

Update on FLEGT, VPA and the EUTR

2.1 EU FLEGT Action Plan and VPA

The **FLEGT** (Forest Law Enforcement, Governance and Trade) Program⁴ of the EU, also known as the EU FLEGT Action Plan, started in 2003 with the aim of contributing to the eradication of illegal logging in producer countries as well as combating trade in associated timber (products). Finally, the FLEGT Program is intended to contribute to sustainable forest management by stimulating legal management, by eliminating unfair competition by the illegal trade and by enabling Governments of producer countries to obtain the tax income they are supposed to derive from legal transactions, amongst other objectives.

⁴ The FLEGT Action Plan covers a range of activities, that focus on 7 broad areas: 1. support to timber producing countries; 2. activities to promote trade in legal timber; 3. promotion of public procurement policies in EU countries; 4. support for private sector initiatives; 5. safeguards for financing and investment; 6. use of existing legislative instruments or adoption of new legislation to support the Plan; 7. addressing the problem of “conflict timber”.

⁵ Although the definition of legality depends on the legal context (laws, regulations, ratified international treaties, etc) of the producer country and full legal compliance is aimed for, at least the following elements shall be addressed: a. right to harvest timber within legally gazetted boundaries; b. payments for harvest rights and timber, including duties related to timber harvesting; c. timber harvesting, including environmental and forest legislation, including forest management and biodiversity conservation, where directly related to timber harvesting, d. third parties legal rights concerning use and tenure that are affected by timber harvesting; e. trade and customs as far as the forest sector is concerned.

The EU FLEGT Action Plan focuses mainly on improving governance structures, policy reforms, improved transparency and information exchange, capacity building, and the promotion of legal timber. The action plan proposes voluntary bilateral agreements between the Governments of producer countries (FLEGT Partner Countries) and the EU. These Voluntary Partnership Agreements (VPA's) set out commitments to action by both parties to tackle illegal logging (FLEGT Briefing note 1, 2007). Through a VPA the EU and a partner country agree to establish and maintain the necessary structures to assure that timber (products) exported by that country with a so-called FLEGT license guarantee that all relevant laws of the producer country are complied with. The most important element of a VPA is the Legality Assurance System (LAS), which sets out the procedures by which a producer country will ensure that timber and timber products originate from legal sources (EFI, 2010). The definition of legality⁵ is the basis of the system and depends on the specific legal context in the producer country.

It is important to understand that a VPA is not a law but a voluntary agreement between the EU and the producer country's government. That means that without a VPA, exports of timber and timber products to the EU can continue as long as the export documents meet the import requirements of the EU.

The LAS consists of 5 elements that are interlinked: 1. the **Legality Definition** (this defines the legislative and regulatory requirements to be systematically fulfilled and verified without any exception to ensure legal compliance); 2. **Control of the supply chain** (this refers to a timber tracking system that, firstly, enables the operator to demonstrate that timber is from a legal source and, secondly, covers the entire supply chain (Chain of Custody; CoC) from the point of harvest to the point of export); 3. **Verification system** (this refers to a set of procedures and processes to systematically check compliance with the requirements of the Legality Definition and the CoC); 4. **National Licencing system** (a system by which a designated authority in the producer country issues FLEGT licences for timber (products) thus confirming that these have been legally produced); 5. **Independent Monitoring** (an independent 3rd party is used to check that all aspects of the LAS function as intended).

The scheme (Figure 2.1) is applied equally in all VPA partner countries worldwide. A Joint Implementation Committee (JIC, consisting of representatives of the partner country and the EU) is responsible for the bilateral control of the VPA, once in operation. It is informed by (at least) the half-yearly reports of the independent monitoring organization. The JIC may require adjustments of the LAS and may annul the VPA if the LAS does not function to its satisfaction.

