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# Consultation on the UK implementation of the European FLEGT Regulation 2005

**A scheme for verification of FLEGT-licensed imports from countries which have signed a Voluntary Partnership Agreement with the European Union to establish the legality of their timber and timber exports**

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This document, plus associated impact assessment, is available on the Defra website at:  
<http://www.defra.gov.uk/corporate/consult/flegt/index.htm>

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# 1. Introduction

## The Forest Law Enforcement Governance and Trade Action Plan 2003

- 1.1. The EU Forest Law Enforcement Governance and Trade (FLEGT) Action Plan 2003<sup>1</sup> seeks to address the problem of illegal logging and its related trade through a combination of supply- and demand-side measures that simultaneously provide support to developing countries to improve forest governance, while stimulating markets for legal and sustainable timber in the European Union.
- 1.2. A significant element of the FLEGT Action Plan 2003 is the negotiation and implementation of bilateral Voluntary Partnership Agreements (VPAs) between the European Union and tropical timber producing countries where illegal logging is a recognised problem. A VPA is a binding agreement which establishes a legality assurance system i.e. the FLEGT timber licensing system, to ensure that exports of timber products to the EU have been legally harvested. The VPA approach, once functioning, means that unlicensed timber from VPA countries will be denied entry to the European Community market.
- 1.3. In December 2005, under the UK's Presidency of the European Union, the Council of Ministers of the European Union adopted the Forest Law Enforcement, Governance and Trade Regulation<sup>2</sup> ('FLEGT Regulation'), which, together with its Implementing Regulation<sup>3</sup>, puts in place the European legislative framework for the controls needed to implement the EU's VPA obligations. The UK is now required to put these European Regulations into effect through domestic legislation that establishes procedures for the receipt, verification and acceptance of FLEGT licensed shipments by UK competent authorities and for the enforcement of this scheme.
- 1.4. To date, two countries have signed VPAs with the EU: Ghana in September 2008, and the Republic of Congo (Brazzaville) in May 2009. The EU and Cameroon also finalised VPA negotiations in June 2009. The European Commission expects that a further one or two countries will sign agreements by the end of 2009. Indonesia, Malaysia and Liberia are currently negotiating agreements, and several other countries have also indicated their intent to commence negotiations in 2009. It is therefore expected that further countries will sign agreements in this and coming years.
- 1.5. The UK is now developing implementation options to receive FLEGT licensed timber. This consultation document, alongside the associated impact assessment, sets out the possible approaches and costs associated with implementing the FLEGT licensing scheme. It is published alongside a public consultation letter seeking comments and input from stakeholders across industry, NGOs and the public.
- 1.6. Further justification for the policy is included within the Impact Assessment document, also available at:

<http://www.defra.gov.uk/corporate/consult/flegt/index.htm>

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<sup>1</sup> <http://ec.europa.eu/environment/forests/flegt.htm>

<sup>2</sup> Council Regulation (EC) No. 2173/2005 of 20 December 2005 on the establishment of a FLEGT licensing scheme for imports of timber into the European Community

<sup>3</sup> Commission Regulation (EC) No. 1024/2008 of 17 October 2008 laying down detailed measures for the implementation of Council Regulation (EC) No 2173/2005 on the establishment of a FLEGT licensing scheme for imports of timber into the European Community

- 1.7. This consultation process builds upon a previous consultation to seek stakeholder views on the FLEGT Regulation held in 2005 when the Regulation was being negotiated.<sup>4</sup> Five options were then considered: i.) Oppose the Proposed Regulation and ‘Do nothing’; ii.) Oppose the proposed Regulation and introduce a multi-lateral agreement; iii.) Oppose the proposed Regulation and introduce a ban on illegal timber; iv.) Accept the proposed regulation; and v.) Seek amendments to the proposed Regulation. As a result of the consultation, we accepted the FLEGT Regulation largely as proposed, seeking only minor amendments.
- 1.8. Possible approaches to implementing the FLEGT Regulation and its Implementing Regulation in the UK are outlined in this document, and we are seeking views from stakeholders on some of the relevant principles and practicalities of putting these Regulations into effect.

## 2. Consultation Process

2.1. The consultation stage impact assessment and this consultation document, read together, describe implementation options for the UK FLEGT licensing scheme. The specific questions in this document, and in Annex 2, seek to identify the likely impact of the FLEGT licensing scheme on UK stakeholders, including all UK timber and timber products importers, timber traders and product manufacturers **which import from VPA countries**.

2.2. The main areas upon which we would like to receive views are the following:

2.2.1. **Cost and Charging:** We are currently considering whether we should delay charging UK operators for the costs accrued to HM Government until year three of the scheme, then charging at a modest level on a full cost recovery basis from year three onwards. It is a key point that the cost of running a charging scheme in these first years, with the associated low volumes of timber, could be close to the revenue received, meaning that it would not be cost effective to charge from the outset. At later stages, when a greater number of FLEGT licensed shipments might arrive, economies of scale should be achieved, shifting the cost-benefit analysis. We will consult publically on the cost of any charge ahead of its implementation, but would welcome views from stakeholders on our approach now.

2.2.2. **Offences and associated penalties:** Our intention is that domestic legislation putting into effect the FLEGT licensing scheme in the UK should sit alongside the Customs and Excise Management Act 1979 (CEMA), with the latter providing a comprehensive enforcement regime for the FLEGT licensing scheme. Views are sought on whether this is sufficient to cover the range of breaches which may be associated with the Regulation. We ask for views on whether supplementary offences (and associated penalties) are required, and specifically views on whether administrative penalties should apply.

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<sup>4</sup> [http://www.illegal-logging.info/item\\_single.php?item=document&item\\_id=192&approach\\_id=26](http://www.illegal-logging.info/item_single.php?item=document&item_id=192&approach_id=26)

2.2.3. **Inspections regime:** We are seeking views on our proposal that inspections by UK CITES<sup>5</sup> Management Authority inspectors and checks of shipments should be undertaken on a risk and intelligence-led manner, based upon established intelligence models, and in line with government policy on minimising the burden of inspections on UK business.

