Environmental Investigation Agency response to the UK DEFRA consultation on Implementing due diligence on forest risk commodities

March 2022

About you

1. What is your full name?
Environmental Investigation Agency (EIA)
2. What is your email address?
vanessarichardson@eia-international.org
3. What country are you based in?
UK
4. Would you like your response to be treated as confidential?
Yes No
5. Are you responding:
on behalf of an organisation
6. What type of organisation are you responding on behalf of?
non-governmental organisation
7. Please provide your organisation's name.
Environmental Investigation Agency

Questions 8-20 are only relevant for businesses

21. Should we lay secondary legislation at the earliest opportunity?

Yes No

22. What should we take into account when considering how long businesses have to prepare for regulation before it comes into effect? What should we take into account

For decades, voluntary commitments and certification schemes have failed to curb deforestation around the globe. For many 2020 marked the failed deadline for a number of forest-related international commitments such as the New York Declaration on Forests, Target 15.2 of the UN Sustainable Development Goals (SDGs) and Aichi Biodiversity Target 5, adopted in 2010 under the UN Convention on Biological Diversity (CBD). The destruction of precious old growth natural forests continues. Last year 2021 marked a 15 year high of deforestation in Brazil – equal to over 13 thousand square kilometres. (https://www.theguardian.com/environment/2021/nov/18/deforestation-in-brazils-amazon-rises-by-more-than-a-fifth-in-a-year).

The biggest consideration to take into account is urgency. Urgent action to curb deforestation is consistently and loudly declared by many international bodies to which the UK is signatory to, from the UN Intergovernmental Panel on Climate Change 2022 report, to the G7, to the New York Declaration on Forests. At the climate COP26 in 2021

the UK pledged to 'halt and reverse' forest loss and land degradation by 2030 (Glasgow Leaders Declaration on Forest and Land Use) (https://ukcop26.org/glasgow-leaders-declaration-on-forests-and-land-use/). The New York Declaration on Forests in February 2022 reported that to achieve the target of halting natural forest loss by 2030 would require deforestation to decrease by nearly 1 million hectares each year and this requires urgent and comprehensive action. (https://674644-2215740-raikfcquaxqncofqfm.stackpathdns.com/wp-content/uploads/2022/02/Ending-natural-forest-loss-Progress-since-2014.pdf)

Within the UK, further compelling evidence on the urgency required to end consumer-led deforestation is expressed in The 2020 Global Initiative Report, JNCC data and the associated impact assessment for this legislation.

Given the UK's legislation amounts to ensuring local laws are complied with – and companies should already be ensuring their products are produced legally at the minimum - a year is more than sufficient time. This is especially considering other regulatory proposals currently on the table in the USA (https://www.congress.gov/bill/117th-congress/senate-bill/2950/text?r=2&s=2) and EU (https://ec.europa.eu/environment/publications/proposal-regulation-deforestation-free-products_en have proposed 12 months lead time for implementation whilst still covering at least six forest risk commodities and, in the case of the EU, goes beyond legality.

Many companies already have voluntary commitments, and are already doing some due diligence, and therefore should be able to comply within a short time frame. For example, out of the top 100 palm oil companies globally, 75% already have sustainability policies in place that apply to all their operations (https://www.spott.org/palm-oil-assessment-summary/). Although these policies are not always robust and not always uniform across sectors. This is therefore why there is an urgent need for a due diligence regulation.

23. Can you provide any further evidence on commodities that drive deforestation? We will consider any further evidence received on commodities that drive deforestation (both tropical and non-tropical) to test which commodities are considered in scope ahead of introducing regulations. Please provide details about your answer, or use the file upload feature.

There is abundant and overwhelming evidence that a few key commodities are responsible for UK's deforestation footprint. Last year, a peer-reviewed scientific paper reported on the top ten UK imported agricultural commodities with the highest deforestation risk. In order these are: palm oil, beef, timber, soybeans, cocoa, coffee, sugar, pepper, rubber, and nutmeg (Table 1, Molotoks and West 2021, https://emeraldopenresearch.s3.amazonaws.com/manuscripts/15396/d754ac69-c12f-4427-8c1e-941bc5261fdc_14306_-_amy_molotoks.pdf).

A recent NGO report has estimated that 21.3 million hectares (Mha) of land (88% of UK land area) were required overseas each year, between 2016 and 2018, to satisfy the UK's

demand for seven commodities (beef & leather, cocoa, palm oil, pulp & paper, rubber, soy and timber, https://www.wwf.org.uk/riskybusiness).

