

ClientEarth position paper to the public consultation ‘Due Diligence on Forest Risk Commodities’

ClientEarth¹ welcomes the public consultation and supports the Department for Environment Food & Rural Affairs (‘Defra’) objective to seek views on whether it is using the appropriate principles to guide its development of legislation.

As it is recalled in the Consultation document, forests provide a number of essential services, including providing livelihoods for more than a billion people, hosting around 80% of the world’s biodiversity on land and acting as carbon ‘sinks’. The Consultation document also points out that deforestation is now the second leading cause of climate change globally and that in the last 60 years more than half of tropical forests worldwide have been destroyed, the vast majority of which by converting forests into agricultural land.

ClientEarth² recognises and encourages the effort of the UK government to promptly reply to one of the key Global Resources Initiative (GRI) taskforce recommendations. Specifically, the Taskforce recommends that the Government urgently introduces a mandatory due diligence obligation for companies that place on the UK market commodities and derived products that contribute to deforestation **and to take action to ensure similar principles are applied to the finance industry.**

ClientEarth believes that the proposal is well formulated regarding (i) development of a due diligence requirement for companies with a public reporting obligation attached to it; (ii) development of a penalty regime, and (iii) introduction of a review mechanism. However, ClientEarth would like to recommend

¹ ClientEarth is an environmental law organisation, comprising legal, scientific, policy, and communications experts working to shape and enforce the law to tackle environmental challenges

² ClientEarth is one of the legal experts that took part in working groups to help develop the Global Resources Initiative (GRI) taskforce report

Defra to reconsider some of its principles to be better aligned with those principles set forth in the GRI Recommendations Report.³

ClientEarth also suggest to (i) change the criteria (relevant laws) that will be used to determine whether a commodity has been produced sustainably and legally; (ii) to broaden the scope of businesses targeted by the proposal, and (iii) to ensure robust enforcement mechanisms and penalty regime.

Current proposal: Compliance with relevant laws of the country in which FRC are grown

The core proposal of the consultation expressly mentions that the intent is to ensure that forest risk commodities (FRC) are produced legally and **sustainably**.

However, the details of the proposal make it clear that the aim is merely to prevent 'illegal' FRC from accessing the UK market. To achieve this, (large) businesses must assess if the commodities they use in their production or trade within the UK have been produced in compliance with relevant laws of the country in which they are grown (Consultation document page 6 and 7).

We do not question that an important percentage of deforestation is the result of illegal deforestation. We believe that the upcoming legislation should include compliance with relevant laws of the country of origin of the FRC as one (**but not the only one**) of the criteria against which due diligence must be conducted.

As stated in the Consultation document itself, *'the degree to which forests are protected in national laws varies between countries'*. It is one of the reason why businesses conducting due diligence on FRC **must also consider sustainability**, not just legality. National legal frameworks governing forest conversion are crucial but complex. They involve the laws of several different sectors, such as land, forest, environment and tax. They are also often incomplete or contradictory, and at times sporadically implemented, all of which means that conversion often is not effectively regulated⁴ which can result in ongoing and even accelerated deforestation.

For example, while for many years Brazil was held up as a model in forest conservation efforts (e.g. page 5 of the Consultation document), it is now often cited for its alarming and increased rate of deforestation. The New York Declaration on Forests Five-Year Assessment Report describes at length, for example, how weakening environmental regulations, enforcement, and institutions have led to increased deforestation.⁵

Furthermore, when a project involves the conversion of forests to another land use, this results in the loss of not only the forest but also the homes, livelihoods and cultures of Local Communities and Indigenous Peoples ('LCIP'). Laws protecting LCIPs in source countries are often non-existent, weak, or very poorly applied. If the standard that businesses would have to meet is compliance with relevant laws of the country of origin, there is very little assurance that the rights of LCIPs will be adequately protected.

³ GRI Recommendations Report (page 26)

⁴ ClientEarth, 2018, Legal Toolkit on forest conversion <https://www.clientearth.org/toolkit-forest-conversion-laws/>

⁵ NYDF Assessment Partners. (2019). Protecting and Restoring Forests: A Story of Large Commitments yet Limited Progress. New York Declaration on Forests Five-Year Assessment Report. Climate Focus (coordinator and editor). Accessible at forestdeclaration.org. (pages 75&76)

Indeed, in many countries there is still no formal legal recognition of communities' customary land tenure rights.⁶ In some tropical countries, LCIPs have only received legal recognition of their land tenure rights for a small portion of the land they occupy or customarily use. Even when customary land tenure rights are formally recognised, establishing legal ownership can be expensive, time consuming and complicated, rendering it, at times, basically impossible for LCIPs. This is often due to the (i) lack of clarity about the evidence required to demonstrate customary land tenure rights; (ii) complexity and cost of procedures to register land titles; (iii) inadequate legal framework, and (iv) lack of implementing provisions.⁷ Therefore, in numerous cases globally communities have no security over their land and forest resources.

Finally, this proposal is described as being '*a world-leading new law to protect rainforests and clean up the UK's supply chains*'.⁸ However, by proposing a rather limited approach of merely requiring compliance with relevant laws of the country of origin of the commodities, this proposal will fall short of the commitments made by hundreds of companies using FRC in their supply chains towards achieving deforestation-free supply chains.