2.2.4. **Forfeitures:** Forfeited timber and timber products will be dealt with by the UK Border Agency as Crown property. Forfeited goods may be put to a number of uses, as described at section 10, but we would like to seek views from stakeholders on this and the best options for the subsequent action to deal with what could be timber or timber products from particularly rare or endangered species, for example.

**2.3. All stakeholders are invited to respond to this consultation in whichever format is most convenient for them. Within the responses received it would however be very helpful if respondents could answer the questions in the letter to stakeholders, supplemented by any additional comments to support our analysis process, following the specific responses.**

2.4. The consultation period will last twelve weeks. All consultation responses should be received by: 10th December 2009. Responses should be sent to:

[illegal.logging@defra.gsi.gov.uk](mailto:illegal.logging@defra.gsi.gov.uk)

2.5. Following receipt of responses, views from stakeholders will be analysed, and will be considered in final advice to Ministers on the development of new domestic legislation putting into effect the FLEGT licensing scheme in the UK.

### 3. Application and Scope

3.1. The FLEGT Regulation sets out the broad requirements and principles for the FLEGT licensing scheme and is supplemented by an Implementing Regulation. The UK is now required to put these Regulations into effect and we intend to do this using secondary legislation made under section 2(2) of the European Communities Act 1972.

3.2. The FLEGT Regulation is a trade-based solution to illegal logging, and as such, efforts are most effective when taken at the EU level.

3.3. The FLEGT Regulation does not provide comprehensive detail of exactly how each Member State will develop its system, or how individual organisations will comply. Such detail is left for Member States to develop, who are therefore currently undertaking their own implementation measures. We are working with other Member States to ensure a

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<sup>5</sup> <http://www.defra.gov.uk/animalhealth/cites/>

CITES refers to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), which is an international agreement between governments that came into force in 1975. Its purpose is to ensure that no species of wild fauna or flora becomes or remains subject to unsustainable exploitation because of international trade. CITES accords varying degrees of protection to over 30,000 species of animals and plants, whether they are traded as live or dead specimens, parts (such as ivory or leather), or derivatives (such as medicines made from animals or plants). The member countries act together by regulating trade in species listed under the three appendices to the CITES Convention.

harmonised approach to implementation of the FLEGT Regulation as far as is possible. Member States will establish the detail of their individual enforcement and compliance systems when putting the FLEGT Regulation into effect in their territory.

3.4. To ensure compatibility with WTO rules on non-discrimination, the FLEGT Regulation and Implementing Regulation apply to all applicable timber and timber products (which may vary slightly in each country's VPA) that are exported to the European Union.

### **Coverage: Products in scope**

3.5. A list of timber and timber products which are within the scope of the FLEGT Regulation is set out in Annexes II and III<sup>6</sup>. Annex II contains a list of products which will be included within the scope of all Voluntary Partnership Agreements with all partner countries as long as they are a permitted export, whereas Annex III contains a list of products which will only apply to specific VPAs. This means that certain products may only be covered by some VPAs. Annex III will be amended, as necessary, as new VPAs are agreed. The Government will produce guidance on this closer to the time that the first FLEGT licensed shipments arrive in the UK.

**Q1: Is it clear to you what timber and timber products are in scope of the FLEGT Regulation, and therefore what goods will need to be imported with a FLEGT licence in this scheme?**

## **4. Devolution**

### **Legal Application**

4.1. The FLEGT Regulation does not fall within an area for which responsibility has been devolved to Wales or Scotland, or transferred to Northern Ireland. As a result, the secondary legislation which we would put in place would extend to, and put in place arrangements to implement the FLEGT licensing scheme in, England, Wales, Scotland and Northern Ireland.

4.2. Information on our approach to implementation to date, as described throughout this public consultation document, has been shared with the Devolved Administrations and we will continue to work with them as we finalise the implementation decisions, which will be firmed up as a result of responses received to the consultation.

4.3. The FLEGT Regulation does not apply to Gibraltar or to the UK's Crown Dependencies of Jersey, Guernsey and the Isle of Man. However, the Crown Dependencies have decided to implement the FLEGT timber licensing scheme within their jurisdictions and will take forward their own legislation to achieve this.

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<sup>6</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:347:0001:0006:EN:PDF>

## 5. Summary of costs and benefits

5.1. Alongside this public consultation document we have produced an impact assessment which compares the costs and benefits associated with implementation of the FLEGT licensing scheme. This document is designed to be looked at in parallel with the Impact Assessment, which can be found at:

<http://www.defra.gov.uk/corporate/consult/flegt/index.htm>

5.2. Costs are based upon our initial assessment of the likely costs accruing to importers, based upon our tentative plan to implement a full cost recovery scheme starting in year three of operation of the FLEGT licensing scheme. These costs accrue through a charge imposed upon importers (from year three), which has been estimated at the level necessary to achieve cost recovery. This estimated cost has been calculated based upon the cost to the competent authority of processing, checking and verifying the FLEGT licensed shipments, based in turn upon the volumes of VPA timber entering the UK after certain dates. We ask for specific data from stakeholders that will help us refine these costs and likely volumes of timber and timber products arriving in the UK.

5.3. We would welcome further data or other evidence from stakeholders on the costs they would envisage accruing from implementation of the FLEGT licensing scheme. Administrative costs to industry, including the costs of making extra checks for compliance with FLEGT when signing contracts, and any other costs, need to be better understood. Finally, we do not have data on the number of niche operators that only / or mainly import from current or future FLEGT VPA countries. If any importer believes that they would be disproportionately affected by the FLEGT licensing scheme, we would welcome data from them to demonstrate this. This will refine our impact assessment.

5.4. We have included information in the Impact Assessment on positive benefits accruing in timber producing countries outside of the UK. This is because one of the primary aims of the FLEGT Regulation is to achieve the Government's international development objective of promoting good forest governance through tackling illegal logging. It is recognised that many of these benefits are difficult to quantify, and therefore we have used a number of existing analyses to draw out our conclusions in this area. Benefits are also expected to accrue to the UK timber trade in terms of a trustworthy legality verification standard, and consequent added value for the production of timber products.