Moreover, the UK Government's own research identifies eight commodities as responsible for the majority of recent and ongoing global deforestation and for 65% of the annual tropical deforestation risk associated with UK supply chains: beef, leather, oil palm, soy, maize, coffee, cocoa and rubber (in that order) (https://hub.jncc.gov.uk/assets/709e0304-0460-4f83-9dcd-3fb490f5e676).

Similarly, an analysis by WRI found the largest drivers of deforestation globally to be (in order) cattle, palm oil, soy, cocoa, rubber, coffee and plantation wood fiber (see Table 4): https://files.wri.org/s3fs-public/estimating-role-seven-commodities-agriculture-linked-deforestation.pdf?c5LkqUrzu26_c17r7DE9AZB6mGWN5g7o

A broad range of commodities as listed in the paragraphs above must be considered to effectively address synergies and interplay that exist between different commodities as drivers of deforestation. For example, in South American forests, deforestation often first occurs following selective logging as pastures for cattle are opened along old logging roads. These pastures most often then end up turning into agricultural plantations including soy, maize and increasingly, palm oil. Ignoring cattle and focusing on soy or palm oil for instance would risk missing root causes of deforestation.

Lastly, it is crucial that the legislation considers current deforestation rates, but also is mindful and adaptive in light of future commodity expansion. Shifts in global consumer demands and climate change will increase pressures on other natural ecosystems.

24. Which of the following factors do you think should be considered to determine legislative sequencing? Please tick all that apply.

- The commodity's impact on global deforestation
- The UK's role in this global deforestation
- Ability to deliver effective regulation
- Other - If you ticked other, please specify

  Other: Please see respone to questions 23-25-26-27.

25. What data sources or information should be used to consider the proposed factors? Please provide details about your answer, or use the file upload feature.

Please see our response to questions 22 and 23.

26. Do you have any further comments regarding the order in which we introduce key forest risk commodities?

The UK should regulate a minimum of six forest risk commodities (beef and leather as "cattle", palm oil, soy, cocoa and rubber, including products derived from them) within 12 months of the secondary regulation passing and allow room for the regular evaluation of

commodities within scope. These commodities should be prioritised based on the JNCC's own findings and introduced at the same time. Please also see response to question 27 below.

27. Which option for the first round of secondary legislation do you recommend?

- **Option 1:** Introduce 2 commodities in the first round of secondary legislation. Officials estimate this would take 18-24 months to come into effect, including a minimum period of 6 months for businesses to prepare for regulation. During that time, we would continue to work on how other commodities can be introduced in subsequent rounds, which could follow swiftly.
- **Option 2:** Introduce 3-4 commodities in the first round of secondary legislation. Officials estimate this would take 3-4 years to come into effect, including a minimum period of six months for businesses to prepare for regulation. As with Option 1, we would continue exploring how to introduce other commodities in subsequent rounds.
- **Option 3:** Introduce 5-7 commodities in the first round of secondary legislation. Officials estimate this would take 4-5 years to come into effect, including a minimum period of six months for businesses to prepare for regulation. We could then start work to assess other forest risk commodities for inclusion in scope, including those which may become key drivers of deforestation in the next five years.

Please state your reasons

No box has been ticked - none of these options would catalyse the necessary progress in tackling the UK's deforestation footprint, as emphasized in questions 23-26. The above scenarios must be revised if the UK is to be truly world-leading and ambitious. It would be most effective to introduce 5-7 commodities in the first round of secondary legislation, with urgency and not delay it, thus coming into effect as soon as possible (12 months) – even if this has higher resourcing implications than anticipated by government.

The UK government and companies have been working through voluntary measures for many years and this evidences that regulation - not more time - is needed to catalyse action by companies. The UK's own government-backed Global Resource Initiative discussed the need for a law to tackle the UK's contribution to global deforestation and further noted that "government should ensure sufficient resources are made available to ensure proper enforcement with an appropriately strong penalty regime".

Moreover, information requirements are similar across commodities – a significant delay is not justified by a wider set of commodities in scope.

