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Summary of responses to a consultation on a European Commission Proposal for a Regulation of the European Parliament and of the Council laying down the obligations of operators who place timber and timber products on the market March – May 2009

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1. Introduction

This paper provides a summary of the comments received in response to a recently run public consultation on the Due Diligence Regulation.

Defra's information resource centre can supply copies of the full consultation responses to personal callers, or in response to telephone or email requests (0207 238 6575 or email defra.library@defra.gsi.gov.uk). Wherever possible, personal callers should give the library 24 hours notice of their requirements. An administrative charge will be made to cover photocopying and postage costs. A list of all respondents is at Annex 1.

Defra is very grateful to all those who responded to this consultation and would like to thank them for their time and effort contributed.

2. Background

2.1 The objective of this proposal is to reduce the volume of illegal timber entering the EU by changing operator behaviour. Operators will be required to apply a risk-based approach to removing timber and timber products harvested in contravention of the laws of the country of origin from their supply chains. Timber traders and European domestic producers will be required to exercise due diligence to minimise the risk that the timber they trade is from illegal sources.

2.2 Defra sought views on the draft Proposal, as well as on the suggested amendments to the proposal by the European Parliament. Specifically, we asked about the principles of due diligence and risk assessment, as well as criteria for approval of monitoring organisations. In addition, the Government consulted on the possibility of including a prohibition in the Regulation on the first placing of illegal timber on the European Community market, which is intended to incentivise concerted action by operators.

2.3 The draft Regulation is intended as a broad framework, to be supplemented by more detailed implementation requirements, following agreement of the initial Regulation. As such, the proposal does not provide comprehensive detail on how individual organisations must comply with the risk assessment processes. In its proposal for the Regulation, the Commission has indicated that:

“...further details will be laid down by way of implementing measures in order to facilitate implementation, notably with respect to the identification of the criteria for determining the presence of a high or low risk that illegally harvested timber and timber products are placed on the Community market. In laying down those implementing measures the following principles should be respected: the need to avoid putting any unnecessary burden on the operators; the balance of costs and benefits to operators covered by this Regulation; the need to respect the necessary flexibility in the application of the implementing measures; the need to facilitate the adaptation of small operators to the requirements laid down in this Regulation.”¹

2.4 We are committed to continue engagement with stakeholders on the specific details of a new system, to be determined once political agreement has been reached on these broad features of the Regulation.

¹ http://ec.europa.eu/environment/forests/pdf/proposal_illegal_logging.pdf

3. Consultation Overview

3.1 On 26 March 2009, Defra published a consultation to seek views on the draft European Commission proposal 5036/09: Proposal for a Regulation of the European Parliament and of the Council laying down the obligations of operators who place timber and timber products on the market (known as the Due Diligence Regulation). The consultation closed on 8 May 2009

3.2 Details of the consultation were sent directly to 93 organisations and published on the Defra website. Nineteen responses were received from major stakeholders including environmental non-governmental organisations, trade bodies and private companies. A list of the organisations which responded to the consultation is at Annex A. In addition, the Secretary of State received 2000 letters from members of the public in response to a WWF campaign. The full text of this letter is attached at Annex 2.

3.3 The public consultation was also accompanied by an Impact Assessment which sought to identify the likely impact of the proposed Regulation on a range of UK stakeholders, including importers and timber producers within the EU, and different industry sectors, including furniture, construction and paper under 3 different scenarios. We acknowledged that the impact assessment was based on incomplete information, and should only be considered as a guide for consultees in making their views known. Further information on potential costs and benefits was requested.

3.4 Two additional assessment of possible cost scenarios were conducted, which provided further information on possible costs associated with the proposal. These are available at:
<http://www.defra.gov.uk/corporate/consult/ddr/index.htm>

3.5 Defra attempted to provide a robust assessment of the impacts on small and medium size enterprises, but recognised that there was incomplete information on the possible impacts on this sector. Defra also included information on positive benefits outside of the UK, and of the EU, as the benefits of tackling illegal logging in forest nations internationally is the primary driver of the proposed legislation. However, such benefits were difficult to quantify in specific terms.

