

Briefing: Why a mandatory public list of contravening operators and traders is key for the effective implementation of the proposed Regulation to curb EU-driven deforestation and forest degradation

Key points

- A crucial factor in the failure of the EU Timber Regulation (EUTR) to stop non-compliant timber from entering the EU market is the failure of Member States' Competent Authorities to meaningfully implement and enforce the law in practice.
- The improved enforcement mechanisms in the Commission's Proposal for a regulation on deforestation-free products are not yet sufficient to remedy this failure of the EUTR.
- A public list of contravening operators and traders would provide a powerful additional incentive for compliance as it (a) is not dependent on Competent Authorities' willingness to issue meaningful penalties, (b) serves as a deterrent to companies, and (c) increases transparency.
- A provision requiring a public list of contravening operators and traders was included in an earlier draft of the Commission's Proposal and was also part of the Commission's selected policy option in its Impact Assessment. It is essential that it is included in the final Regulation.

1. Key lessons from EUTR

The European Commission's Proposal for a regulation on deforestation-free products integrates and seeks to improve upon the framework set up with the EUTR. As noted in the findings of the EUTR Fitness Check, upon which the Commission's initiative builds, the EUTR is "hampered by a number of weaknesses in its design and enforcement challenges."ⁱ As a result, non-compliant wood worth millions of dollars has continued to flood into the EU market, as Earthsight has documented over the past years.ⁱⁱ

A crucial factor in the failure of EUTR to stop non-compliant timber from entering the EU market is the failure of Member States' Competent Authorities to meaningfully implement and enforce the law in practice. Routinely, operators' due diligence procedures, which are inadequate to prove negligible risk, are approved. Overall, as an exhaustive WWF study from 2018-2019 showed, implementation has been piecemeal and penalties, when they are issued, have been far from dissuasive or proportionate to the violations detected. Sanctions were often only applied in cases of repeated offenses and warnings.ⁱⁱⁱ WWF's report concluded that "the current situation does not actively discourage the placing of illegal timber products on the EU market and does not support the creation of a level playing field across the EU."^{iv}

The study also showed that only three national Competent Authorities out of the 16 interviewed were making sufficient efforts to disseminate information related to the enforcement of the EUTR (including the publication of the name of the offending operator, product(s) checked, type of breaches and additional details). This represents a serious lack of transparency and consistency from Competent Authorities.

If the new Regulation to curb EU-driven deforestation and forest degradation is to avoid the same fate, it ought to learn from the lessons of the EUTR. Crucially, it must do so from day one. The urgent climate crisis does not allow for fixing flaws later.

2. The Commission's attempt to address EUTR enforcement flaws

The Commission ought to be congratulated for its efforts to learn lessons from the EUTR, both in retaining aspects of the Regulation that have worked well and in seeking to remedy those that have not. The Commission sought to address the EUTR's enforcement flaws through a number of measures, as laid out in its Impact Assessment and Explanatory Memorandum. One such measure, which was included in an earlier draft of the Commission's Proposal and envisioned as policy option 2 in its Impact Assessment^v, provided for a public list of contravening traders and operators.

The draft provision required the Commission to publish a list of operators and traders that fail to fulfil their obligations under the Regulation if a Member State administrative authority or court has imposed penalties on them which are final. Under the draft provision, Member States were required to notify the Commission of contravening traders and operators.^{vi} However, this provision was dropped in the final published Proposal.

The other measures the Commission included in its Proposal, while an improvement from the EUTR, will not by themselves be sufficient to overcome the EUTR's enforcement flaws. Whereas the proposed measures give Competent Authorities a framework for strengthened enforcement action, in the case that these are not used properly by Competent Authorities it would be hard for the Commission or courts (through a review of substantiated concerns provided for in Article 30) to prove this. A public list of contravening operators and traders does not have the same weakness; the failure of Competent Authorities to act according to such provision can easily be proven and remedied.

For example, Articles 14 and 15 of the Proposal provide minimum requirements for compliance checks. The provisions certainly address lessons from EUTR where insufficient checks in many Member States have meant that operators have not felt deterred from placing contravening wood on the EU market. However, minimum requirements for checks don't necessarily translate into Competent Authorities' willingness to impose strong penalties.

Another example is Article 23 of the Proposal, which provides strengthened requirements for national penalty schemes and is a welcome improvement to the EUTR, under which such schemes differ widely across the EU. However, the Article is not in itself fail-free. Even if penalties provided for in implementing legislation are stronger (see Article 23(2)(b)-(d)), there is no obligation on the Competent Authorities to impose these penalties in practice. In fact, experience with the EUTR has shown that Competent Authorities and courts have chosen not to issue fines anywhere close to the maxima allowed under national penalty schemes. Further, while Article 23(2)(a) does provide specific criteria to be considered when calculating fines, this is likely to leave room for interpretation. It would hence be difficult for the European Commission or for NGOs via courts to prove that a Competent Authority indeed imposed a fine that is too low based on the criteria provided.

A third example is Article 24 of the Proposal, which provides cooperation between Competent Authorities and customs authorities and empowers the latter to check and halt shipments at the point of import. While an important improvement on EUTR, whether customs authorities will actually act is dependent on the effectiveness and willingness of individual Competent Authorities to act.