EU/US proposals would come into effect within 12 months and would include a similar or wider set of commodities. Given the wide volumes of trade between the EU and the UK in particular, it would be beneficial for companies trading across borders to follow similar regulations. The EU legislative proposal would cover six commodities (and their

derivatives, cattle, cocoa, coffee, oil palm, soya and wood, notably with beef and leather counted as a single commodity under 'cattle') within 1 year and go beyond legality. Likewise, the proposed US FOREST Act (S. 2950) would cover five new commodities (with beef and leather counted as derivatives of a single commodity under 'cattle') within 1 year (https://www.congress.gov/bill/117th-congress/senate-bill/2950/text?r=2&s=2).

For commodities with large smallholder supply bases (cocoa, palm, coffee) it is critical to ensure that smallholders access to market is supported in implementation. The cost and burden of implementation must not be passed down to communities.

28. Should businesses fall in scope of the requirements if they exceed the turnover threshold in the previous financial year?
Yes

29. Should we use UK turnover as the metric to capture UK based businesses?
No

30. Which of the following metrics should be used to regulate the UK operations of businesses that are based outside of the UK under due diligence legislation? For the purposes of this question, we are asking about businesses whose headquarters are not in the UK, but which have commercial activities in the UK. This could be either without a UK-registered business, or through a small or medium sized UK-registered business.

- **Option 1 – Turnover related to UK activity:** Non-UK based businesses would be in scope if they exceed a threshold related only to their UK based commercial activities, and not according to the scale of their global operations. This threshold would therefore be set using a similar turnover metric to UK based businesses, while accommodating for the fact that non-UK based businesses may not have a UK turnover as reported on by businesses headquartered in the UK.
- **Option 2 - Global turnover:** Non-UK based businesses would be in scope if they exceed a threshold related to their overall global operations, as opposed to the turnover generated from their UK based activities. For example, a non-UK based business that operates in the UK and multiple other countries would be in scope if its turnover across all the countries they operate in exceeds the specified threshold.

- option 1: turnover related to UK activity
- option 2: global turnover
- other

If you ticked other, please specify

EIA considers that a volume-based inclusion threshold is also needed and would provide a much more direct indication than just financial turnover. It is risky to assume that most forest risk commodities end up being used by large businesses, like major retailers and consumer goods manufacturers. This is crucially important as smaller companies

are often specialists in that commodity and therefore can relatively easily comply, will create a level playing field and ensures companies do not try to avoid the regulation by setting up separate, smaller entities or shell companies. This level this should be set at should be informed by responses to questions 38-41.

31. Can you provide any data or information that will help identify potential businesses in scope based outside the UK? Please use the text box to provide further details, or use the file upload feature.

A company's global turnover must be used to determine whether a company is in scope. There are a number of sources to obtain this from. For example, Dun & Bradstreet (DnB) hold information on over 400 million public and private companies globally. Their company profiles provide turnover (sales) data and are available online.. Another example is S&P Global Market Intelligence that is a paid for subscription service. EIA notes that whilst some information is freely available, many of these have subscription charges and that the relevant regulatory authority should be well resourced to maintain and update access to these information databases that collate information on the global turnover of companies.

For this question, we have additionally uploaded some pertitent data analyses which is referenced in our response to question 34 below. Our analysis looked at 30 key companies importing palm oil into the UK and finds over 40% of these companies would not be covered by the legislation if only their UK company's turnover is used.

32. Which of the following factors should be considered when setting the turnover threshold level? Please tick all that apply.

- policy impact
- burden on business
- deliverability
- other If you ticked other, please specify

33. For each of the following commodities, please tick where the turnover threshold for inclusion of UK based businesses should be set.

	£50 million	£100 mill	£200 mill	Don't know
beef	X			
cocoa	X			
coffee	X			
leather	X			
maize	X			

palm oil	X			
rubber	X			
soy	X			

34. Do you have any further comments regarding businesses in scope?

Only using UK based turnover, where this is over £50 million, will miss a large proportion of companies using the relevant forest-risk commodities in the UK. As of 2021, small- and medium-sized companies with a turnover under £50 million account for approximately 99.9% of UK companies (https://www.gov.uk/government/statistics/business-population-estimates-2021/business-population-estimates-for-the-uk-and-regions-2021-statistical-release-html). Although this is not specific to companies handling forest risk commodities, a £50 million turnover threshold would still only cover a portion of the 0.01% of UK companies (7,700 companies) that are categorised as 'large' under the Companies Act. No convincing justification has been presented to exempt 99.9% of UK companies from the Schedule 17 framework.

