

#### **4. Clarification of the requirement for documents indicating compliance of timber with applicable legislation**

##### **Relevant legislation:**

##### **EU Timber Regulation**

##### **Article 2**

[...]

(f) 'legally harvested' means harvested in accordance with the applicable legislation in the country of harvest;

(g) 'illegally harvested' means harvested in contravention of the applicable legislation in the country of harvest;

(h) 'applicable legislation' means the legislation in force in the country of harvest covering the following

matters:

- rights to harvest timber within legally gazetted boundaries,
- payments for harvest rights and timber including duties related to timber harvesting,
- timber harvesting, including environmental and forest legislation including forest management and biodiversity conservation, where directly related to timber harvesting,
- third parties' legal rights concerning use and tenure that are affected by timber harvesting, and
- trade and customs, in so far as the forest sector is concerned.

##### **Article 6**

##### **Due diligence systems**

(1) [...]

(a) measures and procedures providing access to the following information concerning the operator's supply of timber or timber products placed on the market:

[...]

documents or other information indicating compliance of those timber and timber products with the applicable legislation

The rationale behind this obligation is that in the absence of an internationally agreed definition of legally harvested timber, the basis for defining what constitutes illegally harvested timber is the legislation of the country where the timber was harvested.

The EUTR provides in Art. 6(1)(a) last indent that documents or other information indicating compliance with applicable legislation in the country of harvest must be collected as part of the due diligence obligation. It should be stressed from the outset that collecting documentation must be done for the purposes of the risk assessment and should not be viewed as a self-standing requirement. In order to be able to exercise due diligence in accordance with the EUTR operators need to be able to evaluate the content and reliability of the documents they have collected and to demonstrate that they understand the links between the different information in the documents at hand.

The EUTR takes a flexible approach by listing a number of legislative areas without specifying particular laws, which differ from country to country and may be subject to amendments. In order to obtain documents or other information indicating compliance with the applicable legislation in the country of harvest operators must in the first place be aware of what legislation exists in a particular country of harvest. In this effort they may be supported by the Member States' Competent Authorities in collaboration with the European Commission<sup>1</sup>. They may also make use of the services of monitoring organisations (MO). In cases where operators are not using the services of a MO they may seek assistance from organisations with specialist knowledge of the forest sector in specific countries where timber and timber products are harvested.

The obligation to obtain documents or other information should be interpreted broadly as different regulatory regimes exist in different countries, and not all of them require issuing of specific documentation. Therefore it should be read as including official documents issued by competent authorities; documents demonstrating contractual obligations; documents showing company policies; codes of conduct; certificates issued by third party verified schemes, etc. Furthermore this may include both paper-based documents and information in electronic format.

It is important to remember that information included in the collected documents must be verifiable. If the information cannot be verified, the value of the document becomes questionable and the use of the document for risk evaluation and risk mitigation is most likely insufficient.

The following table gives some concrete examples, which are for illustration purposes and cannot be considered compulsory or exhaustive:

1. Documentation for rights to harvest timber within legally gazetted boundaries	Generally available documents in paper or electronic form e.g. documentation of ownership/rights to land use or contract or concession agreements
2. Payments for harvest rights and timber including duties related to timber harvesting	Generally available documents in paper or electronically e.g. contracts, bank notes, VAT documentation, official receipts, etc.
3. Timber harvesting, including environmental and forest legislation including forest management and biodiversity conservation, where directly related to timber harvesting.	Official audit reports; environmental clearance certificates; approved harvest plans; coupe closure reports, ISO certificates; codes of conducts; publicly available information demonstrating rigorous legislative supervision

<sup>1</sup> The EU has concluded a number of Voluntary Partnership Agreements (VPA) with third countries, which contain a detailed description of legislation applicable in those countries. They can guide operators regarding the applicable law in relation to products, which are not included in the Annex to a particular VPA as the case might be.

	and timber tracking and control procedures; official documents issued by competent authorities in a country of harvest etc.
4. Third parties' legal rights concerning use and tenure that are affected by timber harvesting	Environmental impact assessments, environmental management plans, environmental audit reports, social responsibility agreements, specific reports on tenure and rights claims and conflicts.
5. Trade and customs, in so far as the forest sector is concerned	Generally available documents in paper or electronic format e.g. contracts, bank notes, trade notes, import licenses, export licenses, official receipts for export duties, export ban lists, export quota awards, etc.

