6. **LEGALITY**

Relevant legislation:

EUDR – Article 2(40) – Definitions and Article 3(b) – Prohibition

According to Article 3 of the EUDR, relevant commodities and relevant products shall not be placed or made available on the market or exported, unless all the following conditions are fulfilled:

a) they are deforestation-free,

b) they have been produced in accordance with the relevant legislation of the country of production, and

c) they are covered by a due diligence statement.

Relevant products must meet all three criteria separately and individually; otherwise, operators and non-SME traders shall refrain from placing or making them available on the market or exporting them.

a) **Relevant legislation of the country of production**

The basis for determining whether a relevant commodity or relevant product has been produced in accordance with the relevant legislation of the country of production is the legislation of the country in which the commodity, or in the case of a product, the commodity contained in a relevant product was grown, harvested, obtained from or raised on relevant plots of land or, as regards cattle, in establishments.

The EUDR takes a flexible approach by listing a number of areas of law without specifying particular laws, as these differ from country to country and may be subject to amendments. However, only the applicable laws concerning the legal status of the area of production constitute relevant legislation pursuant to Article 2(40) of the EUDR. This means that generally the relevance of laws for the legality requirement in Article 3(b) of the EUDR is not determined by the fact that they may apply generally during the production process of commodities or apply to the supply chains of relevant products and relevant commodities, but by the fact that these laws specifically impact or influence the legal status of the area in which the commodities were produced.

Additionally, Article 2(40) of the EUDR must be read in the light of the objectives of the EUDR as laid down in Article 1(1)(a) and (b), meaning that legislation is also relevant if its contents can be linked to halting deforestation and forest degradation in the context of the Union's commitment to address climate change and biodiversity loss.

Points (a) to (h) of Article 2(40) further specify this relevant legislation. The following list gives some concrete examples which are for illustration purposes only and cannot be considered exhaustive:

— *Land use rights*, including laws on harvesting and producing on the land or on the management of the land; such as

  — legislation on land transfer in particular for agricultural land or forests,

  — legislation on land lease transaction.

— *Environmental protection*. A link to the objective of halting deforestation and forest degradation, the reduction of greenhouse gas emissions or the protection of biodiversity exists, for example, in

- legislation on protected areas,
- legislation on nature protection and nature restoration,
- legislation on the protection and conservation of wildlife and biodiversity,
- legislation on endangered species,
- legislation on land development.

— *Forest-related rules, including forest management and biodiversity conservation, where directly related to wood harvesting*, such as

- legislation on the protection and conservation of forests, and sustainable forest management,
- anti-deforestation legislation,
- rights to harvest timber within the legally gazetted boundaries.

— *Third parties' rights*, including rights to use and tenure affected by producing the relevant commodities and products, and traditional land use rights of indigenous peoples and local communities; this may include e.g. rights to land charge or usufructuary rights.

— *Labour rights* and *human rights protected under international law*, applying either to people being present in the area of production of relevant commodities to the extent relevant to the EUDR taking into account its objectives as enshrined in Article 1(1) of the EUDR, or to people with rights to the area of production of relevant commodities or products, including indigenous peoples' and local communities' rights, if they are applicable or reflected in the respective national legislation; for example rights to land, territories and resources, property rights, rights in relation to treaties, agreements and other constructive arrangements between indigenous peoples and States.

— *The principle of free, prior and informed consent (FPIC), including as set out in the UN Declaration on the Rights of Indigenous Peoples*. Further guidance as to the application of the FPIC principle can e.g. be found through the UN Office of the High Commissioner for Human Rights where it is noted that States must have consent as the objective of consultation before any of the following actions are taken:

- the undertaking of projects that affect indigenous peoples' rights to land, territory and resources, including mining and other utilization or exploitation of resources,
- the relocation of indigenous peoples from their land or territories,
- restitution or other appropriate redressing if lands have been confiscated, taken, occupied or damaged without the free, prior and informed consent of indigenous people who possessed it.

— *Tax, anti-corruption, trade and customs regulations*.

