

# Using official documentation under the EU Timber Regulation's due diligence obligation

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## Introduction

The EU Timber Regulation<sup>1</sup> ('EUTR') prohibits the placing on the EU market of illegally harvested timber. It has created obligations for those placing timber and timber products on the market for the first time ('operators'), so as to minimise the risk of illegality.

One of these obligations is the requirement for operators to exercise due diligence concerning timber and timber products they first place on the EU market<sup>2</sup>. The due diligence obligation is a risk management approach built on three key elements: (i) access to information on the timber and its supply chain, (ii) assessment of risks of illegally harvested timber entering the supply chain and (iii) effective mitigation of non-negligible risks that have been identified through the risk assessment procedure.

'Competent Authorities' designated by Member States are responsible for the application of the EUTR at national level. They must carry out checks on operators to verify that they comply, among other things, with the obligation to exercise due diligence<sup>3</sup>.

Documents from official sources are one type of information that operators are very likely to use to exercise due diligence. This briefing sets out why having access to these documents is not, on its own, sufficient to comply with the EUTR. It also illustrates why the credibility of official documents must always be considered by both operators and Competent Authorities and suggests what can be done to use information beyond official documentation.

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<sup>1</sup> Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market, OJ L 295, 12.11.2010, p. 23.

<sup>2</sup> Articles 4 and 6 EUTR.

<sup>3</sup> Article 10 EUTR.

## What do we mean by 'official documentation' in the context of the EUTR?

The EUTR does not provide its own definition of what constitutes legal timber, but instead refers to timber which has been 'harvested in accordance with the applicable legislation in the country of harvest'<sup>4</sup>. In order for operators to assess the risks of illegalities in their supply chains, the EUTR stipulates that they shall collect 'documents or other information indicating compliance of timber with the legislation of the country of harvest'<sup>5</sup>. The precise list of necessary documents and information depends on the laws and practices in the country of harvest<sup>6</sup>.

For the purpose of this briefing, 'official documentation' refers to all documents which provide assurance of compliance with applicable legislation in the country of harvest, and are issued by a body which exercises official authority in this respect. These will typically be documents issued by public authorities, e.g. the central government, regional and other decentralised administrations as well as government agencies. Documents issued under third-party-verified schemes which are government-accredited, such as the Timber Legal Assurance System in Indonesia ('SVLK'), also fall into this category.

## Why not rely on official documentation alone

The fact that having official documentation is not, on its own, sufficient for an operator to comply with the due diligence obligation, is implicitly recognised by the EUTR. Firstly, under its provisions on due diligence, operators must have access to several different types of information about their supply chain<sup>7</sup>. Secondly, having access to 'documents or other information' is conceived not as a self-standing requirement, but a necessary first step. Operators must then evaluate this, and other information, to assess the risk of illegally harvested timber being in their supply chains<sup>8</sup>. Accordingly, when operators have official documentation, they must still assess its credibility and relevance.

The following examples illustrate why operators must consider the credibility and relevance of official documentation when assessing the risk of illegal timber entering their supply chain. The first set of examples refer to cases where official documents have not been issued in accordance with national applicable rules:

- Forgery of official documents is an issue, which can be encountered notably in timber-exporting countries with weak governance. In the course of an investigation carried out in 2013, the German EUTR Competent Authority was confronted with a fraudulent letter, allegedly issued by the Environment Ministry of the Democratic Republic of Congo. The operator submitted the letter to the Competent Authority after the Competent Authority had questioned the legality of timber shipped from the Democratic Republic of Congo and placed on the German market. It appeared that this letter had been forged, together with other documents, in order to cover up the illegal origin of the timber<sup>9</sup>.

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4 Article 2(f) EUTR.

5 Article 6(1)(a) last indent EUTR.

6 For an overview of the categories of relevant information see Annex.

7 Article 6(1)(a) EUTR

8 Article 6 EUTR.

9 See 2013 activity report of the German Competent Authority,

[http://www.ble.de/SharedDocs/Downloads/08\\_Service/07\\_Publikationen/Geschaeftsbericht2013.html](http://www.ble.de/SharedDocs/Downloads/08_Service/07_Publikationen/Geschaeftsbericht2013.html), p. 26, and 2014 powerpoint presentation by a Competent Authority official,

