

# EU Timber Regulation

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# Issues for discussion

- Commission guidance
  - definition of operator/trader
  - legal opinion
- Different approaches across the EU?
- Geographic boundaries for Regulators?
- Due diligence?
- Role for certification?
- View of producers outside the EU?

# Operators & Traders – legal text

(15) Many timber products undergo numerous processes before and after they are placed on the internal market for the first time.

In order to avoid imposing any unnecessary administrative burden, only **operators** that place timber and timber products on the internal market for the first time should be subject to the due diligence system.

A **trader** in the supply chain should be required to provide basic information on its supplier and its buyer to enable the traceability of timber and timber products.

Regulation 995/2010

# Commission Guidance Note

The guidance document will not have a binding legal effect; its sole purpose is to provide explanations on certain aspects of the EU Timber Regulation and the two Commission non-legislative acts.

It does not replace, add or amend anything to the provisions of the Regulation (EU) No 995/2010, the Commission Regulation (EU) No 363/2012, and the Commission Regulation (EU) No 607/2012, which constitute the legal basis to be applied. The issues addressed in the guidance document should not be considered in isolation; they must be used in conjunction with the legislation, and not as a “stand-alone” reference.

Our belief however is that the guidance document will be a useful reference material for everyone who will have to comply with the EU TR as it provides important elucidation on parts of the legislative text that are difficult to understand. The guidance document will serve also to guide national competent authorities and enforcement bodies in the process of implementation and enforcement of this legislative package.

# Placing on the market – CEPI view

The guidance fails to clarify the provisions related to the terms “operator” and “placing on the market” as defined in articles 2 (b) and (c) of Regulation (EU)995/2010. Instead it modifies the provisions set in the legally binding Regulation and places more burden on European industry, including the forest-based sector.

“Once again the European Commission overlooks the competitiveness of the European industry, putting it at a disadvantage vis-a-vis foreign competitors. And this in spite of the constant pledges for the need to re-industrialise Europe.” said Teresa Presas, CEPI Director General, expressing the sentiment in CEPI.

In addition, by altering the definition of an “operator” three weeks before the Regulation enters into application, the European Commission creates more unclarities for the economic actors dealing with timber and timber products in Europe than it resolves. “The proposed clarifications clearly contradict previous legal interpretations of the Regulation”

# Placing on the market – legal text

## Article 2

For the purposes of this Regulation, the following definitions shall apply:

(b) "placing on the market" means the supply by any means, irrespective of the selling technique used, of timber or timber products for the first time on the internal market for distribution or use in the course of a commercial activity, whether in return for payment or free of charge. It also includes the supply by means of distance communication as defined in Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts [9]. The supply on the internal market of timber products derived from timber or timber products already placed on the internal market shall not constitute "placing on the market";

Regulation 995/2010

# Placing on the market – guidance - 1

For timber harvested outside the EU:

- Where an EU based company buys timber or timber products in a third country and imports them into the EU, the EU based company becomes an operator when the timber or timber products enter the EU
- Where an EU based company buys timber or timber products in a third country and then has an agent imports them into the EU, the EU based company becomes an operator when the timber or timber products enter the EU
- Where an EU based company orders timber or timber products in a third country from a non-EU based supplier who imports them into the EU, the EU company becomes an operator when the timber enters the EU (even if ownership does not formally transfer until the timber is delivered to the EU based company)
- Where a non-EU based company imports timber or timber products into the EU, obtains the release for free circulation and then seeks a buyer, the non-EU based company becomes an operator when the timber or timber products enter the EU (because the non-EU company has made the timber products available on the EU market)
- Where a non-EU based company sells timber or timber products from a third country directly to non-commercial end-users in the EU, the non-EU company becomes an operator when the timber or timber products enter the EU

# Placing on the market – guidance - 2

## Comparison between the text of the regulation and the guidance:

Article 2 (b) of regulation 995/2010 defines placing on the market as follows:

“placing on the market” means the supply by any means, irrespective of the selling technique used, of timber or timber products for the first time on the internal market for distribution or use in the course of a commercial activity, whether in return for payment or free of charge. It also includes the supply by means of distance communication as defined in Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contracts...”