4. Summary of Respondents and Organisation types

4.1 Over 2019 responses were received in total; nineteen were from stakeholder organisations as listed below and over 2000 formed part of a letter campaign from members of the public. A copy of the letter received is attached at Annex 2.

4.2 A breakdown of responses by category of organisation included: 1 certification body; 7 trade bodies; 3 private companies – 2 large, 1 small (this small company was an IT systems supplier, not an SME timber trader); 5 NGOs / charities; 1 local authority association; 1 landowning association, and 1 research / academic / think tank.

4.3 It is worth noting that of those organisations responding to this consultation, many were representative of a much wider constituency or sector. For example, some of the NGOs have a broad supporter base of the general public, in some cases reaching millions of supporters. Further, trade representative bodies were representative of a large number of other smaller companies. Other organisations which responded were also representative of significant numbers of land owners, small and large timber producers across Europe, and also of indigenous peoples, or other groups affected by the serious problem of illegal logging internationally.

5. Summary of responses

5.1 Does the cost-benefit analysis in the Impact Assessment reflect costs and benefits adequately?

Eight organisations mentioned the cost benefit analysis (CBA) explicitly. Four trade representative organisations highlighted that if a more complex due diligence requirement emerged in the final Regulation, this would increase costs, whereas others identified new costs such as:

- Producer countries pursuing independent third party certification and/or verification;
- Employing additional staff where due diligence systems are in use already, on the basis that such systems would need tweaking to cope with an expanded number of operators.

Others commented on the CBA methodology and whether it formed a reasonable basis for decision making: concerns were raised by three NGOs and a small business that the significant benefits of the legislation had not been adequately reflected, which they felt would weaken arguments for strong legislation to tackling illegal logging.

5.2 Underlying Prohibition – is it needed, and in what form?

5.2.1 Summary

Most responses expressed some form of support for a prohibition. More than 50% of the organisations from a range of stakeholder types, from NGOs and academic institutions to industry, including two large companies and a small non-timber trade company, trade organisations representing large and SMEs, as well as 2000 letters from members of the public, supported strengthening the proposal. No response expressed opposition to a prohibition, while six organisations did not comment, and three required more information to understand the potential effect of a prohibition, including one certification provider and a trade representative body. One retailer expressed strong support for ensuring that the principle of due diligence was maintained in the proposal, and should not be removed, including if a possible prohibition were to be written in to the proposal. A number of respondents sought clarification of the implications for the practical enforcement of the Regulation if it were to include a prohibition.

Several organisations, including one large trade federation representing a significant number of timber trade operators, NGOs, and a large retail company, mentioned that a significant proportion of trading companies have been developing due diligence systems for quite some time, and that this should be taken into account in strengthening the final Regulation.

5.2.2 Extension down the supply chain

Eleven organisations of nineteen, as well as 2000 individuals in the letter campaign, supported some form of responsibility being extended down the supply chain (such an extension of responsibilities could be considered similar in approach to the European Parliament's proposals for a differentiated

responsibility for 'due care' for those down the supply chain)². In general, NGOs, and those large retail organisations and a number of sectoral trade bodies which already employ due diligence and / or legality assurance systems, agreed that responsibility for eliminating risks, and accountability for ensuring legality of all traded products, should be shared across supply chains, which would both create a level playing field across their sectors, and across Europe. In contrast, eight organisations opposed such an extension, including industry bodies, trade bodies representing timber goods manufacturers, and landowning or small timber product associations. This opposition was on grounds of better regulation and minimisation of administrative burdens. These organisations agreed that such an extension of a responsibility for due diligence down the supply chain would undermine the competitiveness of their businesses, especially for SMEs. One local government body called for due diligence for timber or timber products entering at the border to be regulated at the port of entry.

5.2.3 Are you content that a prohibition on the placing of illegal timber on the Community market for the first time would strengthen the regulation in a proportionate and appropriate way?

Fifteen organisations supported a prohibition on placing illegal timber on the market, but of these, twelve organisations proposed amendments to the prohibition that they believed should be made to ensure that the Regulation was more effective and appropriate. One organisation commented that a prohibition would only be effective if there were adequate sanctions in place against those who placed illegal timber on the community market (but they also felt that there did not appear to be any clarity on what sanctions would look like place at this stage). One organisation supported measures to avoid illegal timber being placed on the Community market, but believed that the legislation was wholly inappropriate in a UK timber context. One organisation supported the prohibition, but felt that its objectives could be met using different means.

