



Department
for Environment
Food & Rural Affairs

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Consultation on the Timber and Timber Products (Placing on the Market) Regulations 2013

A summary of responses to the consultation and
the government reply

February 2013



Llywodraeth Cymru
Welsh Government



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www.defra.gov.uk/consult/2012/12/27/timber-regs-2013/

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Introduction

This paper summarises the responses to the public consultation on the Timber and Timber Products (Placing on the Market) Regulations 2013¹. These regulations provide for the enforcement of the EU Timber Regulations (EUTR), which come into force on 3 March 2013.

The consultation ran from 27 December 2012 to 4 February 2013, the relatively short consultation period reflecting the close engagement with stakeholders throughout the development of the regulations, and the need to bring the regulations into force to meet the EU Timber Regulations.

The consultation paper contained questions relating to enforcement, penalties, impacts on business and others, and guidance. Thirteen responses were received from six trade organisations, one company, four NGOs and two individuals. Defra held a stakeholder consultation event on 22 January 2013 with around thirty key stakeholders, the questions and issues raised at which were noted, and are incorporated in the summary of responses below.

Responses to the consultation

Enforcement

Defra proposed a number of enforcement mechanisms, including: powers of entry, powers of inspection, powers to seize timber, and powers to issue notices of remedial action. Defra also sought views on the level of enforcement for which the NMO should be resourced, proposing “full enforcement” of the UK’s obligations under the EUTR, in preference to additional supplementation of the enforcement approach under the “added value” and “maximum enforcement” regimes.

In the consultation document Defra asked respondents:

- **Are you content with our proposed approach to enforcement in the UK?**
- **Are you content with our proposals on the seizure of timber, including proposals for disposing of illegally harvested timber and for recovery of costs?**

The consultation responses show broad support for the proposed UK approach to enforcement, from across the range of respondents. All respondents were content with the proposed “full enforcement” regime, bar one NGO who advocated the “maximum enforcement” programme.

¹ The consultation paper, draft regulations, and associated documents can be found on the Defra website at www.defra.gov.uk/consult/2012/12/27/timber-regs-2013/.

A range of issues and requests for clarification relevant to enforcement were raised by respondents, which are detailed below, alongside the Government reply.

Issue raised by respondents	Government reply
<p>How will the NMO approach enforcement of the regulations?</p>	<p>The approach to enforcement will be a multi-tiered approach of supporting industry compliance, followed by non-criminal sanctions such as the issue of a notice of remedial actions; with prosecution reserved for those who demonstrate flagrant or persistent violations of the regulations.</p> <p>The NMO will have a significant focus on supporting the industry to comply through dialogue with the industry and the provision of advice. The NMO will take a risk-based approach to enforcement, targeting those parts of the industry where the risk of illegally harvested timber entering the EU is greatest.</p>
<p>It is not clear how the “full enforcement” proposal differs from “added value” and “maximum enforcement”.</p> <p>For instance, how many visits or spot-checks might a business be subject to under each approach? What sort of resources might a business have access to in relation to support for improving compliance?</p>	<p>The “full enforcement” proposal allows the UK to fulfil its obligations under the EUTR by providing checks on operators conducted in accordance with a periodically reviewed plan following a risk-based approach and responding to substantiated concerns (EUTR Article 10). The NMO will determine the number of visits to business and level of support provided to industry with a view to maximising compliance with the regulations.</p> <p>The “added value” and “maximum enforcement” options would provide the NMO with increased resources for spot checks and to carry out targeted operations on specific sectors of the industry as well as to provide greater support and advice to industry.</p>
<p>What scope is there to enforce the regulations with non-EU operators?</p>	<p>The NMO will expect non-EU operators to provide evidence of compliance with the regulations in much the same way as for EU operators. Where appropriate, the NMO will have powers to issue notices of remedial actions and to seize timber placed on the EU</p>