**Q2. Are you content that the costs reflected in the consultation impact assessment reflect the actual costs to your organisation? Please provide any evidence of further potential costs and benefits. We have included some additional questions for Small and Medium Enterprises in relation to this question:**

- a. **What are the characteristics of your business? For example, number of employees, size, ownership type (sole proprietor, partnership, limited company, etc...) and geographic distribution?**
- b. **What changes, if any, will your company have to make to the way your business operates in order to comply with the FLEGT Regulation?**

**Q3. Do you have any evidence to suggest that niche importers which might only import timber and timber products from FLEGT VPA countries might be disproportionately affected by the FLEGT licensing scheme?**

**Q4. Have we provided an accurate representation of the benefits accruing to society?**

## **6. Decision on UK Competent Authority**

6.1. A Competent Authority is required to take overall responsibility for the UK Government arrangements for the FLEGT licensing scheme, to check FLEGT licences for timber imports from VPA countries, verify their validity, and communicate with UK customs authorities to provide clearance for import. The Competent Authority will also coordinate subsequent inspections and enforcement where these are necessary. Not all of these functions will necessarily be fulfilled by the same UK authority.

6.2. After considering a number of options, we have appointed the UK CITES Licensing Management Authority, the implementing body in the UK for CITES (Convention on International Trade in Endangered Species of Wild Fauna and Flora)<sup>7</sup>, housed within Defra's Executive Agency, Animal Health as the Competent Authority. Our deliberations concluded that this agency is best placed to take on both overall responsibility for FLEGT licence validation, and to coordinate the process for any follow-up inspections (including post-importation checks at traders' premises) that may be needed. This is similar to systems in place for CITES licensing, which involves verification of licences for import of restricted goods, liaison with customs authorities, and follow up actions for irregularities.

6.3. In summary, the Government has appointed the CITES Licensing Management Authority in Animal Health as Competent Authority for the following reasons:

- a. Their flexibility and verified potential to increase capacity over time, once new VPAs are signed;
- b. Experience of assuring legality of timber, as well as manufactured products, as opposed to raw timber only, as a day to day aspect of fulfilling their remit;
- c. Experience of regular liaison with tropical timber nations and governments;
- d. Existing working relationships with border authorities including the UK Border Agency and HMRC are already in place;
- e. Existing communications and administrative processes will form the basis for a FLEGT timber licensing mechanism with minimal additional set-up and redesign; and
- f. Existing information technology systems can be used and are compatible.

## **7. Guidance for Industry stakeholders on implementation**

### **Definition of 'import', 'importer' and other elements**

7.1. Under the FLEGT Regulation 'imports' are defined as the release for free circulation of timber products, which is in accord with the meaning set out at Article 79 of Council

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<sup>7</sup> See footnote 5 for an explanation of CITES

Regulation (EEC) No 2913/1992 of 12 October 1992 establishing the Community Customs Code<sup>8</sup>.

7.2. The term ‘importer’ is not defined in the FLEGT Regulation. For the purposes of our domestic arrangements, we propose defining ‘importer’ as the person who has ownership and the right of disposal of the goods, and has arranged for release for free circulation. Note, under section 1 of the Customs and Excise Management Act 1979 (CEMA), the term “importer” includes any owner or other person for the time being possessed of or beneficially interested in the goods, which applies in relation to any goods at any time between their importation and the time when they clear customs for free circulation.

### **Definition of ‘export’ from the FLEGT VPA country**

7.3. Though other international trade agreements, such as the Generalised System of Preferences (GSP), are based on the ‘country of origin’ of imports, which is a well-understood term in EU customs rules, the FLEGT Regulation does not take a ‘country of origin’ approach. Instead, it states that the Regulation applies to products ‘exported from partner countries’.

7.4. ‘Export’ is defined in the FLEGT Regulation as the physical leaving or taking out of timber products from any part of the geographical territory of a partner country to bring them into the [European] Community. This will include manufactured timber products that are exported from the FLEGT VPA country, but which are made from timber which was not harvested there.

7.5. In other words, all shipments of timber or timber products (covered by a particular VPA Agreement) exported from the VPA country will require a FLEGT licence, regardless of whether or not they were harvested or further processed there. Timber or timber products produced in a VPA country but exported to a non-VPA country prior to further export to the EU will not require a FLEGT licence.

7.6. The VPAs with the Republic of Congo and Cameroon will provide specific exceptions for transit timber. Under the Republic of Congo and Cameroon VPAs, timber from third countries that transits Republic of Congo or Cameroon and leaves from one of their territorial ports will move through the country under the control of Cameroon or Congo Customs authorities. This timber will be traced in Cameroon’s or Republic of Congo’s respective traceability systems as timber in transit and will identify them as an export of the third country. They will not require a FLEGT licence. Cameroon or Congo Customs authorities (as the case may be) will provide confirmation that such shipments are leaving their ports as an export of a third country. Other VPAs may also contain their own specific variations to the FLEGT requirements.

7.7. Other useful definitions can be found in the FLEGT Regulation 2173/2005<sup>9</sup> and its Implementing Regulation 1024/2008<sup>10</sup>.