3. A list of contravening operators and traders serves as an essential enforcement tool

A public list of contravening operators and traders, which essentially serves a 'naming and shaming' function, would provide a powerful additional incentive for compliance as it (a) is not dependent on Competent Authorities' willingness to issue meaningful penalties, (b) serves as a deterrent to

companies, and (c) increases transparency. The mechanism hence directly tackles the EUTR's enforcement flaws highlighted earlier in such a way that the other improved enforcement mechanisms do not.

a. The list is not dependent on Competent Authorities' willingness to impose meaningful penalties

The public list of contravening operators and traders would not be dependent on Competent Authorities proving willing to issue meaningful penalties. Though it would still depend on Competent Authorities identifying cases of non-compliance, where non-compliances are so identified, a name-and-shame requirement for such cases would firstly be independent of the severity of the imposed penalty. It is for this reason that, in order to be more effective, a public list must also include companies that receive formal warnings from Competent Authorities, not only final penalties or sanctions that have passed through all appealing stages or been issued by a court.

In addition, it would be relatively straightforward for courts to enforce placing an actor on a list of contravening operators and traders via Article 30 (review of substantiated concerns) of the Proposal.

b. The list serves as deterrent factor

Operators, especially the largest ones which control the greatest proportion of the relevant imports into the EU, are very sensitive to brand image. Greater transparency through a mandatory public list of contravening operators and traders can lead to negative media coverage and engagement by clients, business partners and investors. It thereby serves as a key deterrent factor for companies.

c. The list increases transparency

Civil society is key in holding companies accountable and has played an essential role in advancing implementation of the EUTR. For example, Earthsight's reports on illegal logging in Ukraine and the billion-Euro trade to the EU led several EU companies to make changes to their purchasing practices and promoted nationwide enforcement crackdowns in Ukraine.^{vii} The reports also led the European Commission to adopt a guidance document on implementation of the EUTR to assist companies in mitigating the risk of importing illegal timber.^{viii} The essential role of civil society is recognised in the Commission's Proposal, which requires Member States to adopt a legal framework that facilitates the use of substantiated concerns by third parties (Article 29) and provides for court access to review any substantiated concerns that the party considers have not been fully considered and dealt with (Article 30).

However, the work of uncovering corporate wrongdoing is laborious and resource intensive. Civil society is often not privy to the same information and evidence Competent Authorities have access to. In addition, they are under constant threat of libel suits by the companies whose wrongdoing they seek to expose. Having access to a list of operators and traders found to be in violation of legal requirements would enable civil society to carry out their work more effectively and ultimately lead to greater compliance.

Moreover, a public list of contravening operators and traders can help civil society monitor cases across the EU and analyse the effectiveness and implementation of the planned Regulation over time. In addition, it can offer affected communities in producer countries the necessary evidence and backing to support their own demands in the struggle for their rights. Lastly, such a list can also support sustainable consumer choices by serving as an additional resource to consumer watch groups and protection authorities.

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ⁱ European Commission, '[Commission Staff Working Document – Fitness Check on Regulation \(EU\) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market \(the EU Timber Regulation\) and on 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 \(FLEGT Regulation\)](#)'.

ⁱⁱ See, for example: Earthsight '[IKEA'S HOUSE OF HORRORS: The stolen Russian forests being greenwashed into kids' furniture](#)'; '[Untamed Timber: The Brazilian flooring giant let off the hook by Bolsonaro's government and now thriving across the US and EU](#)'.

ⁱⁱⁱ WWF '[Enforcement Review of the EU Timber Regulation \(EUTR\) – EU Synthesis Report](#)'.

^{iv} Ibid, pg. 3.

^v European Commission '[Staff Working Document – Impact Assessment “Minimising the risk of deforestation and forest degradation associated with products placed on the EU market” Part 1](#)', pg. 41.

^{vi} The following language was included in an earlier leaked draft of the Proposal:

“Article [X]

List of contravening operators and traders

1. The Commission shall publish in the Official Journal of the European Union a list of operators and traders having failed to fulfil their obligations under this Regulation. An operator or trader will be placed on the list if a Member State administrative authority or court has imposed penalties on the operator or trader in line with Article 18 which are final.
2. Member States shall notify the Commission without undue delay about any final administrative or criminal sanction or penalty imposed on operators or traders for indringing their obligations under this regulation.
3. Upon receipt of such notification the Commission shall, without delay, include the operator or trader concerned on the list and inform the operator and trader concerned of its inclusion.

Article [X]

Removal from the list of contravening operators and traders

The Commission shall remove an operator or trader from the list of contravening operators and traders X years after the final administrative or criminal sanction or penalty, if no further reports or sanctions or administrative or criminal proceedings concerning alleged contravening activity have been reported by the respective Member State authority.”

^{vii} Earthsight '[Ukraine Prime Minister pledges crackdown on illegal logging after Earthsight exposé](#)'.

^{viii} Earthsight '[It's official: EU says neither FSC nor Ukraine government can guarantee wood is legal](#)'.