	market by non-EU operators.
<p>The draft regulations allow for the seizure of timber where inspectors reasonably believe the timber has been illegally harvested and placed on the market, in contravention of EU Timber Regulation 4(1). The phrase “reasonably believe” is too broad. On what grounds would the power to seize timber be triggered?</p>	<p>The phrase “reasonably believe” is a standard legal term. It would not be helpful for the effective enforcement of the Regulation to try to prescribe in too much detail the evidence the enforcement body requires. The level of evidence required for seizure of timber will vary on a case by case basis. Ultimately it will be for a magistrate (or sheriff in Scotland) to determine whether the actions of NMO inspectors are reasonable, based on all the available evidence. As part of their programme to support industry compliance, the NMO may provide further information on the grounds on which they would use their powers to seize timber.</p>
<p>Regulation 10 allows for seizure of illegally harvested timber or timber products placed on the market but not when there has been a failure to exercise due diligence. There should be some mechanism to impound timber while potential due diligence failures are investigated.</p>	<p>It is not considered a proportionate use of the power to seize timber for it to be used whenever there is a suspected failure to exercise due diligence. Should NMO inspectors, in the course of their investigations come across evidence that would cause them to reasonably believe that that illegally harvested timber had been placed on the market, they could then take action to seize the timber in those circumstances.</p>
<p>What will happen to timber that is seized under the regulations?</p> <p>How will seized branded timber products be disposed of?</p> <p>Can seized timber be returned to the country of harvest as a means of restitution?</p> <p>Can the timber be allowed to remain in the supply chain once penalties have been applied, through a process of formal dispensation granted by the NMO?</p>	<p>Draft regulation 10 allows for the destruction, donation, sale, or other disposal of seized timber. A number of available options for the disposal of seized timber allows for the wide variety of timber or timber products that could be seized. The appropriate method of disposal will be determined on a case-by-case basis. Where products are branded this will be taken into account in determining the appropriate course of action.</p> <p>The restitution of illegally harvested timber to source countries will be possible under the draft regulations. Whether this is an appropriate course of action will need to be</p>

	<p>determined on a case-by-case basis.</p> <p>Seized timber may in appropriate circumstances be returned to the supply chain. However, given that the seizure of timber forms part of the disincentive for bringing illegally harvested timber into the EU, any such decision would be taken on a case-by-case basis.</p>
<p>Any proceeds arising from the sale of seized timber should not go to the regulator, so as to avoid a financial incentive to seize goods.</p>	<p>Proceeds arising from the sale of seized timber will not be returned to the NMO. Her Majesty's Treasury will benefit from any such funds.</p>
<p>Can illegally harvested timber be seized from traders? If so, isn't this unfair to traders who will lose out financially despite not being responsible for placing the timber on the market?</p>	<p>The draft regulations allow for timber to be seized where an inspector has reasonable grounds for believing that it has been illegally harvested. The seizure of illegally harvested timber could be from the premises of traders as well as operators. Traders can minimise the risk to their business by (a) exercising greater vigilance when making purchasing decisions, (b) exploring insurance options to protect themselves against such events and (c) ensuring that contractual arrangements allow them to take legal action against the company that sold it the illegal timber for breach of contract to recover costs.</p> <p>Limiting seizure powers to "operators" would reduce the ability to take effective enforcement action, for example when illegal timber has been passed quickly down the supply chain.</p>
<p>Draft regulation 10(4) refers to inspectors marking seized timber. Will this marking be permanent or in any way damage the timber or timber product, as this will have cost implications if the timber owner subsequently wins an appeal against the seizure notice?</p>	<p>No, the method of marking employed will be designed to allow identification of the seized timber for enforcement purposes. The intent of the marking will not be to permanently mark or damage the timber.</p>
<p>When and how will NMO report on its</p>	<p>The NMO is expected to publish information</p>

enforcement actions and outcomes?	on its enforcement actions and outcomes on an annual basis.
Do the powers of inspection include warehouses or other storage units belonging to the owner; or vehicles?	Yes. An inspector may enter premises (except premises used wholly or mainly as a private dwelling house) for the purpose of enforcing the Regulations. This power extends to vehicles.
The regulations give powers to inspectors to remove records and other information for copying purposes. This may involve the loss for a considerable period of time of documents and records vital to the continuation of the business. Removing records should therefore be a last resort to minimise the operational impact on UK businesses in a tough economic environment.	The NMO will endeavour to minimise any disruption to businesses resulting from its inspections. Removed documents and other information will be held by NMO only for as long as is necessary for the NMO to perform its enforcement duties.
How will the NMO work with Her Majesty's Revenue and Customs (HMRC) and Border Force regarding incoming shipments of timber and timber products?	The NMO will work closely with HMRC and Border Force where appropriate to share information in order to assist in its enforcement objectives.
How will the NMO collaborate with enforcement bodies in other EU Member States?	The NMO will look to collaborate with enforcement bodies in other EU Member States to share intelligence and to work towards consistent enforcement of the EUTR across the EU. The NMO has already begun to establish contacts with other enforcement bodies and will look to set up a protocol for collaboration.
In Regulation 6 ("Defence") there is no explicit mention of how inspectors will deal with timber and timber products which are accompanied by FLEGT licences (VPA countries) or CITES licenses (Article 3 in EU Legislation). These should be treated as compliant as per EU legislation.	The status of FLEGT and CITES licensed timber is clarified in the EUTR. Further mention in the UK Regulations is not necessary.

