States has been a pioneer with the adoption of the Lacey Act and the Legal Timber Protection Act.

Australia has also adopted laws on the timber trade, namely the Australian Illegal Logging Prohibition Act and Regulation. These laws impose an obligation for importers to adopt a due diligence system.

Japan has also dealt with the issue of timber trade and adopted the Act on Promotion of Use and Distribution of Legally-Harvested Wood and Wood Products (also called the Clean Wood Act), which is a non-binding text.

CHAPTER 3 – APPLICATION OF DUE DILIGENCE SYSTEM IN CONFLICT MINERALS

I. IN THE EUROPEAN UNION: REGULATION 2017/821

On 17 May 2017, the EU has adopted a Regulation laying down supply chain due diligence obligations for European Union importers of tin, tantalum and tungsten and their respective ores as well as gold originating from conflict-affected and high-risk areas (Regulation 2017/821).

The due diligence obligation imposed by Regulation 2017/821 is specifically linked to the "supply chain" and establishes various obligations for importers of minerals into the EU.

Regulation 2017/821 has been drafted in line with the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas ("OECD Guidance"). Regulation 2017/821 and the OECD Guidance will therefore be analysed together. Regulation 2017/821 and the OECD Guidance can both be examined in the context of the EUTR

as the two EU Regulations are somewhat similar, given that they both require the implementation of a due diligence system based on risk management.

There are five steps in the due diligence system laid down by the OECD Guidance and Regulation 2017/821.

The first step consists of management system obligations. European Union importers of minerals or metals must adopt various measures specified in Regulation 2017/821 in order to ensure compliance with their due diligence system.

The second step consists of risk management obligations to identify and assess the risks of adverse impacts in the mineral supply chain. European Union importers must determine the scope of the risk assessment, establish the factual conditions of the supply chain and assess the risks based on the analysis of the information thus obtained.

The third step is to implement a strategy to respond to the identified risks in order to prevent or mitigate adverse impacts. With regard to such risks, importers must report findings of the supply chain risk assessment to the senior management designated for that purpose, adopt and implement a risk management plan and undertake additional fact and risk mitigation assessments for risks requiring mitigation.

The fifth step is to carry out audits via an independent third party ("third party audit").

II. IN THE UNITED STATES: DODD FRANK ACT SECTION 1502

Conflict minerals issues have been regulated in the Dodd Frank Act Section 1502, which entered in force in January 2012.

Section 1502 requires U.S. companies to disclose the source of their minerals in a report which is submitted to the Securities and Exchange Commission (SEC). Companies have to ensure that the raw materials they use are not related to any armed conflict in in the Congo. This amounts to a disclosure obligation whereby companies must report if their products contain conflict minerals. Section 1502 also refers to the due diligence obligation with regard to the origin of the natural resources.

III. IN CHINA: DUE DILIGENCE GUIDELINES FOR RESPONSIBLE MINERAL SUPPLY CHAINS

The China Chamber of Commerce of Metals, Minerals and Chemicals Importers & Exporters adopted the Chinese Due Diligence for Responsible Mineral Supply Chains launched in 2015. This text provides a non-binding guidance and calls on companies to develop a due diligence system in order to identify risks and prevent human rights abuses when marketing minerals from conflict areas in Africa.

CHAPER 4 – CHECKS AND PENALTIES IN THE EU MEMBER STATES

I. CHECKS ON OPERATORS BY RELEVANT AUTHORITIES

The relevant authorities must adopt a periodically reviewed plan in order to carry out checks to verify if Operators comply with the requirements set out in the EUTR (Article 10).

The EUTR does not provide for a detailed procedure regarding the checks on Operators. It only specifies in Article 10 that checks may include examination of the due diligence system, including risk assessment and risk mitigation procedures, an examination of documentation and records that demonstrate the proper functioning of the due diligence system and procedures and spot checks, including field audits.

