EUTR Questions and Answers

When will the EUTR come into force?

The EUTR will come into force on 3 March 2013. By this date, companies involved in the timber and timber product supply chain must have either introduced systems to ensure compliance or ensured that the systems that each company already uses are compliant. EU Member States must also have completed their rules on sanctions for infringements of EUTR.

Who does the EUTR affect?

The product scope of EUTR is very wide and covers logs, paper and pulp, wood fuel, sawn timber, veneer, plywood, as well as manufactured products as diverse as flooring, mouldings, furniture and prefabricated buildings.

The EUTR imposes new obligations on timber and timber product trading entities within the EU. The law divides these entities into two distinct categories known as “operators” and “traders”, each with a different set of obligations.

“Operators” are those people or organisations that “first place” timber on the internal EU market. They include forest managers that first sell timber harvested in the EU, together with importers of timber and processed wood products. Operators will shoulder by far the largest burden of responsibility under EUTR. Only operators will be required to implement a “Due Diligence System” and be liable for prosecution under the “prohibition” articles of the law.

“Traders” are people or organisations that sell or buy any timber or timber based product already placed onto the EU market (by an operator). Traders include internal EU merchants, manufacturers and retailers that do not harvest or import wood directly into the EU. Traders are subject only to a “traceability obligation” under EUTR. This requires that each is able to identify their immediate timber suppliers and immediate buyers. This obligation may be fulfilled using existing financial documentation such as purchase and sales invoices. The aim is to help identify the EU operator that first placed timber on the EU market in the event of a challenge to its legal origin. The “traceability obligation” does not impose any requirement to identify the actual forest of origin of a timber product.

Do importers have to prove the legality of their wood purchases?

No. Although the “prohibition” article of EUTR makes it a criminal offence for operators to place illegally harvested timber on the EU market, it does not reverse the burden of proof. Operators are innocent unless proven guilty. The onus is on European authorities to prove that a particular timber product is derived from an illegal source to prosecute under the “prohibition” article of the law.

Does EUTR impose any new documentation requirements at point of entry into the EU?

No. EUTR imposes no new documentation requirements for timber at point of entry into the EU. European customs authorities will not demand any new certificates or legality licenses as a result of EUTR.

However, the EUTR places new obligations on operators, as part of their “due diligence system”, to gather specific information so that they can assess and mitigate the risk of timber coming from an illegal source. Individual operators may therefore require suppliers to provide

provide additional documentation to support claims that wood is from a legal source.

What is a "due diligence system"?

EUTR requires operators to implement a due diligence system. This is similar to an ISO9001 or ISO14001 system with a single objective, to ensure a negligible risk of any wood being derived from an illegal source.

Under EUTR, the due diligence system must ensure that all wood purchases are covered by documentation identifying the country of harvest, species, quantity and "where appropriate", the region of origin and/or "concession of harvest". The system must also ensure access to "documents or other information indicating [legal] compliance".

The due diligence system must have procedures that draw on this information to enable the operator to evaluate the risk of illegally harvested timber being placed on the market. If the risk is assessed to be "negligible", then the operator need take no further action. If the risk is assessed to be not negligible, then the operator must take steps to mitigate the risk. These steps must be "adequate and proportionate" and may include requiring additional information or documents and/or requiring third party verification of their timber suppliers.

In practice this means that EU importers are likely to demand third-party verified certificates that wood is from a specific legally harvested forest with all shipments of wood from, say, Indonesia or the Brazilian Amazon where independent studies suggest at least a third of wood supplied might derive from illegal sources.

On the other hand, EU importers should need only a reliable assurance of region of origin if it can be shown that there is a negligible risk of any illegal logging within that region.

Does the EUTR require European operators to identify the forest of origin of all traded wood?

No. EUTR requires operators to identify the origin of timber and timber products only to the extent necessary to make a reliable assessment of negligible risk. If the timber derives from a defined region where there is clear, objective and up-to-date evidence to demonstrate a negligible risk of illegal logging, then it is only necessary to track wood back to that region. In some cases, regions of negligible risk might encompass whole countries.

Who will be responsible for enforcement?

Competent Authorities appointed by each EU Member State are responsible for producing national legislation for infringement of the EUTR and for enforcement. The Competent Authorities will carry out checks on operators to ensure they are complying with the EUTR. These will be risk based and will also take place when information comes to light concerning compliance by an operator with the EUTR. The checks may include examination of the due diligence system as well as examination of documentation and records showing how it functions. In addition, spot checks and site audits will be undertaken.