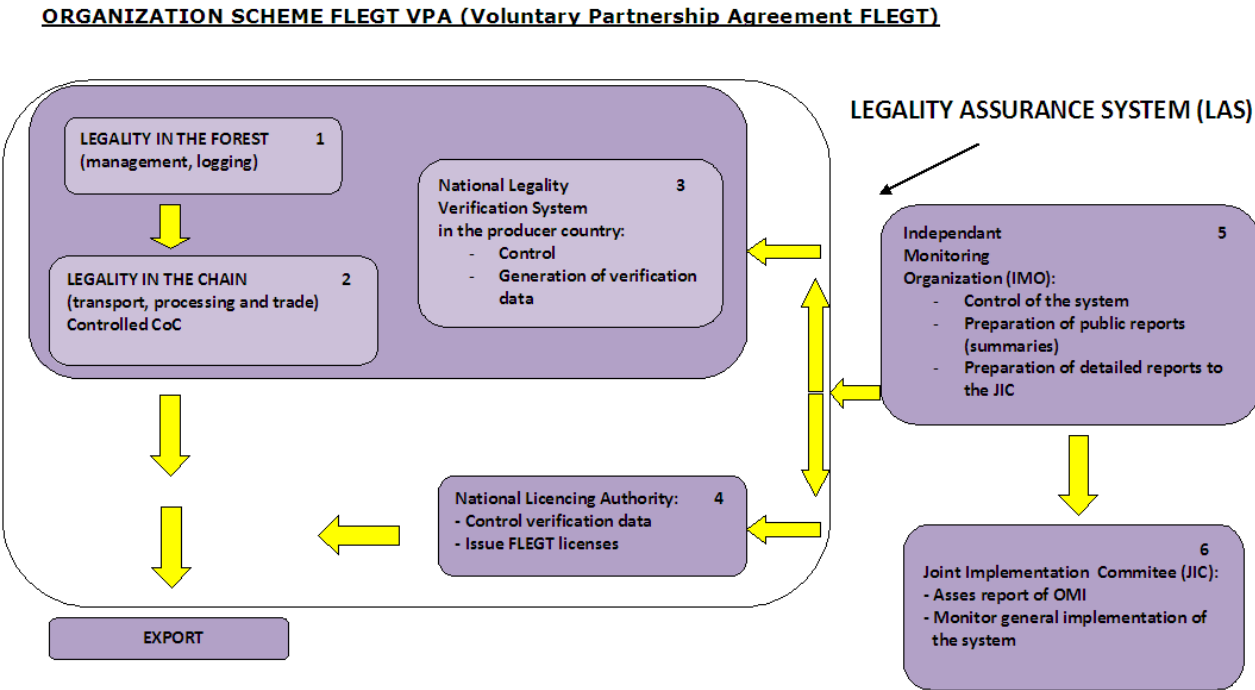


Figure 2.1: General institutional arrangement for a VPA.

The path to a functioning VPA consists of several phases (Figure 2.2): a. pre-negotiation (preliminary information exchange and assessment of relevance and mutual interest); b. negotiation (processes, including wide stakeholder consultation⁶, to establish the definition of legality; awareness creation; negotiations within and between stakeholder groups; study of legal context; identification of needs for reforms; definition of legality, where possible by consensus); c. signing (official ceremony) of the VPA (which describes the legality definition and the required reforms, where applicable, and a detailed plan that sets out time bound actions for improving forest sector governance and implementing the licencing scheme) and ratification (by the partners and EU Parliament); d. preparation for implementation (assuring that the different elements of the LAS are in place and fully operational); e. implementation (this will only happen after field testing has indicated that the system is functioning well in practice and will cover implementation of the different tasks, including issuance of FLEGT licenses by the competent authority to companies that comply with legal requirements, and monitoring). This process allows stakeholders the opportunity to provide their input, raise their concerns, and provide suggestions on the content of the definition of legality of timber and timber products. Stakeholders can be defined as groups that are directly involved in or affected by forestry operations. Stakeholders are, for example, forest services, government agencies, community members, forest companies, and NGOs (EFI, 2010). The stakeholder consultation process in the producer country is the most difficult process due to the fact that in most producer countries there is not a strong tradition of this type of consultation (personal note J. Bruneval, 2012).