Other elements may be included in the periodically reviewed plan. In particular, the relevant authorities may identify the Operators to be monitored. They can also verify the reliability of the due diligence system established by the Operators. This may include verifying the appointment of a responsible person with sufficient expertise. The relevant authorities may carry out checks by means of questionnaires to be completed by Operators.

In addition, the relevant authorities must also keep records of their checks.

II. CHECKS IN MEMBER STATES

Several relevant authorities have adopted measures following the control of Operators and traders. Some court decisions in various Member States have also been issued.

- The Netherlands: Rechtbank Amsterdam, 04/07/2017

After carrying out checks on Operators at Greenpeace's request, the Dutch authority notes that some Operators were not complying with their due diligence obligations. On the basis of its internal policy document, the Dutch authority issued warnings against the Operators concerned. Dissatisfied with these mere warnings, Greenpeace referred the matter to a Dutch court, which considered that a violation of Articles 4, 5 and 6 of the EUTR are not "minor offences" and that more appropriate measures than warnings should be adopted.

- The Netherlands: Rechtbank Noord-Holland, 24/05/2017

Following checks carried out by the Dutch authority on an Operator importing timber from Cameroon, it was found that the Operator failed to collect all the information relating to the origin of the timber. A full risk assessment could therefore not take place, in violation of the EUTR. A financial penalty of 1,800 euros per cubic metre of wood was imposed by the authority and subsequently confirmed by the Court's decision.

- The Netherlands: Rechtbank Den Haag, 10/07/2018

After several warnings, operators continued to import timber from Myanmar in violation of the EUTR. Documents demonstrating the legality of the origin of the wood were missing, leading the Dutch authority to impose a fine of 20,000 euros per cubic metre of wood. The Court confirmed this fine and found that the Operators had not adequately discharged their due diligence obligations.

- Danish authority : 13/03/2017

The Danish authority decided in 2017 to issue a formal injunction to Operators importing teak from Myanmar to comply with the requirements of the EUTR and to pay particular attention to timber from Myanmar due to the high level of corruption in the country.

- United Kingdom: Westminster Magistrate Court, 25/10/2017

A timber operator importing teak from Myanmar was sentenced by a judge to pay a fine of £5,000 for violating the EUTR and a national implementing law.

- Sweden: Administrative Court of Jönköping, 05/10/2016

After receiving a warning, an operator importing timber from Myanmar was sentenced by the Swedish authority to pay a fine of SEK 17,000 (€1,700). The Court confirmed the fine but suspended its enforcement and considered that the operator should exercise greater diligence in verifying the authenticity of Burmese official documents.

- Sweden: Administrative Court of Jönköping, 06/06/2018

An operator importing timber from Myanmar was fined SEK 800,000 (€80,000) by the Swedish authority. The fine was confirmed by the Court since the operator did not provide complete documentation as to on how it had complied with its due diligence obligation.

- United Kingdom: Manchester Magistrate Court, 02/03/2018

An operator was fined £4,000 by the Court for importing timber from Cameroon without first verifying that the timber was legally harvested even though a third-party certificate had been delivered.

- Germany: Administrative Court of Cologne, 01/07/2017

An operator was convicted by the German authority for importing timber from the Democratic Republic of Congo with falsified certificates and government documents. The timber was confiscated and sold off by auction.

CHAPTER 5 – DUE DILIGENCE SYSTEM FOR OPERATORS

Operators may choose to set up their own due diligence system or adopt a system established by a monitoring organisation. In any event, Operators are required to comply with their obligations under the EUTR, namely the adoption of measures providing access to information, risk assessment procedures and risk mitigation procedures.

I. FIRST OBLIGATION: MEASURES PROVIDING ACCESS TO INFORMATION

Operators should first take measures and implement procedures granting access to information on timber or timber products placed on the market.

This information is set out in a non-exhaustive list in Article 6§1, a) of the EUTR and is specified in Article 3 of the Commission Implementing Regulation.

In addition to this information, Operators must try to obtain all information relating to the legality of the origin of the timber.