<p>The draft Statute should explicitly state, under its Article 6, that proper use of a due diligence system is only a partial defence in proceedings for an offence for a failure to comply with Article 4(1) EUTR's prohibition requirement.</p>	<p>Even the most robust due diligence can never eliminate the risk of sourcing illegally harvested timber (for example, reliance may be placed in good faith on fraudulent documentation). Therefore, it is appropriate to provide for a defence where an operator has carried out adequate due diligence. It is expected that the due diligence exercised in such a case would be closely scrutinised however.</p>
<p>Proper use of a due diligence system should not be a statutory defence available to a defendant in proceedings for an offence for failure to comply with Article 4(2) EUTR's requirement for operators to exercise due diligence when placing timber or timber products on the market.</p>	<p>Where a defendant is able to demonstrate that they have made proper use of a due diligence system, it follows that they will be able to use this as a defence against the accusation that they failed to exercise due diligence. This is particularly important in cases where operators rely in good faith on due diligence systems provided by monitoring organisations.</p>
<p>The potential timescale from inspection and seizure of timber through to appeal and product return or court proceedings is not clear. Without defined time limits it is possible to conceive of a situation with a significant backlog of cases and seized materials unavailable for trade</p>	<p>An inspector can only seize timber where he has reasonable grounds for believing it to have been illegally harvested. The person in possession of the timber or its owner then has 28 days to appeal to the Secretary of State, who must then either return it or take court proceedings to confirm its seizure (unless the timber is being held for the purposes of a criminal investigation). These provisions provide a proportionate and flexible mechanism permitting seizures where necessary but also giving timber traders a right of appeal.</p>
<p>Who will contribute to the 5-year review report? This should engage a wide cross section of stakeholders (private sector, civil society, etc.) and it would benefit from being produced by an independent body.</p>	<p>The relevant Secretary of State is responsible for the report. Under current arrangements, responsibility would fall to Defra. In keeping with the approach thus far, Defra would anticipate open engagement with stakeholders when carrying out the review. Whether the report is produced by the Government or an independent body is a matter to be determined at the time of the</p>

	review and light of the circumstances at that time.
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Penalties

Defra proposed maximum penalties of two years imprisonment and an unlimited fine for placing illegally harvested timber on the market, failing to exercise due diligence, and failing to maintain an adequate due diligence system. Penalties were also proposed for the offences of failing to comply with a notice of remedial actions, obstructing an inspector, and for operators and traders failing to keep specified information and provide this to the competent authority on request.

In the consultation document Defra asked respondents:

- **Do you consider the penalties proposed to be adequate, insufficient or excessive?**
- **Do you think they meet the requirement to provide penalties which are effective, proportionate and dissuasive?**

The consultation responses revealed general support for the proposed penalties. One trade organisation expressed concern that the penalty allowing up to two years imprisonment is excessive and not proportionate, while one NGO considered that the penalties were insufficiently punitive.

In light of the consultation responses and following input from the Ministry of Justice during the consultation period, it was considered appropriate to change the penalties associated with the offences of obstructing an inspector and failing to comply with a notice of remedial actions, to a £5000 fine. This brings the penalties into line with offences in similar legislation, such as the FLEGT Regulations 2012.

For the key offences of placing illegally harvested timber on the EU market, and failing to comply with due diligence requirements, the maximum penalty available will remain as two years imprisonment and an unlimited fine. We consider this to be an effective deterrent to encourage compliance, and a proportionate punishment for those who demonstrate persistent or flagrant non-compliance with the regulations.

A lesser maximum penalty of a £5000 fine is applied to the lesser offences of: failing to comply with a notice of remedial actions, obstructing an inspector, and failure of operators and traders to keep specified information and make it available to the competent authority on request. These penalties may apply on each separate occasion of non-compliance. These penalties were developed in consultation with the Ministry of Justice, and the governments of Scotland and Northern Ireland, and we consider they strike the right balance, acting as a proportionate yet dissuasive penalty, while recognising the need for the penalty to match the offence.

The effectiveness of the regulations will be subject to regular review and, should there be evidence that the penalties are inappropriate, they could be subject to revision.

A trade organisation raised a concern about the proposed time limits for prosecution to commence, due to the lack of an absolute cut-off date for proceedings to commence. In response to this concern, the Statutory Instrument will be amended to read that proceedings may be commenced within three years from the date of the offence or within one year from the discovery of the offence by the prosecutor whichever is the earlier.