FLEGT VPA PROCESS

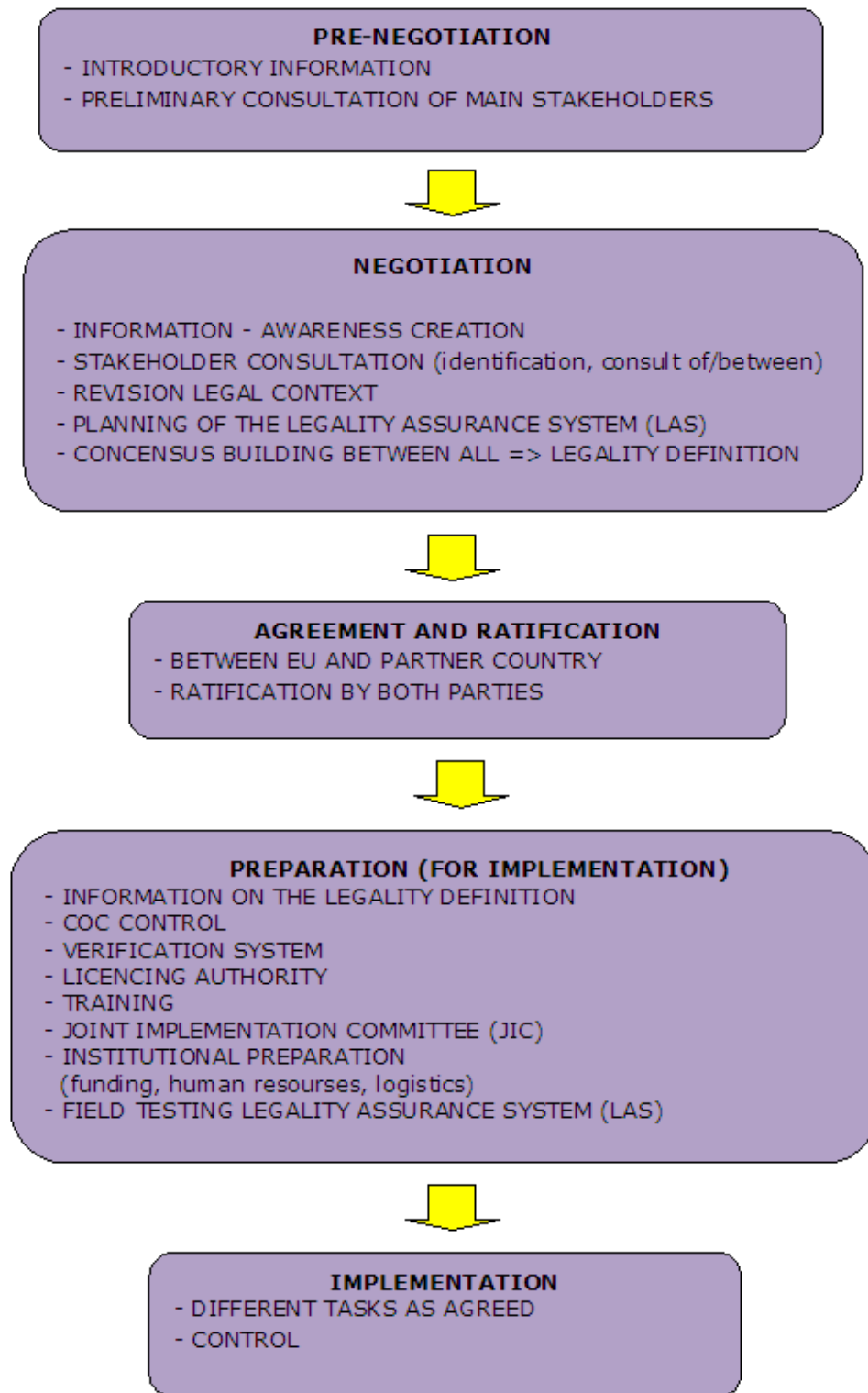


Figure 2.2: Phases of the VPA process.

To date, six VPA's have been signed and ratified (Indonesia, Ghana, Cameroon, Congo, CAR, Liberia) while another 4 are in negotiation (Malaysia, Gabon, DRC, Vietnam). These countries are amongst the major suppliers of tropical timber (products) to the EU; not one Latin American country is included⁷ yet. Figure 2.3 indicates the time required for the VPA negotiations and the preparation for implementation. It should be noted that while the process so far has taken between 3 and 6 years, not one of these VPA's has yet reached the implementation phase; in other words, the preparation process is still on-going. It is questionable whether any of the VPA's (signed and/or in negotiation) will be functional by March 3rd 2013, i.e. there is a big chance that at that time no timber with a FLEGT license will actually be available.