What will be the sanctions for failure to comply to EUTR?

The EUTR requires that EU Member States establish penalties that are "effective, proportionate and dissuasive" and can include:

- Fines proportionate to the environmental damage, the value of the timber/timber products concerned, tax losses and any economic detriment resulting from infringement.
- Seizure of timber/timber based products concerned.
- Immediate suspension of authorisation to trade.

What actions will EU operators have to take when sourcing U.S. hardwoods to comply with the EUTR?

AHEC's interpretation of the EUTR, following consultations with legal experts at the European Commission, is that EU operators need take no additional action to confirm negligible risk for American hardwoods beyond ensuring they are genuinely grown in the United States.

In 2008, AHEC commissioned the "Seneca Creek Study", probably the most comprehensive illegal logging risk assessment undertaken anywhere in the world to date. The study provides objective, independent and peer-reviewed evidence that there is less than 1% risk of any hardwood grown in the United States being derived from an illegal source. AHEC will commission regular review and update of this study to demonstrate negligible on an on-going basis.

For U.S. hardwoods, the combination of the Seneca Creek study (and updates) and existing shipping documents - such as exporters' invoices, phytosanitary certificates, and U.S. Shipper Export Declaration forms which accurately identify species, product type, quantity and that the product is of U.S. origin – will be sufficient to demonstrate negligible risk and meet the EUTR documentation requirements.

Does the EUTR provide any guidance on what timber may be regarded as negligible risk?

Only two categories of timber are identified in the text of the EUTR as requiring no further mitigation action by operators:

- Timber covered by permits issued under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). CITES timber species are listed at http://www.unep-wcmc-apps.org/species/dbases/CITES-listedtrees.html. Only a very limited number of commercial timbers (almost all tropical) are covered, the best known being South American mahogany, South American cedar, Asian ramin, and Brazilian rosewood.

- Timber covered by a License issued under a Forest Law Enforcement, Governance and Trade (FLEGT) Voluntary Partnership Agreement (VPA) with the EU. FLEGT VPAs are designed to improve forest governance in countries where there is a relatively high risk of illegal logging. A range of tropical developing countries are now at various stages of the FLEGT VPA process. No country has yet reached the "full implementation and licensing phase" when each timber product shipped from the partner country to the EU will have to be accompanied by a FLEGT License before being given access to the EU market. 6 countries are at the "VPA system development phase": Cameroon, Central African Republic, Ghana, Indonesia, Liberia, and Republic of Congo. An additional four countries are at the "VPA negotiation phase" and have yet to sign formal VPA agreements: Democratic Republic of Congo, Gabon, Malaysia, and Vietnam.

EUTR gives no guidance on the ability of any specific private-sector certification or legality verification system to demonstrate negligible risk. However, it states that systems of "certification or other third-party-verified schemes which cover compliance with applicable legislation" should be "taken into account" during risk assessment procedures. It is therefore probably safe to assume that regulating authorities will accept that widely recognised and well established certification systems like FSC and PEFC should be treated as an effective risk mitigation tool.

Does the EC intend to give any more detailed guidance on risk assessment and mitigation?

The European Commission may provide further guidance on risk assessment and risk mitigation in the EUTR "Implementing Regulations" which are due for publication before 3rd March 2012 (i.e. one year before the law is enforced). In March and April 2011, the EC tasked the European Forestry Institute (EFI) to undertake formal consultations on "best options for risk assessment and risk mitigation". However, EFI's conclusions were essentially that the EC

should steer clear of proposing overly comprehensive and rigid guidance on these aspects at this stage.

EFI note that: “it is evident that any possible outcome of the implementation regulation must acknowledge the variety of affected actors across the different industry sectors….the operators should define their respective [Due Diligence Systems] and include the most suitable tool set for their implementation. Due to the high degree of different conditions, it is not feasible to develop a fixed and uniform DDS description which would be applicable for all operators”.

Beyond this, EFI identify a clear need for "information services to ease the administrative burden of the risk assessment and support the evaluation of the relevant evidence….This information service could provide information on the relevant applicable legislation, determine risks for certain regions, indicate the status of FLEGT and CITES in different countries…. This would support a more consistent approach and make it less costly and more time-efficient for the SMEs, as well as other operators, to develop and implement their own [Due Diligence Systems]."

Having recognised the need, EFI do not go on to consider who should be responsible for establishing these information sources or what the criteria might be for defining different risk categories.