5.3 Are you content with the current proposal which covers only those operators who first place timber on the EU market?

Seven organisations were content with the current proposal because, depending on its application, an absolute requirement not to place illegally logged timber on the market could be damaging to some operators depending on its application. It was considered difficult to make a judgement on whether this would be proportionate or appropriate without knowing how mechanisms would operate. Further, an absolute requirement could be challenging to enforce pragmatically because retailers rely on their suppliers and cannot be held responsible for something they cannot control.

Additional comments were made, such as:

²The reasons why people supported the extension of responsibility included: needing to identify whether timber or timber products are legal at all stages; ensuring that deliberate, large scale fraud is not longer possible; avoiding impacts on the UK manufacturing base where importing enterprises relocated to other parts of the EU; avoiding UK operators being undercut by those in some MS where there could be weaker enforcement which would give them a competitive advantage as well as making them a vulnerable entry points for the whole EU.

- Operators who first place timber on the EU market must be clearly defined;
- The due diligence requirement should focus on the point of entry of the products into the EC or UK as this is where timber/timber products can be checked with documentation.

Nine organisations were not however content with the Commission's current proposal for the Regulation, and felt that the entire supply chain should be responsible for ensuring that the timber and timber products are legal and that the scope of the Regulation should be extended down the supply chain. There were a number of practical suggestions on how this should be done:

- There should be an EU-wide prohibition on 'making available on the market of illegally harvested timber or timber products', combined with credible and dissuasive penalties for non-compliance applied equally to all operators at all stages in the commercial timber supply chain in all EU states;
- As all supply chain actors should share responsibility for eliminating the risk of trading illegally harvested timber and timber products, the Regulation should be applicable to all those who make timber and wood products available in the market. However, some stakeholders supported an approach within which not all operators should necessarily be under the same obligation to act. Those placing timber products on the market should be required to use a full system of measures and procedures (i.e. due diligence), whereas those making timber products should show due care.

Reasons why an extension of responsibility down the supply chain should be integrated into the proposal were suggested by stakeholders in their responses; for example:

- If there were no extension of responsibility down the supply chain, once products enter the EU, there would be no subsequent checks - or possibility of any check - on the products' legality;
- If there were an extension throughout the supply chain, then any operator found handling illegal products could have action taken against them;
- If operators throughout the EU knew that prosecution actions could be taken against them, then there would be increased emphasis and effort established by traders on the systems put in place to ensure that they were handling legal products;
- Operators in the supply chain do have a responsibility to carry out checks on the legality of the timber they handle;
- Practical division of responsibility throughout the supply chain is an important element in improving competitive advantage for those companies acting responsibly. The 'due diligence' responsibility should fall upon those operators first placing, and 'due care' should then be applied throughout the rest of the supply chain. This would avoid any unfair

burdens, by motivating vigilance and distribute the burden of responsibility more equitably among the operators and reduce the risk that responsible operators will be undermined;

- Dealers, wholesale retailers, intra-EU importer/exporters are not currently within scope of the Regulation, unless they directly import into the EU. Major retailers are therefore often likely to be exempt from the requirements of the Regulation. For the proposal to fully meet its objectives, then the due diligence system would need to be applied throughout the entire supply chain.

5.4 What constitutes a due diligence system, Risk Management approaches?

The majority of the consultation responses noted that more clarity was needed on exactly how the due diligence system prescribed by the Commission would work, including criteria establishing the principles to underpin any system set up by any individual organisation or monitoring organisation. There was however a number of messages from stakeholders in relation to how the system should work. For example: NGOs, an academic institution, and a major provider of chain of custody certification (which is an integral part of a due diligence system), agreed that the nature of the obligation to remove illegal timber from supply chains needed to be clarified, given that: **the proposal as drafted, without a prohibition, focuses on [a system of] paper-based compliance whilst not allowing MS to take action in cases of actual breach i.e. incidence of illegal timber being found in supply chains.**

Many organisations such as: trade bodies for a number of segments of the timber industry, an I.T. software provider, two large retailers, NGOs and certification bodies set out the principles and characteristics of a desirable system in their comments. They called for a flexible system which builds on existing chain of custody monitoring and/or due diligence systems, and minimises additional administrative burdens upon industry. Six NGOs and trade bodies expressed that the information requirements should be more clearly set out.