The documentation gathered has to be assessed as a whole, providing traceability throughout the supply chain, and the information therein must be verifiable. In any case the operator has to check for example:

- whether the different documents are in line with each other and with other information available,
- what exactly a certain document is proving,
- on which system (e.g. control by authorities, independent audit etc.) the document is based and
- the reliability and validity of a document, meaning that it is important to check the likelihood of documents being falsified or issued unlawfully.

In addition it is also necessary to take into account the risk of corruption, where possible, specifically in relation to the forestry sector. In cases where the risk of corruption is not negligible even official documents issued from authorities cannot be valued as reliable in themselves. Various sources provide generally available information about the level of corruption in a country or subnational region. The most common used is the Corruption Perception Index (CPI) by Transparency International but other similar indices or other relevant information should also be used.

A low CPI indicates that further verification may be required; meaning that special care is necessary when validating the documents as there might be reason to doubt their credibility depending on the conditions of each specific case. One has to be aware that the CPI of a country is an average indication of perception of corruption in the public domain, and as such may not directly indicate the specific situation in the forestry sector. It may also be that the risk of corruption varies between subnational regions within a country.

The higher the risk of corruption in a specific case is, the more it is necessary to get additional evidence to mitigate the risk of illegal timber entering the EU market. Examples of such additional evidence may

include third party verified schemes (see number 6 of this guidance), independent / self-conducted audits or timber tracking technologies (e.g. with genetic markers or stable isotopes).

## **10b. Treatment of CITES unlisted timber products made of CITES listed timber species**

### **Relevant legislation:**

#### **EU Timber Regulation**

##### **Article 3**

##### **Status of timber and timber products covered by FLEGT and CITES**

[...]

Timber of species listed in Annex A, B or C to Regulation (EC) No 338/97 and which complies with that Regulation and its

implementing provisions shall be considered to have been legally harvested for the purposes of this Regulation.

[...]

#### **Council Regulation (EC) No 338/97**

### **CITES and the EU Wildlife Trade Regulations**

The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) is an inter-governmental agreement which aims to ensure that international trade in specimens of wild animals and plants does not threaten their survival. It accords varying degrees of protection to more than 30 000 species of animals and plants. CITES works by making international trade in specimens of selected species subject to certain controls. These include a licensing system that requires the authorization of the import and (re-)export of species covered by the Convention.

Species covered by the Convention are listed in one of three Appendices, depending on the degree of protection required according to scientific assessments. Appendix I includes species currently threatened with extinction. Trade in specimens of these species is permitted only in exceptional circumstances. Appendix II includes species not necessarily threatened with extinction in the immediate term, but in which trade must be controlled in order to avoid 'utilization incompatible with their survival'. Appendix III contains species that are protected in at least one country, which has asked the other CITES Parties for assistance in controlling their trade.

CITES is implemented in the European Union through Regulations jointly known as the EU Wildlife Trade Regulations (WTR)<sup>2</sup>. Council Regulation (EC) No 338/97 (the Basic Regulation) lays down the

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<sup>2</sup> Currently these are: Council Regulation (EC) No 338/97 on the protection of species of wild fauna and flora by regulating trade therein; as last amended by Commission Regulation (EU) No 1320/2014 (the Basic Regulation); Commission Regulation (EC) No 865/2006 (as last amended by Commission Regulation (EU) 56/2015) laying down detailed rules concerning the implementation of Council Regulation (EC) No 338/97 (the Implementing Regulation); Commission Implementing Regulation (EU) No 792/2012 of 23 August 2012 (as amended by Commission Implementing Regulation (EU) 57/2015) laying down rules for the design of permits, certificates

provisions for the introduction into, export and re-export from, and movements within the EU of specimens<sup>3</sup> of species listed in four Annexes (A-D). Different regulatory controls apply, depending on the Annex on which a species is listed. Certain WTR provisions go beyond those laid down by CITES.

### The issue

The Appendices to CITES and the Annexes to Council Regulation 338/97 sometimes list only specific parts or derivatives of a species; or only specific populations of a species<sup>4</sup>. Where an item or product is not covered by the provisions of Council Regulation 338/97 (for example, because of a limited listing in the Annexes), it will not be regulated under the WTR. Article 3 of the Regulation 995/2010 would not apply to such an item. Thus it would not automatically be considered as legally harvested for the purposes of the Regulation.