As a government body, the EC is constrained by WTO rules for "National Treatment" requiring that imported and locally produced goods be treated equally. Therefore the EC is unlikely to give guidance on products or regions for which it considers risks to be "negligible" or “not negligible”. This is a gap that will likely have to be filled by the private sector.

Are any special procedures being put in place for smaller operators in the EU?

A significant challenge for implementation of EUTR in Europe is the vast number of smaller companies engaged in the timber industry (at least 300,000 in the wood-working and furniture industries alone). In the recent report by the European Forest Institute (EFI) on “Implementing Regulations” for the EUTR, it is noted that “very few” SMEs in Europe have ever even heard of the EUTR and that “even membership in a well-represented association or federation does not mean that information [on EUTR] will reach them…While many SMEs will be considered as traders according to the EUTR and are not at risk of having to change their normal business methods, small importers/merchants with lots of complex product lines and high-risk timber sources (eg tropical hardwood) are more vulnerable.”

In addition to lack of awareness, many smaller operators are unlikely to have the capacity or skills within their organisation to develop their own due diligence procedures and to make reliable assessments of risk.

To help overcome this problem, the EUTR allows private companies and other organisations (such as timber trade associations or NGOs) to become “Monitoring Organisations”. Each Monitoring Organisation (MO) will provide its members with a ready-made due diligence system and will monitor use of that system. The MO will effectively operate a “group due diligence system” in the same way that forestry associations or forestry consultants operate “group forest certification” for small forest owners.

MO’s will not be responsible for enforcement or conformity assessment (that responsibility will lie with the Competent Authority), but rather for organising large numbers of operators to facilitate more efficient and cost-effective implementation of EUTR.

The EUTR establishes the following specific requirements for an MO: maintenance and regular evaluation of a due diligence system; granting operators the right to use it; verifying its proper use by operators; and taking appropriate action in the event of failure. The MO must have "appropriate expertise" and "capacity" and must "ensure the absence of any conflict of interest".

It is anticipated that organisations with existing experience of promoting Codes of Conduct and Responsible Procurement Policies amongst member companies in the timber industry will apply to the European Commission for recognition as an MO.

MOs are also expected to play a key role to promote development of centralised databases of information on forest laws, practices, documentation requirements, and levels of risk in different supply regions to assist EU operators to implement the due diligence system.

Why focus on legality when the real prize is sustainability?

EUTR's focus on "legality" rather than "sustainability" is for reasons of national sovereignty, WTO compliance and technical limits to existing certification programs for "sustainable timber".

Consumer country laws demanding production standards different from those enshrined in the laws of producer countries are seen by producers, quite naturally, as a significant infringement of their national sovereignty.

Unless conformance to rules for "sustainable timber" can be demonstrated through internationally recognised standards and certification systems, all such measures run the risk of challenge under the WTO's non-discrimination rules.

Systems like FSC and PEFC have considerable merits. But neither can yet claim to be built on a national consensus forestry standard within all the member states of the WTO. There are still big gaps in their international networks. Less than 2% of forest in Asia, Latin America and Africa is currently FSC or PEFC certified. Even within North America and Europe, the vast majority of non-industrial private forest owners are not yet engaged in forest certification.

So it is politically more acceptable and more constructive for consuming countries to assist producer governments to enforce their own forest laws than to attempt to dictate sustainability standards.

Why require due diligence by EU operators rather than simply demand legality certificates at point of delivery into the EU?

The EU imports a huge range of timber and timber products from all over the world. Therefore a requirement for mandatory legality certificates at point of entry implies the development of a global legality verification system. This framework would have to regulate the entire wood production chain from extraction through to entry into the EU. Such a requirement would be disproportionate, potentially discriminatory and counter-productive.

Consider that at most 5% of wood consumed in the EU is at risk of being derived from an illegal source. A requirement for universal legality certificates would add unnecessary costs in supply of wood from regions where there is little risk of illegal logging.

Tracking wood to a specific forest stand is hugely challenging in supply chains for complex wood products. It is particularly difficult and expensive where forest ownership is fragmented and small family forest owners predominate. Therefore a requirement for mandatory legality certificates would create a significant risk that these owners are shut out of the market, an outcome likely to be detrimental to sustainable forestry.

Furthermore, resources and capacity for such a global system are lacking. Demanding legality certificates under these circumstances may well just lead to an explosion in the numbers of bogus legality certificates.