Our analysis (attached as supporting evidence to question 31 above) looked at 30 key companies importing palm oil into the UK and finds over 40% of these companies would not be covered by the legislation if only their UK company's turnover is used.

These companies do not sell their palm oil, and products derived from them, exclusively only to large companies further up the supply chain. Therefore, their use of forest risk commodities will only be partly covered by the regulation, if at all, despite them often being major players in the palm oil sector and already having sustainability policies in place for years.

Examples of companies not covered if only UK turnover is used include:

- Olam Food Ingredients – Olam is often described as the world's biggest farmer and has recently been the interim CEO of the Roundtable on Sustainable Palm Oil (RSPO). Olam Food Ingredients (OFI) UK Ltd – their UK business - only has a turnover of £21 million. OFI also owns the Britannia Foods refinery – one of the four major palm oil refineries in the UK. Olam International has a global turnover of USD 26 billion.
- Pura Foods Ltd – is a subsidiary of Archer Daniel Midlands (ADM) one of the world's largest agricultural processors and traders, who has a global turnover of USD 64 billion and uses over 1.6 million tonnes of palm oil globally every year. Yet Pura Foods (UK) Ltd only has a turnover of £26 million. ADM has been a member of the RSPO since 2007, and implemented comprehensive No Deforestation, No Exploitation policies for both palm oil and soy (which it is also a major trader in)

in 2015. ADM owns the Pura refinery – one of the four major palm oil refineries in the UK.

- Daabon – is a Colombian company that specialises in organic farming, including palm oil, and is often well ranked for its palm oil sustainability. Like Olam and ADM is it an active member of the RSPO - since 2004. Its UK turnover is below £1 million (classed as a small company). It also owns Soapworks in Glasgow, the UK's leading manufacturer of soaps and cleansing bars that utilises palm oil and which is also classed as a small company. Its parent companies are also small companies and it supplies to a mixture of SMEs in the UK.

The impact assessment refers to there being 'pinch points' in palm oil and soy commodity supply chains, where large businesses handle large volumes of commodities. While this is true, the regulation as proposed misses some of the key pinch points as referred to in Defra's 2013 report mapping the UK palm oil supply chain. The palm oil supply chain is often referred to as a hourglass as nearly all palm oil passes through a handful of large trading companies in the middle. Yet these companies, notably ADM and Olam who own two of the four palm oil refineries in the UK, would not be covered based on the current proposals. This seems like a significant oversight.

In addition, non-UK based companies do not often report their turnover related only to UK-based operations and therefore determining this seems problematic. It is therefore strongly recommended to focus on overall global turnover of the ultimate parent company.

The Stockholm Environment Institute also raised similar challenges on soy in their 2020 submission, noting: "165 companies are listed in the HMRC Importers Details database as having imported soy, or soy-linked products, in 2019. 61 of these qualify as small and medium sized enterprises (SMEs). Seventeen of these SMEs imported soy-linked material in at least six separate months in 2019, indicating its importance in their supply chains." (http://www.ngoforestcoalition.org/media/dc2720c7-697b-497b-94a4-faca6005892b)

As well as an exemption threshold, we also highly recommend an inclusion threshold where companies that are below the turnover threshold but use a large volume of any one of the commodities are covered by the regulation. These could be smaller companies in lesser-known sectors that face less consumer pressure, and therefore may have lower standards. This will then capture companies like Daabon. This is crucially important as such companies are often specialists in that commodity and therefore can relatively easily comply, will create a level playing field and ensures companies do not try to avoid the regulation by setting up separate, smaller entities or shell companies. This level this should be set at should be informed by responses to questions 38 to 41 below.

The analysis by Efeca in the impact assessment appears to list the number of companies in each sector above the £50mil turnover threshold, where a sector could possibly use a commodity (noting the methodology is not clearly specified) and reports around 1500 companies per commodity will be covered based on the £50 million limit. However, this appears to assume all those large businesses in that sector use the commodity (or use

more than the exemption threshold) which seems very unlikely. For example, it is highly unlikely all large travel agents, security agencies, extraterritorial organisations, zoos, performing arts centres, etc. would use any, or beyond the exemption threshold of, palm oil. London Zoo who works actively on palm oil and is a member of the RSPO only uses 0.06 tonnes of palm oil annually (as reported in its annual reporting – ACOP 2020 – to the RSPO).