These documents must be related to the growing and harvesting of the timber, including property rights or land use rights, the payment of harvesting rights including taxes related to timber harvesting, the applicable environmental and forestry legislation and the legal rights of third parties relating to the use and ownership that are affected by the timber harvest. These documents may also be related to wood processing, wood transport, or wood export and trade.

In addition, Operators are required to keep records of this information.

Operators should also establish an internal management system in line with the OECD Guidance and Regulation 2017/821.

Operators should first adopt a supply chain policy and commit to respecting it. Operators should then organize internal management measures such as appointing a senior member of management to monitor the due diligence process, ensuring the availability of resources necessary to monitor the due diligence process and providing due diligence training to employees and suppliers.

Operators should then establish a system of controls over, and transparency in relation to, the timber supply chain. In this respect, they should insert contractual information clauses with suppliers, create internal documentation and register or establish harvest inventories.

Operators must also strengthen their relations with their suppliers. A supply chain policy should be incorporated into contracts and/or agreements with suppliers. Where possible, they should also assist suppliers in building capacities with a view to improving due diligence performance.

Finally, Operators should also establish a company-level, or industry-wide, grievance mechanism as an early-warning risk-awareness system.

II. SECOND OBLIGATION: RISK ASSESSMENT

Once all information on the origin of the wood has been collected, Operators must assess the risks associated with the extraction of the wood they intended to place on the internal market. In this respect Operators must identify and assess the risks associated with harvesting, processing, transporting and marketing timber. It must be determined whether or not the timber has been harvested in violation of the applicable legislation in the country of origin.

Operators must first of all be aware of the potential risks associated with timber extraction, processing, export and transport.

In this respect, Operators may adopt the reasoning developed by the European Commission and ask the following questions: Is there a FLEGT licence or a CITES licence? Where was the timber harvested? Is the level of governance a concern? Are all documents showing compliance with applicable legislation made available by the supplier, and are they verifiable? Is the supply chain complex?

In order to reduce the risk of importing illegal timber, Operators may use third party certification. This does not exempt them from their due diligence obligation but these certificates are a means of establishing compliance with the requirements of the EUTR.

Under their risk assessment obligation, Operators should also carry out audits of their suppliers. These field audits verify whether the harvests are in compliance with the applicable legislation. This requires determining the scope of the audit, the criteria, the underlying principles such as independence, adequate skill levels and accountability, the preparatory audit procedures, the document review, the on-site investigations and the conclusions of the audit.

III. THIRD OBLIGATION: RISK MITIGATION PROCEDURES

Except where the risk identified in course of the risk assessment procedures is negligible, Operators must follow risk mitigation procedures.

Risk mitigation procedures may consist in a set of measures and procedures that are adequate and proportionate to effectively minimize the risk and which may include a visit to the supplier, request of an audit by a third party, design and adoption of a risk management plan that may include the continuation, suspension or disengagement with a supplier.

CHAPTER 6 – CHECKS OF DUE DILIGENCE BY RELEVANT AUTHORITIES

Relevant authorities must carry out checks to verify that Operators comply with the requirements of the EUTR. The relevant authorities will review the due diligence system adopted by Operators, including the risk assessment and the mitigation procedures.

I. STEP 1: ACTIONS PRIOR TO CONTROLS

The relevant authority may request Operators to send within a certain period of time all the documentation in their possession describing their due diligence system. The relevant authority may also choose to inform the Operator of subsequent controls.

II. STEP 2: DOCUMENTARY CONTROL OF THE OPERATOR'S DUE DILIGENCE SYSTEM

At this stage, the relevant authorities can verify and analyse the documents related to the Operator's due diligence system.

The relevant authorities must check the material presence of the company's internal documents concerning its own due diligence system as well as the material presence of a risk assessment procedure and risk mitigation procedures. Following this, the relevant authorities will verify the existence of records attesting the use of due diligence.

III. STEP 3: CONTROL PER SE OF THE DUE DILIGENCE SYSTEM

The relevant authorities must carry out a control at the Operator's site to verify how the Operator applies its due diligence system.