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<sup>8</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31992R2913:EN:HTML>

<sup>9</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:347:0001:0006:EN:PDF>

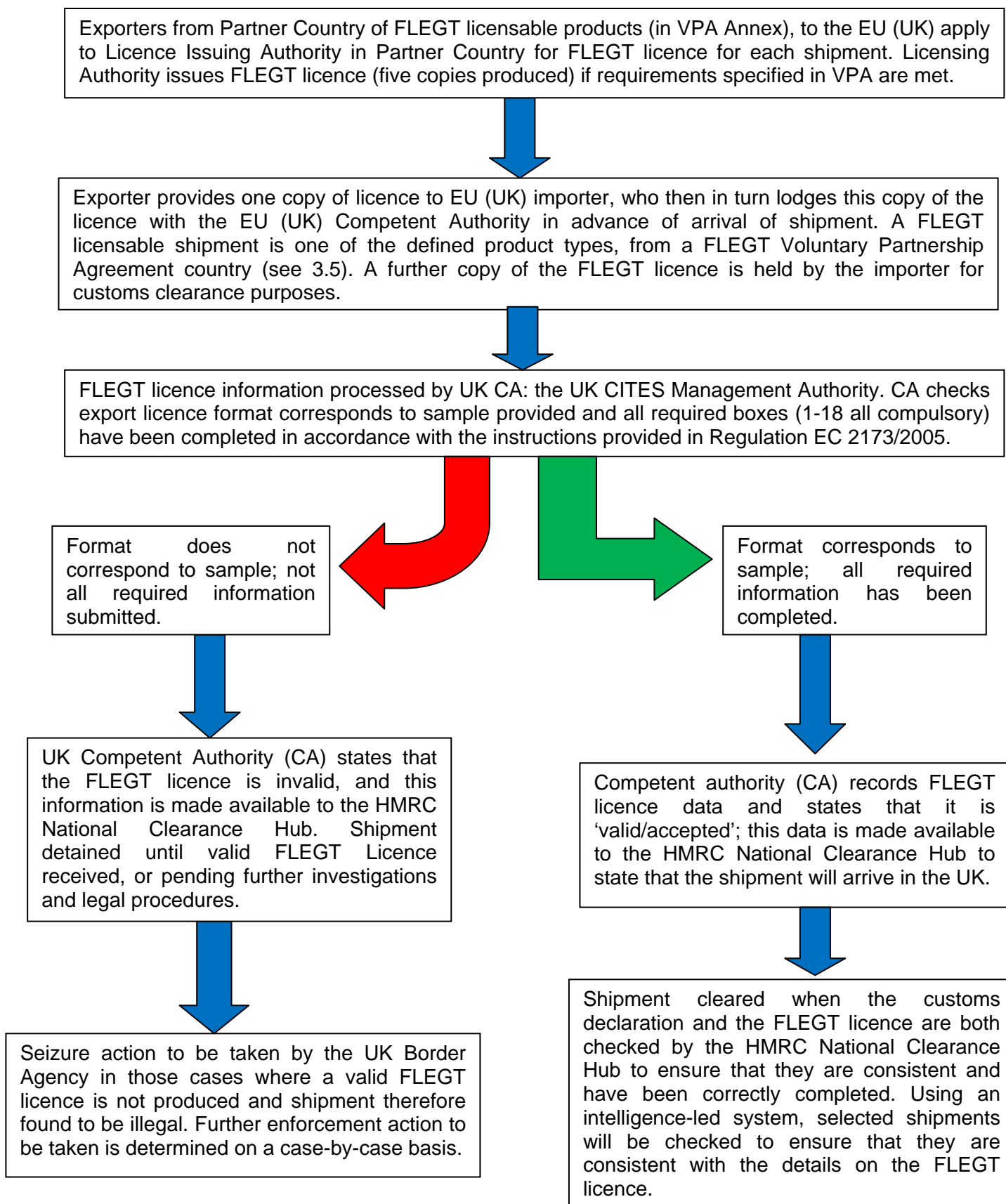
<sup>10</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:277:0023:0029:EN:PDF>

**Q5. Is our broad outline of the FLEGT licence approval process a clear overview (to be supplemented by detailed guidance at a later date)?**

**Q6. Are the definitions of 'import', 'importer', and 'export' clear in their coverage?**

7.8. To ensure clarity for the industry and other stakeholders, we have illustrated in the flow chart below the FLEGT licence verification process, and the stages through which a FLEGT licensed shipment will pass during customs clearances.

**Diagram 1: FLEGT licence approval process**



## 8. Implementation and Delivery Plan

### Process for the development of the FLEGT licensing scheme - Delivery Plan

- 8.1. It is expected that the first shipments of FLEGT licensed timber and timber products will arrive in the UK in mid-2010. We are legally required to have in place arrangements to receive FLEGT Licensed timber into the UK by the time the first VPA country is added to Annex I of the FLEGT Regulation<sup>11</sup>.
- 8.2. Certain decisions about the broad framework of the FLEGT process in the UK have already been taken: such as the choice of a Competent Authority (CA), because it has been necessary to start work with the CA on implementation. We have outlined our rationale for the choice of CA in section 5 above.
- 8.3. HMRC is responsible for the customs clearance process, and this will include checking the FLEGT licence against the customs declaration. Importers will be required to be in possession of a valid FLEGT licence. The CITES Licensing Management Authority in Animal Health will notify HMRC that a given shipment is covered by a valid FLEGT licence. HMRC will release a shipment of a relevant product exported from a VPA country for free circulation only if it has received such notification from the CA, and is satisfied that the customs declaration and the FLEGT licence match. The UK Border Agency will be responsible for carrying out physical examination and taking enforcement action where a shipment of timber products fails to meet the FLEGT licensing requirements. For more information on this process, see diagram 1 on page 10.

### Next steps

- 8.4. Defra is now seeking views ahead of making final decisions on the implementation of several elements of the FLEGT licensing scheme before domestic legislation putting into effect arrangements for the FLEGT process in the UK is drawn up. . We outline throughout this public consultation document key elements of our planned implementation approach.
- 8.5. The following four sections outline our suggested approaches to four elements of implementation:
- 8.5.1. Delayed full cost recovery (section 9);
  - 8.5.2. Enforcement and penalties (section 10).
  - 8.5.3. An intelligence-led regime to check and verify shipments (section 11);
  - 8.5.4. Dealing with seized timber (section 12);
- 8.6. Following this consultation the Government will finalise its plans in each of these areas, and undertake further work to support the process of change, for example guidance on the operation of the scheme for all current and prospective importers will be developed. Defra will also work alongside the Competent Authority, the UK CITES Management Authority, to further publicise the commencement of operation of the scheme closer to the time of arrival

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<sup>11</sup> The FLEGT Implementing Regulation requires that domestic provisions be put into place in each Member State by the time that the first amendment to Annex I of the FLEGT Regulation is adopted. This amendment is a legal process, which will occur once the European Union is content that systems are in place in each VPA country to verify the legality of FLEGT licensed timber and timber products exported from that country.

of the first shipments from the first VPA country (see section 6.1; expected from the mid-2010 onwards).