- Corruption may lead to a national permit attribution system being flawed, and unable to guarantee that timber covered by logging permits has been harvested according to applicable national rules. An example of this was reported in 2011 by Cameroon's independent anti-corruption commission, concerning tenders for certain types of logging permits (*ventes de coupe*)<sup>10</sup>. In particular, members of the interministerial committee, in charge of evaluating and selecting offers submitted by companies, were alleged to be involved in several irregularities, such as embezzlement practices as well as ignoring the allocation criteria set out in the law, the existence of conflicts of interest, or the submission of unreliable documentation. The report therefore recommended that the results of the tender for *vente de coupes* permits be cancelled for a whole trimester in 2011, and the system of permit allocation redesigned.
- Problems with logging permits can also arise where a country has introduced new forestry laws regulating how logging permits are allocated, but previously issued permits, which are not legal according to the new national framework, are still used by companies. This seems to be the case in Ghana, following the adoption of a new law in 1998<sup>11</sup>. In accordance with this law, previous timber rights, concessions or leases should have been 'converted' into Timber Utilization Contracts. Yet research by Global Witness shows that a large number of permits granted before 1998 are still in use, and have not been converted. Regardless of the reasons for lack of conversion, these old leases, concessions or timber rights fail to meet legality requirements set by Ghanaian law<sup>12</sup>.

Official documents can also be problematic where they have been correctly issued according to national rules, but irregularities appear in practice at a later stage:

- A common concern relates to illegal exploitation practices. Logging in excess of permit or concession quotas may occur in countries or regions with weak forest governance and few resources to monitor logging activities. Suppliers may be able to provide operators and Competent Authorities with authentic official documents, but these may not guarantee that the timber comes from the trees that should have been cut. Greenpeace has, for example, pointed to recurring problems in the Brazilian state of Pará, where exporting sawmills refer to authorised forest management plans, which in reality, do not correspond to actual harvested forest areas<sup>13</sup>.
- Another type of irregularity relates to the lack of enforcement of forestry laws. It has been reported, for example, that in Myanmar timber exporting rules are not always complied with<sup>14</sup>. In Myanmar, timber can be legally harvested from five sources, but only authorised for export if it comes from three of these sources: state managed forests, plantations and natural forests. However, because of lack of efficient segregation policies at the main point of export, Yangon's seaports, timber from different sources is

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[http://www.ti.bund.de/fileadmin/dam\\_uploads/vTI/Bilder/Startseite/Kompetenzzentrum/Vortraege\\_2014/18.3.2014\\_J%C3%B6rg%20Appel.pdf](http://www.ti.bund.de/fileadmin/dam_uploads/vTI/Bilder/Startseite/Kompetenzzentrum/Vortraege_2014/18.3.2014_J%C3%B6rg%20Appel.pdf), p. 16.

<sup>10</sup> See Rapport sur l'état de la lutte contre la corruption au Cameroun en 2011, November 2012, p. 130 and following, [https://www.google.be/search?q=rapport+sur+l%27%C3%A9tat+de+la+lutte+contre+la+corruption+au+cameroun+en+2011&ie=utf-8&aq=t&rls=org.mozilla:fr:official&client=firefox-a&channel=nts&gfe\\_rd=cr&ei=EK2FVP6XL9fDcKz6gagl](https://www.google.be/search?q=rapport+sur+l%27%C3%A9tat+de+la+lutte+contre+la+corruption+au+cameroun+en+2011&ie=utf-8&aq=t&rls=org.mozilla:fr:official&client=firefox-a&channel=nts&gfe_rd=cr&ei=EK2FVP6XL9fDcKz6gagl).

<sup>11</sup> Timber Resources Management Act, 1998 (Act 547).

<sup>12</sup> See Global Witness report "Three quarters of Ghana's logging permits could break Europe's new timber law", May 2013, [http://www.globalwitness.org/sites/default/files/library/GW\\_Ghana\\_logging\\_permits.pdf](http://www.globalwitness.org/sites/default/files/library/GW_Ghana_logging_permits.pdf).

<sup>13</sup> See Greenpeace report 'The Amazon Silent Crisis', May 2014, <http://www.greenpeace.org/usa/Global/usa/planet3/PDFs/Forests/SilentCrisisTimberReport.pdf> as well as Greenpeace's report Night Terrors, October 2014, [http://www.greenpeace.org.uk/sites/files/gpuk/gp\\_amz\\_silent\\_crimefile\\_final\\_dps.pdf](http://www.greenpeace.org.uk/sites/files/gpuk/gp_amz_silent_crimefile_final_dps.pdf).

<sup>14</sup> See Forest Trends report "Timber Trade Flows and Actors in Myanmar: the Political Economy of Myanmar's Timber Trade", November 2013, p.1, [http://www.forest-trends.org/documents/files/doc\\_4133.pdf](http://www.forest-trends.org/documents/files/doc_4133.pdf).

commonly mixed. Therefore, timber that cannot be legally exported, but does have official documentation, may enter the supply chains of EU operators.

These examples show that looking at official documentation can only be one element of the due diligence obligation, and that it is essential to take into account information about the timber supply from other sources. They also demonstrate that there may be sources of information available to operators that are relevant to their supply chains and should directly inform their risk analysis.