Issues raised by respondents relevant to penalties are detailed below, alongside the Government reply.

Issue raised by respondents	Government reply
<p>The EUTR suggests a possible penalty for non-compliance of suspending a company from trading. Why not implement such a penalty in the UK?</p> <p>To aid enforcement of the regulations, could you require “operators” to register as such in order to trade?</p>	<p>Consideration was given to the use of a penalty that would allow for the suspension of trade of a non-compliant operator. However, it was concluded that the requirements for implementing such a penalty, which would necessitate licensing arrangements for the timber industry, would create a disproportionate burden on businesses. For the same reason, an approach requiring the registration of “operators” was not pursued. It is considered that the proposed enforcement arrangements introduce an effective punishment and deterrent whilst keeping the administrative burden on businesses to a minimum.</p>
<p>Where a notice of remedial actions is issued to a business that is using a due diligence tool provided by another organisation, what are the implications for the organisation providing the due diligence tool?</p>	<p>Responsibility falls to the individual business to ensure their due diligence is adequate, regardless of who supplies the due diligence tool they are using. The business to whom the notice of remedial actions is issued is therefore responsible for implementing the actions required.</p> <p>Where a business uses the services of an accredited Monitoring Organisation, evidence that a Monitoring Organisation is failing to fulfil its functions properly will be shared with the European Commission, which may then remove that Monitoring Organisation’s recognition.</p>

<p>A formal review mechanism is required to consider the effectiveness of the proposed penalties.</p>	<p>The regulations include a clause requiring a review within five years. This review will be carried out by Defra, the government department responsible for the regulations, and may include a consideration of the effectiveness of the penalties.</p>
<p>The consultation document states on page 6 that: “Any person who discloses information received from the Competent Authority, without permission; will be subject to a fine up to the maximum level of £5,000 for each offence if convicted in a Magistrates Court.” Could you please clarify what ‘information’ this relates to?</p>	<p>This is an error in the consultation document, for which we apologise. There is no intention to introduce such an offence and there is no reference to this offence in the Statutory Instrument.</p>

Impacts on business and others

The impact on business and others due to the EU Timber Regulations coming into force on 3 March 2013 is beyond the scope of this consultation. However, the impacts of the proposed approach to enforcement are within scope.

In the consultation document Defra asked respondents:

- **Do you agree with our assessment of the likely impacts on UK business?**
- **Are you able to quantify the impact on your business, in terms of both staff time and costs (please specify whether you consider yourself to be an operator or a trader under these regulations and, if possible, which sector you work in)?**
- **If you work in the construction sector, and use timber or timber products, do you foresee significant overlaps with the forthcoming —Construction Products Regulation? If so, what level of coordination in the enforcement of the two regulations would you wish to see?**

The responses received were broadly in agreement with, or without comment on, the estimated impact on business. A number of responses from industry stated that there would be minimal impact as they already have due diligence systems in place.

A trade organisation suggested that 0.5 to 1.0 FTE would be required to undertake robust due diligence for operators, although it is not clear at what staffing level this resource would be required. The final impact assessment will take this into account.

Another trade organisation stated that the financial cost impact on some retailers will be significantly greater than those estimated in the impact assessment, due to the need for

some retailers to upgrade their systems. Example estimated cost figures have been provided, in the region of £58.5k to £135k per annum per retailer, which will be considered in the final impact assessment.

It is acknowledged that the impact on some sectors will be greater than others but it is also noted that UK business has been broadly supportive of the EUTR, which has the potential to enhance UK business interests by creating a level playing field across the EU.

An issue was raised of potentially increased litigation costs due to changes in contractual arrangements with suppliers to ensure that costs of timber seizure are covered by suppliers. However, no estimated cost impact was provided.

One firm suggested that the costs of compliance with EUTR included costs of travel and senior management time to visit source countries to carry out due diligence. However, it is considered that these costs relate to the general running costs of the business and are not specific to the EUTR or proposed UK regulations. The EUTR does not create a requirement to visit source countries to carry out due diligence, although it is acknowledged that companies may wish to do so in the course of their business.

No issues were raised regarding the Construction Products Regulation, and there was support for avoiding an enforcement overlap between this and the EUTR.

Issues raised by respondents relevant to impacts on business and others are detailed below, alongside the Government reply.