8.7. We will introduce a review clause into new domestic legislation putting into effect the FLEGT licensing scheme in the UK which will require evaluation of the operation of the scheme after two years. We will also undertake periodic reassessments of the fees payable. The European Commission has also specified review and reporting requirements (Article 9, FLEGT Regulation<sup>12</sup>).

## **9. Delayed Full Cost Recovery**

### **What is full cost recovery?**

9.1. Full cost recovery means recovering the total costs of a project, service or activity, including a relevant part of overhead costs. Organisations must seek to secure funding or income to recover a proportion (or part) of overhead costs, as well as the direct costs of a project.

### **Why full cost recovery for the FLEGT licensing scheme?**

9.2. Full cost recovery is about developing a sustainable funding approach that covers the true costs of delivery, and about developing greater transparency about funding decisions. It is UK government policy to charge for many publicly provided goods and services. This approach helps maximise value for money in the spending of tax revenues, and drives the use of goods or services in a rational way because it prevents waste through excessive or badly targeted consumption or use of that service. It also promotes fair competition and helps develop markets. Government policy is increasingly to seek full cost recovery to recover the costs of running any scheme, such as a licensing scheme. This reflects the standard approach to setting charges for public services at full cost recovery, which also normally also includes recovering a charge for the cost of capital goods. Any charging regime for the FLEGT Regulation should cover the costs to Government of enforcement and maintenance of the new system.

9.3. However, we are aware that the intention of the FLEGT VPA approach is to provide market-based incentives to trade in VPA products from these countries, and a significant cost for checks and verification of the licence issued by the authorities in VPA countries may introduce a barrier to those seeking to promote and engage in the FLEGT process. Imposing a charge from the outset of implementation of this policy could therefore prove counterproductive to the aims and objectives of that policy.

9.4. We are also working on the basis that the market for timber and timber products is currently undergoing some evolution, with trading conditions, for example, being driven by European and wider policy changes, such as the emerging Due Diligence Regulation (Commission proposal 644/2008). It is our view that the market will evolve and the benefits of the reduced risk from trading FLEGT licensed timber will make it appropriate to charge operators at a later stage. The 'beneficiary pays' idea is an integral part of full cost recovery; charges target those that benefit from a policy intervention, and they pay for

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<sup>12</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:347:0001:0006:EN:PDF>

implementation, rather than funding this through general taxation. We recognise, however, that that these benefits may take time to accrue.

- 9.5. We therefore acknowledge that there are reasons to delay charging for this particular scheme until the Government is confident that FLEGT licensed timber and timber products will deliver a sufficient benefit to traders to justify it. We propose that during the first years of operation of the FLEGT licensing scheme, we will not impose a charge on importers to cover the costs to HMG, for example for checking and verifying FLEGT licences and enforcement.
- 9.6. The issue of charging will be reconsidered by the Government at a later stage. We hope that in time, with both the increasing number of shipments, and timber volumes that we expect to arrive as a result of further VPAs being agreed, economies of scale in management and running of the scheme will emerge for Government and the private sector, which mean that imposing a charge will be more appropriate.
- 9.7. For the purposes of providing an indication of how such a delayed Full Cost Recovery might work, we have included at Annex 2 an outline of how an estimated number of shipments, when multiplied by an initial estimation of the possible charge for checking each licence, produces a sum which would recover, for the Government, the costs of running this scheme. The initial estimate of the cost of checking a licence has been produced by taking into account a Government administrator's time to check the licence, the input time to communicate receipt of this licence to the border authorities, and an intelligence-led investigations regime. Costs would of course need to be maintained under periodic review.
- 9.8. Finally, having considered the administrative burden of implementing this policy, it is clear that at the outset, the costs of implementing a charging regime could be greater than the potential benefits from that scheme. As economies of scale develop, it will be more cost effective to run a charging mechanism alongside the other aspects of enforcement of this scheme.

**Q7. Are you content with the delayed Full Cost Recovery approach that we have described?**

## **10. Enforcement and sanctions**

### **Summary**

- 10.1. This section presents a suggested approach to developing applicable offences and a range of corresponding penalties for the FLEGT licensing scheme for the UK. We are consulting stakeholders in order to identify a full range of possible offences and penalties
- 10.2. Article 5 of the FLEGT Regulation calls for Member States to put in place 'an effective, proportionate and dissuasive penalty regime'. The regime needs to be effective in changing the behaviour of those involved in the timber trade, deterring repeat or future offenders from committing offences, and making the trade in illegal timber from FLEGT countries unprofitable. The high-value of some timber products traded means that the

penalties regime should aim, where possible, to reflect the expected financial benefits of non-compliance.

10.3. The application of criminal and civil penalties, if and where applicable, will remain at the discretion of the Courts and competent authorities respectively. However, as a general principle, the Government will seek to ensure in future implementation that penalties set take into account the level of the harm caused by illegal logging<sup>13</sup>, through communication to raise awareness of this issue with the UK prosecuting authorities, judges and magistrates.

#### **What could a FLEGT licensing scheme offence and penalty regime look like?**

10.4. Our intention is for the UK legislation putting into effect the FLEGT Regulation to make reference to the Customs and Excise Management Act 1979 (CEMA, 1979), so that the enforcement powers and penalties which apply under this Act would also apply to breaches of the requirements of the FLEGT licensing scheme. If new domestic legislation putting the FLEGT licensing scheme into effect in the UK does not make reference to offences and penalties in existing legislation, then this new domestic legislation would need to set out new offences and the associated penalties, including any administrative sanctions, as well as all enforcement and inspection powers.