The following table gives two concrete examples, which are for illustration purposes only and cannot be considered exhaustive:

<p>1) <i>Annex B - Swietenia macrophylla</i> (II) (<i>Population of the Neotropics — includes Central and South America and the Caribbean</i>) #6</p>	<p>For this species, only logs, sawn wood, veneer sheets and plywood are currently listed in Council Regulation 338/97 (Annex B). Further, only the neo-tropical populations are covered, and trees growing for example in Indonesia (on plantations) are excluded.</p> <p>Introduction into the EU of these items from these populations would need to comply with the permitting provisions in Council Regulation 338/97.</p>	<p><u>Only</u> logs, sawn wood, veneer sheets and plywood would be covered by Council Regulation 338/97 and (if their introduction is compliant with that Regulation) could be covered by the presumption of legality in Article 3 of Reg 995/2010.</p> <p>All other products made from this species are not regulated under Council Regulation 338/97 and would not be covered by the presumption of legality in Article 3 of of Reg 995/2010.</p>
<p>2) <i>Annex B - Swietenia mahagoni</i> (II) #5</p>	<p>For this species, only logs, sawn wood and veneer sheets are currently listed in Council Regulation 338/97 (Annex B).</p> <p>Introduction into the EU of these items would need to comply with the permitting provisions in Council Regulation 338/97.</p>	<p><u>Only</u> logs, sawn wood and veneer sheets would be covered by Council Regulation 338/97 and (if their introduction is compliant with that Regulation) could be covered by the presumption of legality in Article 3 of Reg 995/2010.</p> <p>All other products made from this species (including plywood) are not regulated under Council Regulation 338/97 and would not be covered by the presumption of</p>

and other documents provided for in Council Regulation (EC) No 338/97 on the protection of species of wild fauna and flora by regulating the trade therein and amending Regulation (EC) No 865/2006 (the Permit Regulation) and Commission Implementing Regulation (EU) No 888/2014 prohibiting the introduction into the Union of specimens of certain species of wild fauna and flora. In addition, a Suspensions Regulation is in place to suspend the introduction into the EU of particular species from certain countries.

<sup>3</sup> The term “specimen” has a specific meaning. It is defined in regulation 2(t) of Council Regulation 338/97.

<sup>4</sup> When a species is included in Annex A, B or C, all parts and derivatives of the species are also included in the same Annex unless the species is annotated to indicate that only specific parts and derivatives are included. Footnote 12 to Regulation 338/97 describes the marking system, using the symbol #.

		legality in Article 3 of Reg 995/2010.
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## Conclusion

Operators should pay particular attention to imports of products which are regulated by the EUTR but which are **not** regulated under the WTR (for example, because of a limited listing in the relevant Annexes of Council Regulation 338/97). There is no presumption of legality for the import of such products under the EUTR.

Operators should therefore carry out due diligence for these as for other imports. In cases of doubt operators should contact the relevant CITES Management Authorities of the corresponding countries of export, whose contact details can be found on the CITES website at <http://www.cites.org/cms/index.php/component/cp>. Operators should bear in mind that Annexes of Council Regulation (EC) No 338/97 are amended at least every two to three years to reflect amendments to CITES Appendices I and II by decisions taken on conferences of the parties. Amendments of Annex C to Council Regulation (EC) No 338/97 (new listing or deletion) take place as appropriate, after an amendment of CITES Appendix III (communicated to Contracting Parties by the CITES Secretariat). Operators should also be aware that some Member States have stricter rules than those laid down in the Council Regulation (EC) No 338/97 (e.g. they may require additional permits for the import and trade in species listed in Annexes C or D).

## 11. Treatment of agents

### Relevant legislation:

#### **Regulation (EC) 995/2010**

##### **Article 2, Definitions**

[...]

(b) '[P]lacing 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. It also includes the supply by means of distance communication as defined in Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts. The supply on the internal market of timber products derived from timber or timber products already placed on the internal market shall not constitute 'placing on the market';

(c) 'operator' means any natural or legal person that places timber or timber products on the market;

[...]

##### **Article 6, Due diligence systems**

1. The due diligence system referred to in Article 4(2) shall contain the following elements:

(a) measures and procedures providing access to the following information concerning the operator's supply of timber or timber products placed on the market:

[...]

##### **Article 10, Checks on operators**

1. The competent authorities shall carry out checks to verify if operators comply with the requirements set out in Articles 4 and 6.

[...]

### **A. Background information**

An Agent is a representative working in the name of, and for the account of, a principal to a contract. In the timber industry, an agent may act on behalf of the supplier or of the buyer. In all cases the contractual partners are the supplier and buyer, and the agent is an intermediary.

Some agents may be unable or unwilling to share certain details of their contacts or supply chains with the importer, often due to commercial reasons. In such cases importers may be prevented from accessing the basic information necessary to exercise due diligence, as required for operators under the EUTR.

Agents may be based in a different country to the importer.