7 Preliminary meetings and/or workshops to explore the potential for negotiation of a VPA have been held in Honduras, Guatemala, Colombia, Guyana and Brazil. Recently (on May 15th 2012) Honduras decided to start negotiations. Guyana has expressed its serious interest to do so, while Brazil indicated not to be interested. In the other countries so far pre-negotiation activities have not lead to the decision to establish formal negotiations.

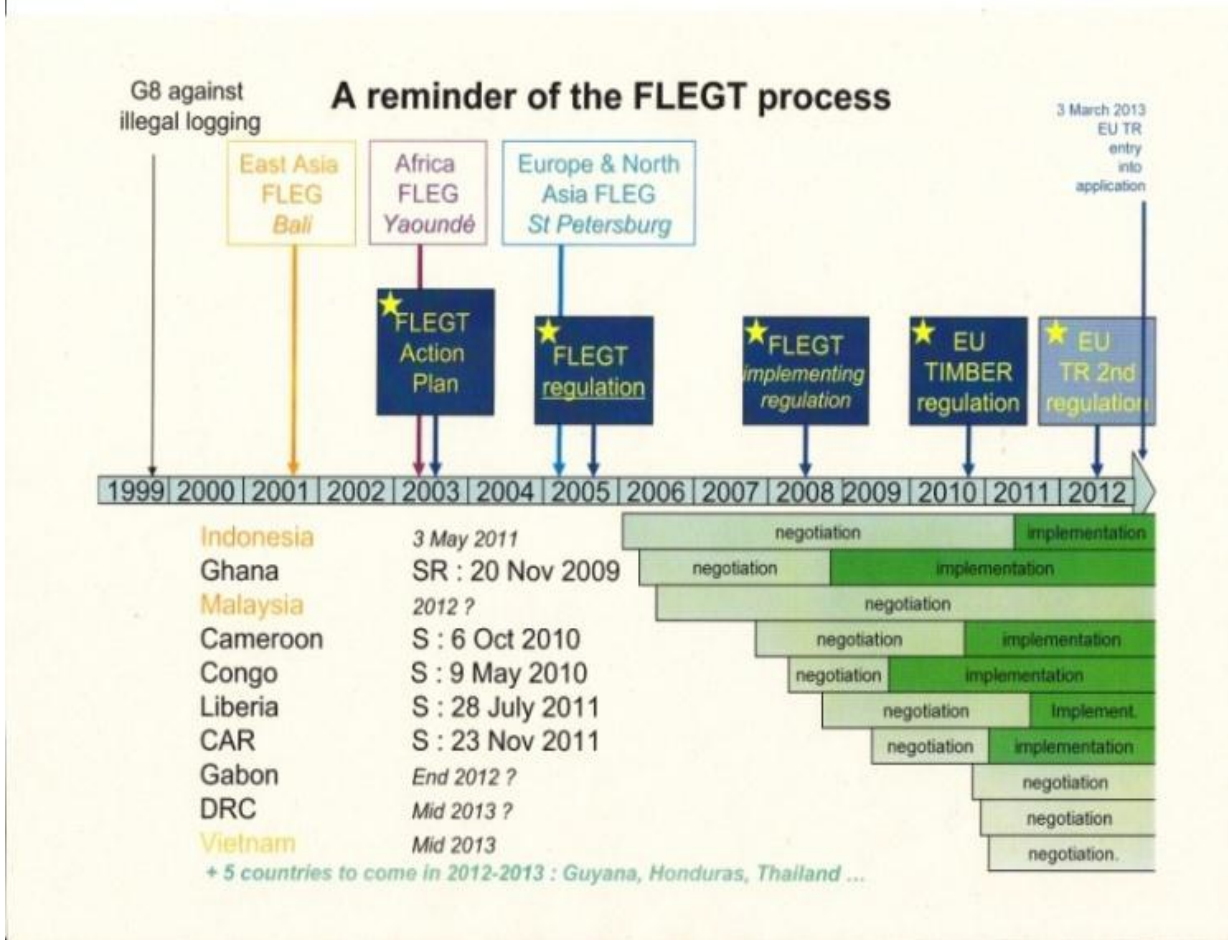


Figure 2.3: An overview of the FLEGT process in different countries (EU PowerPoint presentation, Chatham House Meeting, February 2012)

Lessons learned⁸ within the framework of VPA negotiations:

⁸ Personal communication EU representatives, February 2012.