10.5. CEMA 1979 is a wide ranging Act containing most of the enforcement powers that can be exercised by UK Border Agency officials. It contains a wide range of investigative and enforcement powers for customs offences and also penalties for non-compliance. More detail on this Act can be found below in 12.7 to 12.15.

10.6. If it becomes apparent, following this stakeholder consultation and an analysis of responses, that additional offences and the associated penalties are required to put in place 'an effective, proportionate and dissuasive penalty regime', then these could be contained within the secondary legislation which will be established to put the FLEGT licensing scheme into effect. We have specified the core offence under the FLEGT Regulation, and what this would encompass in Table 1 below. The description of example criteria that would make a licence invalid are included simply to provide a range of possible reasons for authorities to investigate a case further; and are not necessarily restricted to this list.

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<sup>13</sup> Environmental impacts include the greenhouse gases (including carbon dioxide) emitted, and that not sequestered due to illegal logging of the forest ecosystem, loss of biodiversity and the concurrent loss of ecosystem services, and the serious social impacts due to corruption, loss of government revenues that are described in the introduction to this document.

**Table 1: Possible breaches of the FLEGT Regulation – the core offence and rectifiable breaches**

Core offence

The core offence will be the import or attempted import of FLEGT-licensable goods into the UK in breach of the FLEGT Regulation. The main requirement of the FLEGT Regulation is that shipments exported from a VPA country and consisting of products included in Annex II or Annex III of the FLEGT Regulation require a FLEGT licence. Failure to produce a FLEGT licence is, of course, the most obvious breach of this requirement. However, the following would also constitute a contravention, and render the FLEGT licence invalid:

- i. **importing a volume or weight of timber or timber products more than 10% in excess of, or less than, that defined in the associated FLEGT licence<sup>14</sup>;**
- ii. **importing timber or timber products which do not match the description (product, species, country of export) in the associated FLEGT licence. This would constitute an inadequate / incomplete licence;**
- iii. **presentation of an expired, or a forged or illegally altered licence.**

The presentation of a forged licence may also constitute an offence under the Forgery and Counterfeiting Act 1981 for which separate penalties apply.

NB. We will produce guidance for importers to accompany the domestic legislation explaining what is required by the FLEGT licensing scheme and what behaviour will constitute a contravention of the FLEGT Regulation.

Rectifiable Breaches

Sometimes it will be possible to rectify a breach of the Regulation, for example where FLEGT goods are imported without a FLEGT licence, but a valid FLEGT licence is eventually produced or where an expired licence is replaced by a valid one.

In some cases, it might be appropriate to deal with these types of breaches by shipment detainment, pending checks, further clarification or receipt of a valid licence before clearance.

**Q8. Do you think that there is any other behaviour which would contravene the requirements of the FLEGT Regulation, in addition to the core offence, and which ought to be made an offence under domestic legislation?**

**Q9. Do you agree with our analysis of what information deficiency, or inaccuracy, would be covered by the core offence?**

**Q10. Do you have anything to add on how breaches of rectifiable offences should be dealt with by enforcement authorities? There is an opportunity to comment on the application of administrative penalties at Question 12.**

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<sup>14</sup> See Article 10 (2) of the FLEGT Implementing Regulation



## **Provisions contained within the Customs and Excise Management Act (CEMA) 1979**

- 10.7. As explained at 10.5, it is possible for CEMA 1979 to provide the basis of the enforcement and penalty regime for the FLEGT licensing scheme in the UK. If this approach is taken, domestic legislation putting the FLEGT Regulation into effect in the UK would make reference to CEMA 1979 so that the relevant enforcement powers and penalties which apply under that Act would apply to breaches of the requirements of the FLEGT licensing scheme; thus making the relationship between CEMA and the FLEGT Regulation clear. This approach would be similar to that taken in the COTES Regulations (Control of Trade in Endangered Species (Enforcement) Regulations 1985 and 1997) that enforce the European Union Wildlife Trade Regulations<sup>15</sup>, which in turn implement particular aspects of the CITES Convention 1973.
- 10.8. Subject to comments and views to be received from stakeholders, we currently believe that the offences and penalties contained within CEMA 1979 serve the broad needs for UK implementation in terms of defining a range of import offences. Table 2 shows a range of offences that currently already exist within CEMA 1979, and the accompanying criminal penalties. If the Government uses CEMA 1979 as the basis for implementation of the FLEGT Regulation, those relevant penalties which the Government decides to draw upon will thereby also be at the disposition of the Competent Authority (UK CITES Management Authority) and prosecuting authorities.
- 10.9. As seen at Table 2, CEMA 1979 specifies penalties for a number of offences for import of 'guilty goods' in contravention of a prohibition or restriction. This includes where goods have been imported without a required licence. Seizure is such a provision and the UK Border Agency enforces this provision at the UK border. This could form an important part of the enforcement framework to tackle breaches of the FLEGT Regulation. CEMA 1979 also contains criminal provisions and significant criminal penalties, including a term of imprisonment, can be imposed where there has been intentional or negligent breach of the rules. It is key to note that for any seizure of goods, financial penalty or term of imprisonment applied by the courts, there are established processes and appeals procedures in place for such offences.
- 10.10. We are currently considering whether there are valid reasons for creating an additional incentive for importers to ensure they are compliant with the Regulation. As can be seen in Table 2 above, under section 50, CEMA 1979, a person may only be liable to criminal penalties (i.e. a fine or imprisonment) where he has acted *with intent to evade* an import prohibition or restriction. We would like views on whether we should create a new offence, specifically for the FLEGT licensing scheme, which would not involve establishing, by gaining evidence of any intent or other kind of blameworthy behaviour, such as recklessness, on the part of the accused. This is known as a strict liability offence.

### **Q11. Do you think that it will be necessary to create a strict liability offence?**

- 10.11. If a strict liability offence is deemed necessary, then the fact that it will not require the prosecutor to prove intent on the part of the accused might indicate that a light penalty

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<sup>15</sup> The 'European Union Wildlife Trade Regulations' is a term used in respect of a number of Regulations which implement CITES, and covers: Council Regulation (EC) No. 338/97; Commission Regulation (EC) No. 865/2006 and Commission Regulation (EC) No 811/2008

would be the most appropriate. We might also suggest that the offence should contain a due diligence defence, for example, a defence might accrue where a person took all reasonable steps to establish that the goods were licensed. Further, an administrative penalty might be considered more suitable than a criminal penalty. We set out some of the principles for setting administrative penalties in the section which follows.