## **B. Guidance**

### **Agents and due diligence**

Due diligence requirements for operators remain the same regardless of whether or not they use an agent. If an agent who provides timber to an operator is unable or unwilling to provide sufficient information for that operator to exercise satisfactory due diligence, the operator should alter their supply lines so that they can exercise satisfactory due diligence.

### **Agents and operators based in different countries**

The responsibility of competent authorities to carry out checks on operators is not affected by use of an agent. Operators should be checked by the competent authority of the country in which timber is placed on the market. In the case that an operator is supplied with timber via an agent based in a different country, the competent authority responsible for checks on the operator may wish to co-operate with the competent authority, or other authorities, in the country where the agent is based, or elsewhere.

## **12. Treatment of Monitoring Organisations (MOs)**

### **Relevant legislation:**

#### **Regulation (EC) 995/2010**

##### **Article 8, monitoring organisations**

1. A monitoring organisation shall:

- (a) maintain and regularly evaluate a due diligence system as set out in Article 6 and grant operators the right to use it;
- (b) verify the proper use of its due diligence system by such operators;
- (c) take appropriate action in the event of failure by an operator to properly use its due diligence system, including notification of competent authorities in the event of significant or repeated failure by the operator.

2. An organisation may apply for recognition as a monitoring organisation if it complies with the following requirements:

- (a) it has legal personality and is legally established within the Union;
- (b) it has appropriate expertise and the capacity to exercise the functions referred to in paragraph 1; and
- (c) it ensures the absence of any conflict of interest in carrying out its functions.

[...]

4. The competent authorities shall carry out checks at regular intervals to verify that the monitoring organisations operating within the competent authorities' jurisdiction continue to fulfil the functions laid down in paragraph 1 and comply with the requirements laid down in paragraph 2. Checks may also be carried out when the competent authority of the Member State is in possession of relevant information, including substantiated concerns from third parties or when it has detected shortcomings in the implementation by operators of the due diligence system established by a monitoring organisation. A report of the checks shall be made available in accordance with Directive 2003/4/EC.

#### **Commission Delegated Regulation (EU) 363/2012**

##### **Article 8, Absence of conflict of interest**

1. An applicant [to become a monitoring organisation] shall be organised so as to safeguard the objectivity and impartiality of its activities.
2. An applicant shall identify, analyse and maintain records documenting risks of conflict of interest arising as a result of it exercising functions as a monitoring organisation, including any conflicts arising from its relationships with related bodies or subcontractors.
3. Where a risk of a conflict of interest has been identified the applicant shall have in place written policies and procedures to avoid conflicts of interest at organisational and individual level. The written policies and procedures shall be maintained and implemented. Those policies and procedures may include third party audits.

#### **Commission Implementing Regulation (EU) 607/2012**

##### **Article 6, Frequency and nature of checks on monitoring organisations**

1. The competent authorities shall ensure that the checks at regular intervals referred to in Article 8(4) of Regulation (EU) No 995/2010 are carried out at least once every two years.
2. Checks referred to in Article 8(4) of Regulation (EU) No 995/2010 shall be carried out in particular in any of the following cases:
  - (a) where a competent authority has, while carrying out checks on operators, detected shortcomings in the effectiveness or implementation by operators of the due diligence system established by a monitoring organisation;
  - (b) where the Commission has informed the competent authorities that a monitoring organisation has undergone subsequent changes as provided for in Article 9(2) of Commission Delegated Regulation (EU) No 363/2012 of 23 February 2012 on the procedural rules for the recognition and withdrawal of recognition of monitoring organisations as provided for in Regulation (EU) No 995/2010 of the European Parliament and of the Council laying down the obligations of operators who place timber and timber products on the market.
3. Checks shall be carried out without prior warning, except where prior notification of the monitoring organisation is necessary in order to ensure the effectiveness of the checks.
4. The competent authorities shall carry out checks in accordance with documented procedures.
5. Competent authorities shall carry out checks to ensure compliance with Regulation (EU) No 995/2010 that shall include, in particular and as appropriate, the following activities:
  - (a) spot checks, including field audits;
  - (b) examination of documentation and records of monitoring organisations;
  - (c) interviews with the management and staff of the monitoring organisation;
  - (d) interviews with operators and traders or any other relevant person;
  - (e) examination of documentation and records of operators;
  - (f) examination of samples of the supply of operators using the due diligence system of the monitoring organisation concerned.