In addition, one large retailer suggested that membership of existing legality verification schemes, especially those established or most well regarded, should also be sufficient to demonstrate 'due diligence', or 'due care' (if 'due care' defined as a responsibility for all operators were included within the Regulation e.g. in accord with the European Parliament amendment). One large timber trader and retailer was of the view that not all operators need be under the same obligation to act, and operators down the supply chain need only be required to provide a reduced level of assurance to competent authorities, such as 'due care'. Many of the NGOs which responded to the consultation were in agreement with such a principle of differentiated responsibilities.

Many of the trade-based organisations which responded to the Consultation advocated against European Parliament proposals which would set in statute the requirement that operators 'ensure' the removal of illegal timber from their supply chains, given the challenge of demonstrating compliance with a requirement that all timber be legal.

5.5 Applicable legislation: Recognising legality & certification schemes as meeting the legislation nationally/internationally

Respondents expressed mixed views on the scope of the legislation, including strong views from a number of NGOs, who thought the Regulation should be amended to ensure that all relevant national, regional, and international legislation should be considered in defining legality, such as that applying to conservation of biological diversity, forest management, resource use rights and minimisation of adverse environmental impacts, as well as social legislation as applies to property tenure, indigenous people's rights, labour and community welfare legislation, taxes, import and export duties, and royalties or fees related to harvesting.

Other NGOs also responded that the applicable legislation should be agreed by the timber producing country, be consistent with the approach taken in the FLEGT regulation, and that the burden for compliance must rest with the company profiting from the commercial activity. This is because it would not be possible for the European Commission, or other national authority, to set out every local law in scope, whereas it would be possible for companies to act responsibly and make efforts to ensure that they understand the local laws in their country of operation, in the same way that they would treat legal compliance in their business in any EU or non-EU country; they recommended the use of strong industry trade associations to assist work in this area.

UK and small producers' bodies, in particular, were very clear in their support for keeping the definition of applicable legislation simple, thus minimising the burdens on small producers and landowners to prove legality in a greater number of areas of legislative compliance.

5.6 Roles of Monitoring Organisations, competent authorities, and the EU

There was confusion on the role of Monitoring Organisations (MOs), and calls from seven trade representative bodies and NGOs for this to be clarified, notably through:

- i.) ***Characteristics and accreditation criteria for the MO;***
- ii.) ***Definition of independence to avoid conflict of interest between MOs and operators,*** and
- iii.) ***Clearer detail on sanctions*** where a due diligence system might fall short of the requirements of the MO, to avoid the system reflecting that of the lowest common denominator.

There was no overall consensus on the level at which accreditation of monitoring organisations should take place. One trade representative

organisation advocated open eligibility criteria for MOs to support new MOs coming on board. Five respondents advocated centralisation of the system for approving MOs at the European Commission level, in order to ensure harmonisation of standards across the EU, whereas others did not comment or expressed no preference.

Four organisations supported the approval of MOs at the EU Member State level, considered the most efficient and efficient option, which would also enable the Competent Authority to maintain greater oversight of the activities of MOs.

However, several organisations commented that if MOs were approved at the EU level, then the criteria for MOs should be more specific, in order to ensure harmonisation of standards across Europe.

One organisation expressed no preference, but thought that at EU level, it would take longer for the verification process to be complete, and one organisation felt that detail and implementation should be left to the individual member states as there tend to be significant differences in operation and practice across the EU. Eight organisations made no comment.

5.7 Is the Regulation sufficiently clear on the duties, responsibilities and requirements of Monitoring Organisations?

The majority of responses noted that the Regulation was not sufficiently clear on the duties, responsibilities and roles of Monitoring Organisations (MOs). Two organisations felt that the regulation was clear and seven organisations made no comment.