- Every country is different, so there is no blueprint
- It is always a difficult process
- The VPA content depends on the quality of the process
- The most important negotiation is the internal one, i.e. inside the producer country, not the one with the EU
- Preparatory activities are most important to enable consensus building at national level

2.2 The EUTR

The **EUTR** (EU Timber Regulation) will become effective on March 3rd 2013. The EUTR is a law that has been approved by the EU Parliament; it has 3 elements:

a) **Prohibition**. EUTR prohibits operators⁹ from placing illegally harvested timber (products) on the EU market. The definition of legality is based on the legal context of the producer country (country of origin).

⁹ "Operators" are the first individuals or organizations in the supply chain that place timber and/or timber products on the internal European market, either timber produced within the EU or imported to the EU.

¹⁰ Prosecution is defined at the level of the Member Countries. For example in the case of The Netherlands new legislation is being prepared to enable the prosecution of infringements of the EUTR. The expected punishments include fines up to 750.000 € and imprisonment.

b) **Due Diligence System**. EUTR requires operators to apply Due Diligence (DD) either by themselves or by associating with a Monitoring Organization (MO) that applies a DD system. DD comprises three steps: 1. operators shall *provide access to information* concerning the timber, such as country of harvest, concession, species, sizes, quantities; 2. they shall implement a *risk assessment procedure* to evaluate the risk of occurrence of illegally harvested timber or timber products; 3. if the risk of illegally harvested timber (products) is deemed not to be negligible, operators shall implement *risk mitigation measures and procedures* to minimize risk.

c) **Traceability Obligation**. EUTR requires that (internal) traders apply a tracking system, providing basic information to enable identification of their suppliers and clients (1 step in both directions).

Since the EUTR is a law that has been approved by the EU Parliament, it is clear that it will not be postponed (personal note J. Bazill, 2012). The EU border will not be closed; however, mechanisms will be in place to ensure an effective control of timber placed on the EU market. These mechanisms include the establishment of a functional control system in each of the EU member states (Figure 2.4), the necessary changes to laws and regulations in the EU member states (e.g. with respect to prosecution in case of non-compliance) and the development of arrangements to harmonize implementation between the EU member states. Each EU member state will designate the responsibility for control to a Competent Authority that will control both individual operators and MO's. In the latter case, the MO's in turn exert control on the operator through their DD system. Although the burden of proof is with the Competent Authority, in all cases the operator remains responsible for compliance with the law.

The process of definition of EUTR implementation and delegation mechanisms is still ongoing. The final version is expected to be completed in June 2012.

As indicated above the EUTR sets requirements for operators IN the EU, not for exporters TO the EU. This enables EU designated authorities to exert effective control on implementation and - in case of non-compliance - prosecution¹⁰. It is clear, though, that operators in the EU

will require their business partners overseas to provide them with the information necessary to enable them to comply with the requirements of the EUTR.