Scope of Businesses

The Consultation document says: '*We are proposing to target this legislation to a relatively small number of larger businesses that use forest risk commodities in production or trade in the UK, and meet an employee number and turnover threshold. We would set the precise threshold in secondary legislation.*'

Thresholds and phased approaches can help lessen the burden on small and medium sized enterprises, particularly during the phase-in of new requirements. However, these also can create loopholes and undermine legislation as thresholds can be set too high, or smaller companies with riskier supply chains can fall out of the remit of regulatory requirements when minimum thresholds are not met. If the new legislation truly intends to prevent 'illegal' FRC from entering the UK market, it should ultimately cover companies of all sizes.

Respecting the core elements of the due diligence framework as a legal requirement should be applicable to all businesses. However, the measures actually required for due diligence can be designed to be proportionate to the supply chain in question. That is not to say that operators can be exempt from the due diligence obligation, or may simply gather documents provided by suppliers. Compliance must be determined by whether the measures undertaken are informed by sufficient and reasonable information, in the context of each particular case.

Finally, and of **critical importance**, the current proposal fails to cover the finance sector, even though this sector is explicitly covered in the GRI recommendations on due diligence. The GRI Recommendations Report specifically acknowledges that '*financial institutions provide enabling financial services across the commodity supply chain and so should be obligated to exercise due diligence with regard to their lending and investments*'.⁹ We strongly recommend that Defra reassess the link between the finance sector and FRC and unequivocally include the finance sector in its legislative proposal.

⁶ RRI 2015. Who Owns the World's Land? A global baseline of formally recognized indigenous and community land rights. RRI, Washington DC

⁷ Ibid footnote 3, Legal Toolkit on Forest Conversion Factsheet 5: Communities' rights – the need for recognition, <https://www.documents.clientearth.org/library/download-info/legal-toolkit-on-forest-conversion-factsheet-5-communities-rights-the-need-for-recognition/>

⁸ <https://www.gov.uk/government/news/world-leading-new-law-to-protect-rainforests-and-clean-up-supply-chains>

⁹ GRI Recommendations report (page 25)

Enforcement and Penalty regime

Regarding enforcement and penalties, the consultation document proposes to: *'Enable the Government to levy fines and other civil sanctions against businesses that continue to use forest risk commodities that have not been produced legally and/or that do not have a robust system of due diligence in place.'*

To ensure that this intent can be effectively achieved, we emphasise the need to develop provisions in primary legislation to ensure the following:

- Sufficient human and technical resources are allocated to the authority in charge of implementing and enforcing the law;
- Effective, sufficiently dissuasive and proportionate levels of sanctions are available. This means, at a minimum, that the penalty regime ensures that the goal set by the legislative body is reached and that non-compliance is economically unattractive in case of non-compliance;
- Opportunities exist for third parties to submit substantiated concerns/complaints with a formal procedure where the plaintiff will be informed of the admissibility of its complaint and the outcomes of subsequent investigations. The submission of substantiated concerns/complaints should be facilitated to ensure that third parties from producing countries have access to the mechanism, and
- Transparency of the authority in charge of implementation and enforcement regarding checks **carried out and sanctions imposed.**

Final Remarks

1. **Timeline and legal form of the law:** The Consultation document states that secondary legislation will set out details of the law and that secondary legislation would be required for the law to take effect. The government must provide greater clarity and certainty as to how any new ministerial powers to make secondary legislation will be designed and used, ensuring that the appropriate balance between primary and secondary legislation is achieved, and that appropriate scrutiny is given to any change in the law. Considering the well understood urgency to enact these legislative measures, ClientEarth strongly urges that the consultation on the secondary legislation begins without delay.
2. **Role of certification:** Current FRC certification schemes have their limitations¹⁰ and are no substitute for rigorous due diligence by companies on their supply chains. According to the UK legal instruments regulating timber and timber products, operators can use the certification tool when self-assessing and mitigating the risk of timber being illegally logged, but cannot use it on its own as evidence of compliance with the legislation. ClientEarth believes that the upcoming law should follow a similar approach by not overly relying on certification or industry-led schemes and instead requiring rigorous and legally binding due diligence.
3. **Public disclosure:** Currently there are a range of requirements under UK Company and financial laws, which require certain companies to publicly disclose information about environmental risks and impacts in their annual reports. In our experience, compliance with these requirements is

¹⁰ Research undertaken for the European Commission found that: *"The certification schemes still come with some principal limitations to be handled...one key issue is the challenge of monitoring, disclosure and enforcement"*. ECOFYS, Milieu & COWI, Feasibility study on options to step up EU action against deforestation, 2018. p.128.

poor and the quality of the information that is disclosed is often inadequate (see [here](#)). We are aware of a number of government and regulatory initiatives under way to clarify and enhance these reporting requirements, particularly in relation to climate change. At the international level, there are also a number of frameworks and initiatives being developed to help improve the standardisation and quality of disclosures about environmental and social risks and impacts. These are significant developments, however they are not currently adapted specifically to prioritise a due diligence approach to FRC.

The new requirements proposed in this consultation should take into account the existing legal and regulatory disclosure framework and international initiatives relating to public disclosures, but should not be circumscribed or constrained by these. In particular, we would strongly advocate for any public disclosure component of the new requirements proposed in this consultation to require disclosure to be made within a company's annual report. This will help ensure that the information is subject to the same internal controls and accountability measures as any other corporate disclosures and will help improve quality, accuracy and consistency.

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