- Applicable laws concerning the relevant supply chains entering the Union market, or leaving it, if they have a specific link to the objectives of the Regulation, or, in the case of trade and customs laws, if they specifically concern the relevant sectors of agricultural or timber production.

b) **Due diligence regarding legality**

Operators must be aware of what legislation exists in each of the countries they are sourcing from as to the legal status of the area of production. The relevant legislation can, among others, consist of:

— National and regional laws, including relevant secondary legislation,

— International law, including multi- and bilateral treaties and agreements, as applicable in domestic law by codifying

and implementing them, respectively.

Under Article 9(1)(h) of the EUDR, information, including documents and data showing compliance with applicable legislation in the country of production, must be collected as part of the due diligence obligation. This includes information related to any arrangement conferring the right to use the respective area for the purposes of the production of the relevant commodity. Whether a land title or other documentation of an arrangement is needed is dependent on the national legislation; if possession of a land title is not required under domestic law to produce and commercialise agricultural products, it is not required under the EUDR.

The obligation to collect documents or other information depends on the different regulatory regimes of countries, as not all of them require the issuing of specific documentation. Therefore, the obligation should be understood as including, where applicable:

— Official documents issued by countries' authorities, such as e.g. administrative permits,

— Documents showing contractual obligations, including contracts and agreements with indigenous peoples or local communities,

— Complementary information issued by public and private certification or other third-party verified schemes,

— Judicial decisions,

— Impact assessments, management plans, environmental audit reports.

The following additional documents can be also useful:

— Documents showing company policies and codes of conduct,

— Voluntary self-declaration of producers of relevant commodities in which a producer declares that the product was produced in compliance with the legislation of the country of production,

— Social responsibility agreements between private actors and third right holders,

— Specific reports on tenure and rights claims and conflicts.

Information, including documents and data, may be collected in hard copy or in electronic form.

It is important to note that the information, including documents and data, must be collected under Article 9(1)(h) of the EUDR also for the purposes of the risk assessment (Article 10 of the EUDR) and should not be viewed as an independent requirement, unless the product is sourced entirely from low-risk countries or parts thereof. In the case of sourcing entirely from low-risk countries or parts thereof ([13]), according to Article 13 of the EUDR, SME and non-SME operators must only carry out the following steps describing the risk assessment if the operators obtain or are made aware of information pointing to a risk of non-compliance or circumvention.

According to Article 10(1) of the EUDR, the information collected must be assessed as a whole to ensure traceability and compliance throughout the supply chain. All information must be analysed and verified, meaning operators must be able to evaluate the content and reliability of the documents they collect and to understand the links between the different information in different documents. Usually, the operator should check as part of the assessment:

— Whether the different documents are in line with each other and with other information available,

— What exactly each document proves,

— On which system (e.g. control by authorities, independent audit, etc.) the document is based,

— The reliability and validity of each document, meaning the likelihood of it being falsified or issued unlawfully.

Operators should take reasonable measures to satisfy themselves that such documents are genuine, depending on their assessment of the general situation in the country of production. In this regard, the operator should also take into account the risk of corruption (e.g. bribery, collusion, or fraud). Various sources provide generally available information about the

([13]) According to Article 29(2), the Commission will present a list of countries or parts thereof, that present a low or high risk by means of implementing acts.

level of corruption in a country or subnational region, for example Transparency International's Corruption Perceptions Index, or other similar recognised international indices or relevant information ([14]).

In cases where the level of corruption is considered high there might be an implication that documents cannot be considered reliable, and further verification may be required. In the occurrence of such cases special care is necessary when checking the documents as there might be reason to doubt their credibility.

Apart from relying on recognised international indices, operators could check lists of conditions and vulnerabilities, including previous evidence of corrupt practice, that point to a greater risk – and thus demand a higher level of scrutiny. Examples of such additional evidence may include third-party-verified schemes (see Section 10 of this guidance), independent or self-conducted audits, or the use of technologies/forensic methods tracking the relevant products which can help to reveal indications of corruptions or illegalities.

Downstream non-SME operators and non-SME traders are under the obligation to ascertain that due diligence, including on legality, has been exercised by the upstream operator, see Article 4(9) of the EUDR. When collecting information, documentation and data for this purpose, downstream operators and traders should respect the applicable data protection rules and competition rules.

([14]) For the use of such indices see also Chapter 4 of Commission Notice of 12.2.2016, C(2016)755 final (Guidance Document for the EU Timber Regulation).

([15]) Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ L 256, 7.9.1987, p. 1).