The approach adopted in the EUTR is the only practical option. This approach builds on and reinforces existing best practice in the private sector. Effective and efficient due diligence systems are already being implemented voluntarily by a wide range timber trading and manufacturing companies in order to protect brands, satisfy the environmental concerns of customers and shareholders, and improve management of supply chains. Some European

timber trade associations have been developing responsible procurement policies for their members for over 10 years. Systems managed by the WWF's Global Forest and Trade Network and The Forest Trust have played a particularly important role in supporting the procurement efforts of retailing companies.

While these private sector systems vary in detail, some elements are common to all such as: risk assessment of products and suppliers as a first step; setting of targets and action plans to eliminate high risk products and suppliers; regular review to progressively fine-tune systems and improve performance; and reporting to enhance transparency.

What is the difference between chain of custody and due diligence systems?

Chain of custody (CoC) standards and procedures have evolved to support the specific forestry-related claims of wood product labelling systems like FSC and PEFC. The objective of CoC is to ensure that a labelled product (or a specified percentage of that product) is derived from forests certified according to the FSC or PEFC forest management standard.

A CoC certified timber trading company is only required to apply the CoC procedures to those wood supply chains for which it wants to make FSC or PEFC forestry-related claims. In practice, many CoC certified companies only apply the procedures to a small proportion of product lines to supply those customers that demand FSC or PEFC labelled products.

The due diligence systems required under EUTR are "wider" and "shallower" in scope than CoC procedures. They are "wider" because they oblige operators to scrutinise the risk of illegal sourcing associated with 100% of their wood purchases, not just those destined for labelled products, and to implement procedures to mitigate any identified risk. They are "shallower" because they demonstrate only a negligible risk of wood coming from an illegal source and, in isolation, allow no claims with respect to the quality or "sustainability" of forest management. Nor will application of the EUTR due diligence system give an operator the right to apply any product label. There will be no such thing as "EUTR certified" wood products.

Complicating matters slightly, procedures that closely resemble the due diligence systems required under EUTR have been developed by both FSC and PEFC as part of their percentage based (or FSC Mixed) labelling systems. In both FSC and PEFC, the uncertified component of wood products bearing percentage labels must be risk assessed in conformance with defined due diligence procedures. These procedures are described, respectively, in FSC's Controlled Wood Standard and in the Due Diligence System defined in Appendix 2 of the PEFC Chain of Custody standard. Application of these procedures to all wood supply chains, not just those destined for labelled products, would likely be sufficient to demonstrate conformance to EUTR.

How should producers outside the EU respond to EUTR?

Following introduction of EUTR, companies shipping timber products into the EU will be under considerable pressure to demonstrate that there is negligible risk of any wood coming from an illegal source.

Where shippers are confident of good forest governance, the simplest and cheapest option may be for them to commission independent research compiling quantitative evidence to confirm low risk. This is the approach adopted by AHEC through the Seneca Creek study. Shippers can link such independent risk assessments with their own due diligence systems (such as AHEC's Responsible Purchasing Policy) enabling them to make legitimate claims that all their wood purchases derive from negligible risk sources.

An option for some shippers sourcing from areas where forest governance problems exist is to work through national forest law enforcement processes. For example, EU-sponsored FLEGT VPA processes are facilitating nationwide legality licensing systems in an expanding range of tropical timber supplying countries.

Where these systems are absent or slow to develop, shippers sourcing from higher risk regions will have to work through private sector third party legality verification and certification systems.

Why is EUTR a unique opportunity for the wood industry?

The EUTR appears to be an innovative and proportionate piece of legislation with potential to support forest enforcement measures in timber supplying countries while avoiding imposition of unnecessary, costly and potentially discriminatory demands for new forms of legality licensing.

It seeks to achieve this by building on and reinforcing existing best practice in the private sector. The EUTR gives the private sector a leading role, looking to timber trade associations, certifying companies, and NGOs to expand and refine risk assessment and mitigation options, most directly through the formation of Monitoring Organisations.

EUTR's emphasis on risk assessment as a first step in due diligence systems is an opportunity to develop and expand cost-effective forms of legality assurance. AHEC, through the Seneca Creek study, has demonstrated that an assurance of negligible risk of illegal logging can be achieved across a large forest region and millions of forest owners at reasonable cost and without recourse to potentially expensive wood tracking procedures. This means that limited resources for third-party legality verification and certification can be better targeted – for example through the FLEGT VPA process - on those regions where these measures may be required to mitigate risk.

If implemented effectively, the EUTR could provide the foundation for more proactive marketing of the wider environmental benefits of using wood. It could overcome once and for all lingering doubts about the legality of wood products – doubts which undermine the reputation of the whole industry.