## **Principles of good practice in setting administrative penalties**

10.12. It would be possible for new domestic legislation putting into effect the FLEGT licensing scheme in the UK to introduce a new offence or offences, for which administrative penalties (sometimes referred to as civil penalties) could be applicable. Such penalties could be applied to any new offences created where criminal sanctions are not appropriate. Any new offences and penalties would be set out in new domestic legislation (see 10.4). An advantage of setting administrative penalties is that they can be imposed more quickly than criminal proceedings, and are likely to result less costly than pursuing a criminal case through the courts.

10.13. The Regulatory and Enforcement Sanctions Act 2008 (RES Act, 2008) offers guidance for the setting of administrative penalties in new legislation and provides authorities with guidance on the application of such penalties. If used for any new offences introduced in new domestic legislation putting into effect the FLEGT licensing scheme in the UK, administrative penalties should adhere to principles contained within the RES Act 2008, as well as those emerging from the Hampton<sup>16</sup> and Macrory<sup>17</sup> reviews.

10.14. In the final report of his review of regulatory enforcement, Professor Macrory found that regulators were over-reliant on criminal prosecution as a means of enforcement and that this led to a compliance gap, where some regulators lacked the appropriate enforcement tools to address regulatory non-compliance. Professor Macrory also found that criminal sanctions are often an insufficient deterrent to truly criminal or rogue operators. He recommended introducing a set of administrative penalties that would allow regulators to impose proportionate, flexible and meaningful sanctions. Furthermore, he felt that the courts lacked the necessary tools to tackle non-compliance and recommended a range of improvements to criminal prosecution and sentencing.

10.15. The Macrory report's recommendations were accepted in full by the UK Government. Macrory recommended that the following principles should underpin any regulatory sanctioning regime:

- Aim to change the behaviour of the offender;

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<sup>16</sup> <http://www.berr.gov.uk/files/file22988.pdf> 'Reducing administrative burdens: effective inspection and enforcement' considered how to reduce unnecessary administration for businesses, without compromising the UK's excellent regulatory regime. Hampton (2005) found that the current regulatory system imposed too many forms, duplicate information requests and multiple inspections on businesses. He recommended that introducing risk assessment could: reduce inspections by up to a third – meaning around one million fewer inspections, and cut the number of forms sent by regulators by almost 25 per cent. The report also stated that risk assessment would help regulators target non-compliant businesses more effectively, and reduce the burden on those businesses that do comply.

<sup>17</sup> <http://www.berr.gov.uk/files/file44593.pdf> Improving Compliance among Businesses (Macrory Review). The Macrory Review looked at the main reasons businesses do not comply with Regulations imposed upon their business, and what could be done to address the situation. Macrory's Final Report was published in November 2006 and made nine recommendations. These aimed to ensure regulators had a set of modern and flexible sanctions to use that were proportionate and appropriate to the risks faced.

- Aim to eliminate any financial gain or benefit from non-compliance;
- Be responsive and consider what is appropriate for the particular offender and the regulatory issue;
- Be proportionate to the nature of the offence and the harm caused;
- Aim to restore the harm caused by the regulatory non-compliance, where appropriate; and
- Aim to deter future non-compliance.

10.16. Should it be considered appropriate for an administrative penalty to be taken forward, we would apply these principles. It is proposed that an underpinning principle of any administrative penalty regime taken forward should be that such penalties should be selectively applied by the Competent Authority to reflect the severity of compliance breaches in a meaningful way.

**Q12. Do you agree that administrative penalties should:**

- a. be applied if new offences are set out in new domestic legislation, and**
- b. be applied selectively to reflect the severity of compliance breaches in a meaningful way?**

## **Responses to breaches of the FLEGT Regulation**

10.17. We have presented here an initial structure for stakeholders on a number of possible approaches to enforcing the FLEGT licensing scheme. We would like to receive views and comments from stakeholders on whether we have missed any potential offence(s), what the guiding principles for the enforcement regime should be, and views on how we can ensure that our enforcement provisions provide an ‘effective, proportionate and dissuasive’ response to breaches of the FLEGT Regulation.

**Q13. Do you have any final comments on the range of possible offences that have not been acknowledged here, how penalties should be applied to these offences, including whether you think administrative penalties would be an appropriate response?**

## **11. Professional expertise to check and verify shipments**

11.1. We plan to utilise an intelligence-led system for identifying the shipments appropriate for physical checks by specialist inspectors, building on the existing good practice within Her Majesty’s Government in this area. The aim of such checks would be both to verify the detail included on the FLEGT licence, which will be as per the sample attached at Annex 1 of the Implementing Regulation<sup>18</sup>, but also to identify whether any material particular on the FLEGT licence might raise cause for concern by an enforcement official.

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<sup>18</sup> [http://ec.europa.eu/development/icenter/repository/Com\\_Reg\\_1024-08\\_en.pdf](http://ec.europa.eu/development/icenter/repository/Com_Reg_1024-08_en.pdf)

- 11.2. The verification of detail on the FLEGT licence checks would seek to ascertain whether the relevant details recorded on the licence, such as the county of origin, timber volume, the species or common name, commercial description, distinguishing marks, or number of units, give inspectors any cause for concern. This would be an administrative check by the Competent Authority that the information on the FLEGT licence is consistent with that included on the copy of the licence which accompanies shipments.
- 11.3. We intend to use the process described in Diagram 1 at page 11 to ensure compliance with the provisions in the licence, building on the Government's range of expertise in similar areas of implementation, such as for CITES. We propose that the intelligence gathering and analysis system for implementation of the FLEGT licensing scheme would thereby build upon the CITES model. Government agencies currently work alongside each other in a collaborative effort in this area, for example drawing upon the services of the National Wildlife Crime Unit, and for contacts with other law enforcement agencies internationally.
- 11.4. Intelligence gathering starts with information collected by the UK authorities, such as the National Wildlife Crime Unit, on minor misdemeanors through to, and including, organised crime.
- 11.5. We envisage that a greater amount of work to verify the authenticity of licences will be required at the early stages of operation of the scheme, while the system gets up and running, with more targeted work required over time. Also, additional effort on verification might well be needed when a VPA is signed with a new partner country.
- 11.6. The Government has in place systems for targeting its inspection efforts, and these will be deployed in such a way so as to minimise untargeted effort, and maximise Government enforcement and checking and verification effort on those shipments most likely to be non-compliant.