Of the ten organisations that felt the Regulation was not sufficiently clear on the role of MOs, the following comments were made:

- Several questions remain unanswered i.e. who can be an Monitoring Organisation, the location of a Monitoring Organisation, reliance of expertise and know-how;
- The list of requirements needs to be amended to ensure the credibility and independence of Monitoring Organisations. These should demonstrate appropriate expertise of the forest sector, and be legally and financially independent from the operators that they certify;
- There needs to be consistency with the terminology used when clarifying and defining the actions of the proposed Monitoring Organisation;
- Stakeholders felt that often the Regulation was not clear on the respective roles of Competent Authorities and Monitoring Organisations, and also in terms of what is being checked by each of these organisations. In essence, the aim of the measures put in place by the Regulation is not to check the Monitoring Organisation, but in fact is ensuring the rigour and effectiveness of the Due Diligence system.

Two additional comments were made which were relevant to the successful functioning of Monitoring Organisations:

- Without suitable sanctions in place the Monitoring Organisations will be ineffective;

- It is essential that timber organisations are independent from individual timber operators. If an industry association creates an MO, it was suggested by some stakeholders that it should perhaps be required to include representative from the environmental and other sectors on its board, to ensure a wide variety of views is represented and more importantly that rigour and impartiality were maintained. This would be important to ensure that the organisation was not swayed by views from the operators.

5.8 Coverage of the Regulation and products in scope; including exemptions for small operators and/or domestic producers, and specific product types

The majority of respondents acknowledged and recognised the requirement, that due to WTO trade agreements, domestic production must be included within the scope of the Regulation. However, two trade organisations expressed doubt over the need for the Regulation to cover UK / domestic producers, supporting an exemption for small producers, while two others supported such an exemption only if the burden introduced by the Regulation were not minimised according to the criteria for the due diligence system outlined below³.

Respondents from 14 trade bodies and NGOs which commented did not support any exemption for any product type, other than two organisations which highlighted: 1.) the difficulty of ascertaining the source, and therefore the legality, of recycled products; and 2.) that only products for re-sale should be in scope; i.e. not packaging, pallets, leaflets or other promotional material.

There was wide agreement from nine trade bodies, private companies and NGOs for removing an exemption for biomass / other timber-based energy products.

5.9 Offences and penalties

³UK domestic producer's implementation costs will depend on the final legislation and how it is interpreted. In the following situation, in most cases, the cost to UK businesses would be minor, if:

- It is clarified that the operator is the owner of the growing tree who makes the timber available;
- The information requirement is as set out in the European Commission draft regulation;
- There is a simple process for ensuring the operator is aware of the 'applicable legislation' requirement and can satisfy that, e.g. the FC felling licence or grant scheme contains information on the 'applicable legislation' and the owner confirms that they understand and comply with it;
- There is no charge for auditing, e.g. this is carried out by the Forestry Commission.

Very strong support was expressed for building on existing systems for due diligence and taking account of industry best practice, as well as existing legality verification systems. NGOs advocated clearer definition of the offences which would apply under the Regulation, and called strongly for an open and transparent process for any enforcement and prosecution measures decided in comitology in the Implementing Regulation.

6. Way forward

Defra have found the information obtained through the consultation extremely valuable and relevant to ongoing discussions. We note the level of interest and engagement from our stakeholders on this issue. There remains some uncertainty regarding the likely shape of the Regulation, which still requires discussion between EU Member States, and agreement with the European Parliament.

We have particularly noted the concerns about the potential costs associated with the Regulation, and suggestions on how these might be minimised. Concern was raised with two particular set of amendments in the European Parliament's proposal: the extension of responsibilities down the supply chain; and the call for labelling of products. We intend to continue to focus efforts on the first point of placing on the European Community market, and do not support labelling requirements for timber and timber products.

We have also noted the imperative for clear and practical approaches if Industry is to be able to meet the requirements of the Regulation. We have noted the request for clarity on what due diligence and risk assessment entail. We will endeavour to provide clear and concise guiding principles in the current Regulation, based on practicability and coherence with existing good practice.

We have noted the substantial cost saving associated with the current risk-based approach. We will continue to argue for proportionate mitigation measures which target high risk sources of timber. We will seek to design the due diligence and risk assessment elements of the Regulation with this principle in mind, notably a clear distinction between high and low risk operations, and the acceptance of existing tools of best practice (such as recognised legality verification and certification) as means of ensuring compliance with requirements.