The relevant authority shall verify the existence of a business management system and then verify the application of the risk assessment procedure as applied by the Operator. This should include the verification of the documents related to the controlled supplies, the verification of the authenticity of the documents submitted, the analysis of the evaluation reasoning applied by the Operator and the verification of the conformity of the procedure applied to the controlled supplies with the procedure provided for in the adopted system.
The relevant authorities will then verify the risk mitigation procedures adopted by the Operator.

Finally, the relevant authorities carry out a physical inspection of the timber or timber products in stock.

IV. STEP 4: FOLLOW UP ON CONTROLS

A. Penalties in the EUTR

According to Article 19 of the EUTR, Member States shall lay down the rules on penalties applicable to infringements of the provisions of the EUTR and shall take all measures necessary to ensure that they are implemented. Penalties must be effective, proportionate and dissuasive. The penalty must therefore ensure that the objective set by the EUTR is achieved. The penalty must be dissuasive because of its degree of severity and aim to prevent future damages. However, the penalty should not exceed what is necessary to achieve these goals.

Penalties should be imposed on a case-by-case basis, taking into account various factors such as the nature of the infringement, the gravity of the infringement; the repetition of an infringement; and the measures put in place by the Operator to reduce the risk of an infringement.

More substantially, penalties must be imposed in such a way that it is more costly to act in non-compliance with the law than in compliance with it.

B. Regime of penalties in Belgium

The penalty regime in Belgium is implemented in the « loi relative aux normes de produits ayant pour but la promotion de modes de production et de consommation durables et la protection de l'environnement, de la santé et des travailleurs » adopted in 1998.

The relevant authority may impose provisional penalties such as the temporarily sealing of suspicious products, seizures, sealing or requiring the withdrawal of suspicious products from the market, taking urgent measures in case of imminent danger to public health or the environment or ordering the destruction of products in case of compelling reasons of danger to public health and/or the environment.

The relevant authority may also impose administrative fines if the Prosecutor (Procureur du Roi) refuses to initiate criminal proceedings or fails to notify his decision within three months.

Penalties may also be imposed by the Courts. These penalties consist of imprisonment ranging from eight days to three years as well as fines ranging from 160 Euros to 4,000,000 Euros (to be multiplied by the usual statutory multipliers).

The Judge may also impose additional penalties such as the publication of the judgment, the closure of premises where the offences have been committed for a minimum of four weeks and a maximum of one year in case of repeated offences or the provisional prohibition of the carrying-on of one or more specific professional activities in the case of a repeated offence for a period ranging from one year to ten years.

The Court may also adopt measures to protect public health and/or the environment, such as prohibiting the import or export of the product that is the subject of the offence, withdrawing the product that is the subject of the offence from the market, destroying the seized product at the convicted person's expense, seizing illegally acquired property, the publication of the judgment at the expense of the convicted party, the repair of damage to the environment, the prevention of a risk of damage likely to be caused to the environment or the ordering of any other measures likely to protect human health or the environment from damage caused or likely to be caused.

In the event of a repeated offence, the Judge may also order the adoption of direct measures such as the appointment of a special administrator, the prohibition on the carrying out of specific professional activities, the cessation of production and the prohibition on the use of business premises where the offences have been committed.

Various factors must be taken into account when assessing the infringement. The nature of the infringement and the provision infringed may constitute aggravating or mitigating circumstances. These circumstances may influence the penalty. Therefore, the fact that the Operator has received several warnings from the relevant authority, from a monitoring organisation or from NGOs, are factors that may increase the penalty. Failure to cooperate with the relevant authority may also be an aggravating factor. The country of origin of the wood may also constitute an aggravating factor.

It is also necessary to analyse the due diligence system established and applied by the Operator, the result of which analysis may constitute an aggravating or mitigating circumstance.

In any case, the relevant authority has to clearly provide the grounds for any fine and must adopt its decision in accordance with applicable Belgian law.