## **1. Communication and coordination between MOs and Competent Authorities**

### **A. Background Information:**

Effective communication between MOs and Competent Authorities (CAs) can improve the work of both. If CAs know which operators use MOs, they can take account of this within their risk-based planning, for example by making fewer visits to those operators. This is advantageous for CA, operators, and MOs.

If CAs know which operators fail to properly use due diligence systems provided by an MO, they can similarly take account, for example by increasing the number of visits they make to these operators. This is advantageous for CAs; MOs are moreover bound to share this information with CAs by Paragraph 8(1)(c) of Regulation 995/2010.

If MOs encounter specific evidence of illegality, it can be of immediate use to CAs in all MS.

### **B. Guidance:**

MOs are encouraged to share annual reports with the CAs (in the Member States where they provide services) of their customers, detailing contract validity and duration.

## **2. Conflict of interest**

### **A. Background information**

The EUTR and the associated Regulations reference conflict of interest and state that systems should be set up to avoid it.

*Conflict of interest arises from a situation in which a person has a private or other secondary interest, which is such as to influence, or appear to influence, the impartial and objective performance of his or her duties (based on Council of Europe [Recommendation No. R \(2000\)10E](#) .)*

### **B. Guidance**

The monitoring organisation should have, regularly update and implement written procedures in order to avoid of conflicts of interest. These procedures should include:

- procedures for all personnel to disclose in writing all possible and actual conflicts of interest (with all personnel being subject to a contract obligation to follow these procedures);
- procedures on how to react on substantiated concerns by third parties on possible conflicts of interest;
- procedures for determining timely and appropriate responses to possible conflicts of interest, to ensure that they neither may influence, nor are perceived to influence, the decisions of the monitoring organisation; and
- procedures for documenting all possible conflicts of interest and the actions which have been taken to resolve the conflicts of interest.

## **3. The use of 'Due Diligence certificates' in third countries**

### **A. Background information**

Some Operators have been presented with certificates issued by non-EU sister companies of Monitoring Organisations, as part of due diligence. In some cases the Operators seem to have been informed that these certificates relieve them from the obligation to exercise due diligence. The treatment of such certificates is not dealt with explicitly in the legislation.

### **B. Guidance**

The receipt of a certificate does not relieve an operator of the obligation to exercise due diligence described in Article 6 of the Timber Regulation. If a Monitoring Organisation or its non-EU sister company issues such a certificate, it should indicate that it cannot relieve the operator of the due diligence obligation.

A certificate may however be used as part of a due diligence system, similar to other documents indicating compliance (e.g. legality assurance system certificates). In this case, the operator should establish as part of their due diligence precisely what the certificate is certifying, and the frequency of checks. The operator should also have a contact at the company who performs the checks, in case they have further questions or wish to verify the certificates' validity.

#### **4. Checks on MOs providing services in an MS where they do not have an office**

##### **A. Background information**

Several MOs offer services to operators in all MS, although they do not have offices in all MS. This raises the question of whether CAs' checks on MOs have to be done in all MS or just in the ones where the MO has an office.

##### **B. Guidance**

Article 8(4) of the EU Timber Regulation states that “competent authorities shall carry out checks at regular intervals” on “the monitoring organisations operating within the competent authorities’ jurisdiction ...”. “Operating” should be understood here in the sense of Article 8(1) of the EU Timber Regulation, which includes: “grant[ing] operators the right to use [the MOs DDS]” and “verify[ing] the proper use of its [DDS]... by such operators”.

If an MO **provides** services to operators within the jurisdiction of a CA, the CA **should check** this MO at least once every two years. If an MO **does not currently provide** services to operators within the jurisdiction of a CA, the CA **need not** check this MO.

MO’s should be aware that if they do not have an office in a certain member state and the CA of that member state wishes to check the MO, the MO should provide staff and information available to the CA at the CA’s convenience. The CA will not travel to the MO in another country.

However, the CA of the member state where an MO has its **main office should check** the MO at least once every two years. The main office is the address mentioned on the Commissions website.

CAs are encouraged to share their findings with one another.

#### **5. CA checks on operators using MOs**

##### **A. Background information**

Regulation 995/2010 Paragraph 8(1)(b) states that an MO should 'verify the proper use of its due diligence system' by Operators. CAs should carry out checks on all Operators, including Operators using MOs' due diligence systems.

##### **B. Guidance**

CAs should include Operators using MOs' due diligence systems in their risk-based planning. They may choose to consider specifically the use of MOs during this planning, for example by regarding Operators using MOs' due diligence systems as representing a lower risk, where checks on those MOs have shown it to fulfil its functions satisfactorily.

Operators using MOs' due diligence systems should not, however, be excluded from CAs' planning.