However, we must recognise that the subsequent Implementing Regulations are best placed to realise this request. We will continue our consultations with all parties when this process moves forward.

Given the strong and divergent views on the scope of applicable legislation, the UK will remain flexible in its approach. However, we remain convinced that this definition must be framed to support the objectives of the wider Forest Law Enforcement Governance and Trade (FLEGT) process, and thus a definition which is compatible with the FLEGT definition is our ultimate objective.

We recognise the confusion regarding the role of certification, legality verification and monitoring organisations. The UK will seek to clarify these elements of the proposal. We endeavour to ensure that the voluntary system of Monitoring Organisations mirrors current best practice, and avoids an overly complex approach to approval. There remain mixed views on whether recognition is best taken forward at a national (UK) or EU level. We will thus maintain a flexible approach, aiming for a cost effective, enforceable and practical solution.

We have noted the solid support for inclusion of a prohibition on the first placing of timber on the EU market from a range of sectors, while recognising that some have reservations regarding this idea, based on its ability to be enforced, and likely cost implications. There is growing support for this approach from other EU Member States, and we will continue to promote the UK proposal.

We will pay attention to the list of products in scope in the Annex, and suggest amendments accordingly. We will strongly argue for the removal of the Biomass exemption.

Finally on enforcement, the UK will respect the division of competence between the European Community and Member State, and will not be seeking to further articulate the requirements on penalties and enforcement within the Regulation. Applicable penalties and the proposed enforcement regime will be considered again when we come to put the agreed Regulation into effect in the UK.

Annex A – List of stakeholder respondents

- i.) Chatham House – the Royal Institute of International Affairs
- ii.) Confederation of European Forest Owners
- iii.) Confederation of European Paper Industries
- iv.) Confederation of Forest Industries
- v.) Environmental Investigation Agency UK
- vi.) European Federation of Furniture Retailers
- vii.) Greenpeace UK
- viii.) Helveta
- ix.) Kingfisher
- x.) Lacors
- xi.) Malaysian Timber Council
- xii.) Marks and Spencer
- xiii.) Programme for the Endorsement of Forest Certification schemes UK Limited
- xiv.) Progressio
- xv.) Tropical Forest Trust
- xvi.) Timber Trade Federation
- xvii.) UK Forest Products Association
- xviii.) Wood Panel Industries Federation
- xix.) World Wildlife Fund

Annex B – Copy of a campaign letter established by the World Wildlife Fund UK, received from 2000 members of the public

Dear Secretary of State,

Many thanks for giving me the opportunity to put forward my views regarding the European Commission's proposal for a regulation concerning the placing of illegal timber and timber products on the EU market.

Your consultation questions are mostly focused on the wood industry so I trust that you are not losing sight of the main objective of the regulation – that is, to tackle the UK's and EU's role in the global trade in illegal timber. This is essential in order to help producer countries secure revenues potentially lost from the timber trade as well as secure the environmental services – from local flood defences to global carbon storage – that forests provide.

As a consumer of wood and paper products, I find it very difficult to establish what products are from legal or illegal sources. From my point of view I want to be certain that I'm not supporting illegal forest destruction and I believe it's your job to help me.

It strikes me that this regulation must include these key elements:

- **Enforcement** – a workable policing structure that is both legally and financially independent and backed up with appropriate deterrents. With 84% of Brits wanting companies to face penalties if they break the rules, I hope you won't shy away from ensuring proper enforcement measures.
- **Commonality** – ensuring that the law affects all companies placing timber on the market across Europe. It is no good if some companies are exempt or if some countries are less strict – the illegal timber will simply find its way to these companies or countries at the expense of companies that are doing the right thing.

In answer to your request for feedback on the Environment Committee's amendments, please note that I was relieved to hear that the Commission's proposals had been strengthened – indeed without these amendments I am concerned that the regulation would lack the tools to do the job. Please endeavour to adopt the Committee's amendments within the UK's position.

I appreciate that this consultation comes at a crucial time – in a matter of weeks you will, along with other EU ministers, be responding to the Parliament's plenary vote. With 82% of Brits believing it important that Europe-wide legislation is introduced to tackle Europe's role I hope you acknowledge this overwhelming support by ensuring the regulation is strong, effective and passed at the earliest opportunity.

Yours,