**Q14. Are you content with this system to check and verify shipments?**

**Q15. Do you have any evidence to suggest reasons why this may, or may not, work in practice i.e. if such detection systems might not pick up non-compliance?**

## **12. Dealing with seized timber**

- 12.1. We believe that seizure of timber is a significant loss to the trader, and sends the message to them that they should no longer trade without the safeguard of legality that a FLEGT licence would provide. We believe that this has a sufficient deterrent effect to disincentivise operators trading in non-FLEGT licensed (i.e. illegal timber) from VPA countries wherever possible.
- 12.2. We expect that EU timber importers will seek to comply with the FLEGT licensing requirements and that the number of irregularities will be few. However it is important to

clarify a proposed policy in respect of seized timber, given that there may be cases where timber will be seized.

12.3. Recognising the huge intrinsic, ecological and conservation values of the tropical rainforests where much of the seized timber will come from, and the huge detrimental effect that illegal logging has on human livelihoods, ecosystems, and societies globally, the decision of how to deal with such timber, some of which might be precious hardwoods of endangered species is a complex one. There are a number of options for dealing with seized timber and Defra would like to seek views from stakeholders on these.

12.4. Our proposal is that seized timber will become the 'property' of the Crown, to be managed by the UK Border Agency and dealt with on a case by case basis. We will further develop the implementation strategy for this proposal through this stakeholder consultation, but are now seeking views from stakeholders on what would be an acceptable use, by HM Government, for seized timber and timber products from FLEGT VPA countries.

As a result of responses from stakeholders to this consultation, it might be possible for Government to develop guidance for UK Border Agency officials in dealing with seized timber. Options include donating timber to charitable or other socially or culturally useful destinations; possible use of some types of material as a source of biomass energy, and selling the timber at public auction. If auctioned, it may be considered that a minimum price should be set, so that seized timber would not undercut the legally verified timber on the market.

12.5. We believe that it is not desirable, and would not be possible, to define at this stage what will happen to any particular future seized shipment, due to the range of timber or timber products, and size of shipments that this could represent.

**Q16: Are you content with the approach to dealing with seized timber outlined here? In particular, do you have any views on:**

- a. **How seized timber should be disposed of e.g. whether some seized shipments should be sold at a public auction?**
- b. **How decisions should be made as to how any particular shipment is dealt with?**

## **Annex 1: Impact assessment**

Included at link:

<http://www.defra.gov.uk/corporate/consult/flegt/index.htm>

## **Annex 2: List of questions for stakeholders: Consultation on the UK implementation of the European FLEGT Regulation 2005**

This list of questions provides guidance for stakeholders on areas of particular interest to the Government. However, these are our indicative questions; please feel free to submit your views in whatever form is most appropriate to you.

Specific questions relating to impacts on small and medium enterprises have also been included within this questionnaire.

**Q1: Is it clear to you what timber and timber products are in scope of the FLEGT Regulation, and therefore what goods will need to be imported with a FLEGT licence in this scheme?**

**Q2. Are you content that the costs reflected in the consultation impact assessment reflect the actual costs to your organisation? Please provide any evidence of further potential costs and benefits. We have included some additional questions for Small and Medium Enterprises in relation to this question:**

- a. What are the characteristics of your business? For example, number of employees, size, ownership type (sole proprietor, partnership, limited company, etc...) and geographic distribution?
- b. What changes, if any, will your company have to make to the way your business operates in order to comply with the FLEGT Regulation?

**Q3. Do you have any evidence to suggest that niche importers which might only import timber and timber products from FLEGT VPA countries might be disproportionately affected by the FLEGT licensing scheme?**

**Q4. Have we provided an accurate representation of the benefits accruing to society?**

**Q5. Is our broad outline of the FLEGT licence approval process a clear overview (to be supplemented by detailed guidance at a later date)?**

**Q6. Are the definitions of 'import', 'importer', and 'export' clear in their coverage?**

**Q7. Are you content with the delayed Full Cost Recovery approach that we have described?**

**Q8. Do you think that there is any other behaviour which would contravene the requirements of the FLEGT Regulation, in addition to the core offence, and which ought to be made an offence under domestic legislation?**

**Q9. Do you agree with our analysis of what information deficiency, or inaccuracy, would be covered by the core offence?**

**Q10. Do you have anything to add on how breaches of rectifiable offences should be dealt with by enforcement authorities? There is an opportunity to comment on the application of administrative penalties at Question 12.**

**Q11. Do you think that it will be necessary to create a strict liability offence?**

**Q12. Do you agree that administrative penalties should:**

- a. be applied if new offences are set out in new domestic legislation, and**
- b. be applied selectively to reflect the severity of compliance breaches in a meaningful way?**

**Q13. Do you have any final comments on the range of possible offences that have not been acknowledged here, how penalties should be applied to these offences, including whether you think administrative penalties would be an appropriate response?**

**Q14. Are you content with this system to check and verify shipments?**

**Q15. Do you have any evidence to suggest reasons why this may, or may not, work in practice i.e. if such detection systems might not pick up non-compliance?**

**Q16: Are you content with the approach to dealing with seized timber outlined here? In particular, do you have any views on:**

- a. How seized timber should be disposed of e.g. whether some seized shipments should be sold at a public auction?**
- b. How decisions should be made as to how any particular shipment is dealt with?**