The guidance on the EU Timber Regulation describes several situations of placing on the market, among which the following:

“where an EU based company orders timber or timber products in a third country from a non-EU based supplier who imports them into the EU, the EU company becomes an operator when the timber enters the EU (even if ownership does not formally transfer until the timber is delivered to the EU based company).”

# Placing on the market – guidance - 3

With respect to the issue of “placing on the market”, the guidance modifies the provisions of the regulation, since the determining action to become an operator is no longer the supply of timber or timber products, but the placing of an order. By doing so, it increases the burden for EU industry. In other words, it is no longer the one who owns the goods and carries out the custom clearance who is the operator, but the one who passed the order for the good. CEPI reacted with a press release previously discussed...

## **Example:**

EU paper producer A orders pulp from non-EU pulp producer B. Non-EU pulp producer B delivers the pulp to EU paper producer A.

According to the Regulation, non-EU pulp producer B is the operator, since it places a wood product on the market for the first time, as it owns the pulp when clearing the customs in the EU, before delivering it to EU paper producer A.

According to the Guidance, EU paper producer A is the operator, since it ordered the pulp.

# Legal advice

**Received by CEPI** - The guidance note is meant to be “not legally binding” but its introduction claims “Our belief however is that the guidance document will be a useful reference material for everyone who will have to comply with the EU TR as it provides important elucidation of parts of the legislative text that are difficult to understand”

- The guidance note is written using the “we” mode, while not clarifying who is “we” (the Commission? DG ENV? The authors?)
- The content of the guidance note obviously add to the Regulation, while claiming it doesn’t.
- Concerning wood harvested outside of the EU, the fact that the Regulation says “Where an EU-based company order timber or timber products in a third country from a non-EU based supplier who imports them into the EU, the EU company becomes an operator when the timber enters the EU (even if ownership does not formally transfer until the timber is delivered to the EU-based company)” is seen by the lawyers as obviously adding conditions that are not part of the Regulation and create a distinction concerning the transfer of ownership that does not exist in that form in the Regulation.

# Legal advice

**UK Government view** – *“I have noted your concerns and discussed them with Defra legal advisors. Our position is that it is not appropriate for Defra to give legal advice to a third party on the Commission guidance. With this in mind, I can only suggest that you pursue your concerns with the Commission. From a UK perspective, the NMO will enforce the EUTR in line with the legislation, and the interpretation provided in the EU guidance. I do not wish to appear unhelpful but this is the appropriate position for Defra to take in these circumstances.”*

**CEPI legal view** - Because of the stated non-legally binding character of the Regulation – it is impossible to file in a formal complaint towards the EU competent jurisdictions. Still, legal action could be taken as soon as an operator would have been impacted nationally by a decision that would be based on the Guidance note (ex-post action).

They therefore recommend strengthening the lobbying activities that CEPI started with the press release by building additional lobbying material to be used within the press and vis-à-vis the Commission services themselves (DG ENV and Secretariat General)

# Principles of due diligence

(17) The due diligence system includes three elements inherent to risk management: **access to information, risk assessment and mitigation of the risk identified.**

The due diligence system should provide access to information about the sources and suppliers of the timber and timber products being placed on the internal market for the first time, including relevant information such as compliance with the applicable legislation, the country of harvest, species, quantity, and where applicable sub-national region and concession of harvest.

On the basis of this information, operators should carry out a risk assessment. Where a risk is identified, operators should mitigate such risk in a manner proportionate to the risk identified, with a view to preventing illegally harvested timber and timber products derived from such timber from being placed on the internal market.

Regulation 995/2010

# Certification schemes

(18) In order to avoid any unnecessary administrative burden, operators already using systems or procedures which comply with the requirements of this Regulation should not be required to set up new systems.

(19) In order to recognise good practice in the forestry sector, certification or other third party verified schemes that include verification of compliance with applicable legislation may be used in the risk assessment procedure.

Regulation 995/2010