## How to scrutinise official documentation

When Competent Authorities are conducting checks on operators, the operators should be able to demonstrate how they have assessed the credibility and relevance of official documentation (and other information) that they are relying on. To do so, there are a number of different steps that could be taken:

- Accessing additional sources of information on relevant risks associated with different types of official documentation:
  - Public bodies e.g.: UNCCD, UNEP, FAO, International Tropical Timber Organization (ITTO), Directorate General Environment and Development of the European Commission and national Competent Authorities;
  - Research institutes e.g.: the European Forest Institute (EFI), Chatham House and the World Resources Institute (WRI);
  - NGOs e.g.: the Environmental Investigation Agency (EIA), FERN, Friends of the Earth, Forest Trends, Global Witness, Greenpeace, Tropenbos, TRAFFIC and WWF;
  - Other sources e.g.: independent monitors such as Resource Extraction Monitoring (REM) and Forests Monitor. Environmental news sites such as mongabay.org.
- If particular risks are identified for a specific geographical zone, satellite images may be able to help detect illegalities such as harvesting outside of a concession's authorised boundaries. Such images are notably available on the websites of Google Earth and Global Forest Watch.
- Check national requirements to establish whether particular official documentation is indeed relevant and has the potential to prove legality.
- Find out about the specific permit under which the timber was harvested. Then look for evidence that the procedural requirements and terms required for this type of permit have (or have not) been met. For example, the need to go through a competitive bidding process or to obtain prior authorisation or ratification by public bodies.
- Contact public authorities in the country of harvest to rule out forgery. Be aware that the intentional use of a forged document might give rise to criminal sanctions under the laws of most EU Member States<sup>15</sup>.
- Keep records of risk assessment procedures as required by the EUTR, specifically of previous official documents received by operators and suppliers, in order to compare documents received at a later point in time.

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<sup>15</sup> Under the French law implementing the EUTR, checks on operators may also relate to the detection of cases of forgery (Article 76 III loi n° 2014-1170 du 13 octobre 2014 d'avenir pour l'agriculture, l'alimentation et la forêt).

The above guidance on how to scrutinise official documentation could be helpful for operators when carrying out a risk assessment as part of their due diligence obligation, but also for Competent Authorities when examining whether operators have adopted reliable due diligence approaches.

These precautions are however only an illustration of how official documentation should be scrutinised and complemented. Most importantly, it is up to each operator to determine, depending on the circumstances of each case, which reasonable steps can be taken to consider the risks of illegality present in their supply chains and to keep records of what they have done. The operator's compliance with the due diligence obligation should be judged on the basis of the steps that they take and can evidence.

## Summary

Each operator has to determine whether all reasonable steps have been taken to carry out a reliable risk assessment. Relying solely on official documentation is not sufficient. Official documents should always be reviewed for relevance and credibility, which will mean supplementing them with and analysing them against additional sources of information, so as to minimise the risk of placing illegal timber on the EU market.

## Annex: Categories of law that constitute 'applicable legislation'

Category of law	Example of possible documents or information
<b>Documentation for rights to harvest timber</b>	<ul style="list-style-type: none"> <li>• Evidence of the legal authority to harvest: documentation of ownership rights or rights to land use, concession license, felling permit, land conversion permit</li> <li>• Evidence showing that timber has been harvested in authorised (not protected) areas: maps with markings of precise origin of timber, officially approved harvest and forest management plans, audit reports</li> </ul>
<b>Payments for harvest rights</b>	<ul style="list-style-type: none"> <li>• Official records proving that fees for harvest rights and taxes as well as charges have been paid: contracts, bank notes, VAT documentation, official receipts</li> </ul>
<b>Timber harvesting, including environmental and forest legislation</b>	<ul style="list-style-type: none"> <li>• Evidence that other legislation governing timber harvesting has been complied with: official audit reports, environmental clearance certificates, approved harvest plans, coupe closure reports, ISO certificates, codes of conduct, environmental impact assessments, transport permits, processing certificates</li> </ul>
<b>Rights of third parties</b>	<ul style="list-style-type: none"> <li>• Evidence of compliance with third parties' legal rights e.g. local communities' rights: environmental impact assessments, management plans and audit reports, social responsibility agreements, reports on tenure and rights claim and conflicts</li> </ul>
<b>Trade and customs</b>	<ul style="list-style-type: none"> <li>• Evidence that timber has been declared properly and customs duties have been paid: customs declaration form, official receipts for appropriate tariffs, export tax receipts, documents issued by customs authorities such as export and import licenses, official receipts indicating that other taxes and fees have been paid</li> </ul>

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