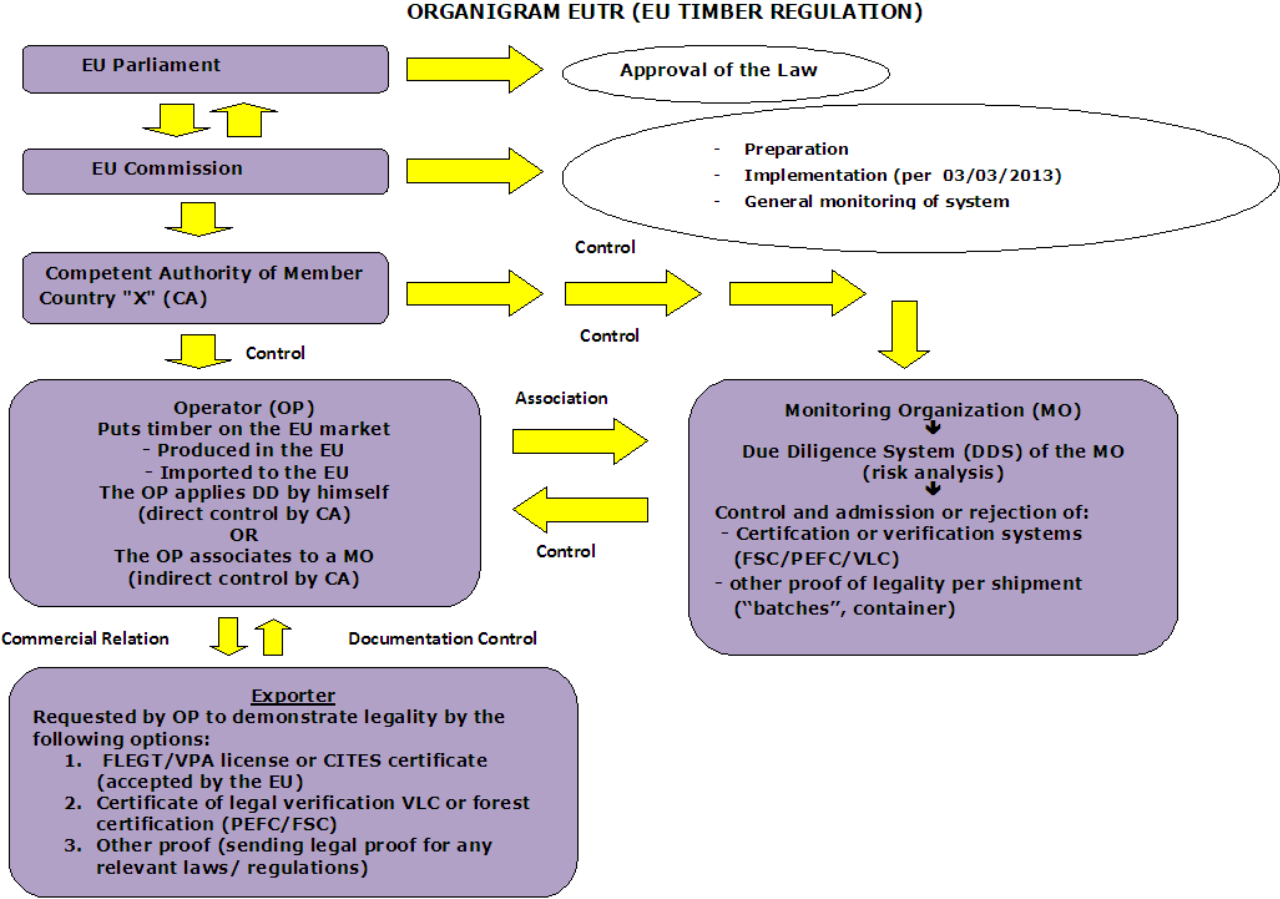


Figure 2.4: Institutional arrangement concerning EUTR control for EU member states.

From March 3rd 2013 there will be **three options** to import timber (products) into the EU:

1) By use of a *FLEGT licence* when there is a functional FLEGT VPA between the producer country and the EU. Timber with a FLEGT license will be accepted without any additional information by any member state of the EU. Likewise, in the case of a *CITES11 certificate*, the EU will not require further information in order to accept the timber (products). In the long term this is the easiest way to prove the legality of timber (products).

2) By use of a *recognised 3rd party certification and/or verification schemes*. Examples of such certification schemes for sustainable forest management are FSC and PEFC; examples of legality verification schemes are the VLC (Verification of Legal Compliance) system of SmartWood/Rainforest Alliance, the TLTV12-VLC system of SGS and the OLB (Origine et

Légalité des Bois) system of BVC. A common misunderstanding is that an FSC certificate is synonymous with meeting all the requirements of the EUTR. There is and will not be a direct relation between EUTR and the FSC certificate (personal note S. Atanasova, 2012). This means that the EU will not define a “green lane” for certain certification/verification systems. Instead, through the EUTR, the EU will establish a functional control system on the basis of due diligence, thus enabling its users to determine whether a certificate of a certain certification/verification system in a particular country will suffice to ensure legality. Thus, being in possession of an FSC, PEFC or a VLC certificate will most probably be helpful in complying with the EUTR requirements. In the short and medium term it is expected that independent 3rd party certification/verification will be the most practical way to prove compliance with local legality requirements and the EUTR.

3) By supplying *all necessary information* to demonstrate the legality of timber (products) scheduled for export to the EU. This involves proofs of legality relevant to the particular producer country and would in principle apply to every batch or at best to every supplier. This option appears to be relatively time consuming and complicated and is therefore considered less practicable.