Issue raised by respondents	Government reply
<p>There is a risk that the regulations will prevent (or create an administrative and legal burden sufficient to prevent) the use of UK sourced timber that does not require a Forestry Commission felling licence (e.g. single/small trees under 5m³ in volume, windblown trees, dead trees), where there is no specific documentary evidence to demonstrate the timber was legally harvested.</p>	<p>The EUTR does not have a small quantities or other exemptions. However, the NMO and Forestry Commission are working together to determine how the legality of UK sourced wood will be established where a felling licence does not currently apply. There is an expectation that a common sense approach will be taken where small quantities are concerned and in other specific cases where a felling licence does not apply.</p>
<p>Depending on how an operator is defined, the number of UK operators will vary, affecting the costs to UK businesses.</p>	<p>The impact assessment is based upon our current understanding of 'operators'. If this changes significantly following the issue of updated EU guidance, the impact may need to be re-evaluated.</p>
<p>If a bureaucratic approach is taken to the UK forestry sector then the costs could</p>	<p>Our intention is to minimise the burden on businesses wherever possible and the NMO's</p>

<p>be significant, and damaging to the management of the UK's forests and woodland, and the individuals and businesses involved in that.</p>	<p>approach to enforcement will reflect this. There is no intention to interfere with or overhaul existing business practices that are deemed sufficient to comply with the regulations.</p>
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Guidance

The consultation asked questions about the guidance available relating to the operation of the EU Timber Regulations:

- **Are you content that the information contained in the draft UK Regulations, this consultation document and the EU Commission's [draft] guidance gives you sufficient information on the operation of the EUTR and your obligations in terms of due diligence?**
- **What further guidance would you find useful, or which areas currently covered by guidance would you like to see more information or clarity on?**

Responses varied from those who consider the current level of information and guidance sufficient to those who consider the guidance inadequate.

One consistent concern was the availability of final EU guidance. This has been a concern for some time and the UK Government has pushed for this to be published as a priority. At the time of writing the final EU guidance had not yet been issued. Once the EU guidance is finalised the NMO will be in a position to provide more definitive guidance to industry and will look to provide best practice case studies through its website, based on the experience of the operation of the Regulation.

A range of areas where guidance and clarity are requested, include:

- the definition of an operator
- the level of due diligence required
- composite products and the level of detail that is required when collecting information, particularly on species.
- whether the EN 13556 standard will be used as the reference for internationally accepted timber nomenclatures, even where it only goes so far as referencing the genus of the timber and not the species.
- Applicable legal and regulatory frameworks pertaining to the harvesting of timber in source countries
- Risk profiles of countries of harvest

- Role of genetic testing in enforcement
- Exclusion of reclaimed material
- Biofuels and UK sustainability criteria

These and other suggestions for guidance will be taken forward at the national level by the NMO and, where appropriate, at the EU level by Defra.

Responses outside the scope of the consultation

A number of responses raised issues outside of the scope of the consultation, mostly concerning the existing EU Timber Regulations, rather than the proposed UK Regulations. Whilst not directly relevant to the consultation, they have been noted and are of relevance to Defra's future work in the area of forestry and illegal logging. These responses are summarised below:

- General objection to Regulation by the EU.
- Regulation covering the UK is not required as illegal logging is not a problem in the UK.
- Limiting to 'first' placing on market raises concerns about timber coming through Eastern European countries as a back door into EU.
- Counterfeit documentation may become a bigger issue due to due diligence requirement.
- Various questions about what products are or are not covered by the EU Timber Regulations.
- A number of timber products are not covered by the regulation. The EU Timber Regulations Annex should be amended to include those timber products not covered by the use of Custom Codes.
- Suggestion that the regulation should be limited to EU operators due to the difficulty in enforcing the EU Timber Regulations against non-EU operators.
- Concern about consistency of enforcement across the EU (level playing field) and whether action will be taken to bring those Member States who are not properly enforcing the EU Timber Regulations after 3 March 2013 into line.
- Concern over the status of Monitoring Organisations
- Importance of a clear understanding of what is meant by "applicable legislation in the country of harvest".

These responses have been noted and will be used to inform the implementation of the EUTR and the UK Government's work within the EU.

Next steps

The Timber and Timber Products (Placing on the Market) Regulations 2013 will be implemented with the relevant changes noted above. These Regulations will come into force to meet the EUTR, on 3rd March 2013.

List of respondents

The following organisations responded to the consultation in writing:

British Furniture Confederation

British Retail Consortium

Confederation of Paper Industries

Confor

Forth Energy

Global Witness

Joint Nature Conservation Committee

Timber Trade Federation

TRAFFIC

UK Contractors Group

WWF