Therefore, the estimation in the impact assessment of the companies actually covered by the regulation is very likely an overestimation and the turnover thresholds as proposed should be altered to ensure the companies who actually use the commodities are captured.

To conclude:

- Global turnover of the parent company must be used and not UK based turnover. This is to apply regardless of whether the company is UK based or non-UK based. This will avoid large companies creating smaller shell companies to avoid the regulation or missing major global companies that have smaller UK based operations.
- There should be an inclusion threshold, as well as exemption threshold, based on the volume of the commodity the company uses annually to capture companies below the turnover threshold but using a high volume of a commodity.

EIA further notes that Schedule 17 of the primary legislation (the Environment Act) does not require the obligation to only apply to 'large companies' and that there is no turnover threshold in similar existing or proposed laws (e.g. EU proposal, EU/ UK Timber Regulations, US FOREST Act). Only the EU's proposed Corporate Sustainability Due Diligence Directive proposes a turnover threshold, but it then applies to a company's own operations, the operations of their subsidiaries, and the value chain operations carried out by entities with whom the company has an established business relationship, and therefore has a much wider scope. The priority should be to ensure policy impact, especially with an obligation concerning legality.

With regards to concerns on the costs to business of implementing due diligence, the costs are estimated to be negligible - estimated at 0.074% of revenue for SMEs. There is a leakage risk in setting just a very high turnover threshold as this would create a loophole based on company size – companies would be able to create shell companies to avoid the threshold. Or smaller companies may segregate supplies sending only their 'clean' supplies to large companies in the UK (like the major supermarkets, manufacturers, etc.), while continuing to send illegally produced commodities to UK SMEs that also fall outside the regulation's scope. It is therefore essential to bring all or most businesses handling these commodities into scope. This would facilitate efficient implementation and cooperation across the entire industry.

35. Should we set a single exemption threshold for each regulated forest risk commodity, combining raw commodity use with derived commodity use?

Yes No

36. Should businesses be able to use conversion factors to estimate the volumes of commodities used in the supply chain to understand whether they can be exempt from due diligence requirements?

leave blank
If you ticked no, please state why

Conversion factors methodologies should be uniform across companies and per commodity and regulary updated in the guidance. We suggest that penalties should be issued if companies are non compliant and deliberately use skewed methodologies that might result in an unlawful exemption.

37. Should we use the proposed approach for businesses to understand whether they could be exempt? The proposed approach is to give businesses the freedom to choose which methodology they use to calculate volumes, to provide information on recommended methodologies in guidance, and to require in secondary legislation that the methodology should be reasonable.

Yes No Do not know

If you ticked no, please state why

The method and conversion factors used should be uniform across companies and per commodity and regularly updated in the guidance to ensure a level playing field. We suggest that penalties should be issued if companies are non compliant and deliberately use skewed methodologies that might result in an unlawful exemption.

38. Which of the following factors should be considered when setting the exemption threshold level? Please tick all that apply

- policy impact
- burden on business
- deliverability
- other, If you ticked other, please specify

Please state your reasons

39. For each of the following commodities, please tick the scale at which the exemption threshold level should be set.

	1 tonne	10 tonnes	100 tonnes	1000 tonnes	Don't know
beef	X				

cocoa	X				
coffee	X				
leather	X				
maize	X				
palm oil	X				
rubber	X				
soy	X				

40. Please provide reasons for the scale selected for each commodity in Question 39.

The exemption threshold should be as low as possible, especially considering only very large companies (above £50 million) are proposed to be in scope.

41. Do you have any further comments on the exemption?

Further comments

For palm oil, if the company is a RSPO member the amount of palm oil the company uses annually globally is self-reported in the Annual Communication of Progress (ACOPs) that are online at: https://rspo.org/members/acop or available on each company's individual RSPO membership page, which can help to inform the level any exemption, or inclusion, threshold is set at.

It is of note that if a company uses more than 500 tonnes of palm oil a year globally it has to become a full (ordinary) member. If it uses less than 500 tonnes it can choose whether to become an ordinary or associate member (https://rspo.org/members/membership-categories). On this basis an exemption threshold of 1,000 tonnes would be far too high. For example, Hovis uses 993 tonnes of palm oil annually globally. If only considering the use of the commodity in a company's UK commercial activities (which is rarely reported by companies), the exemption threshold needs to be much lower as UK only use will be lower.

Questions 42-43-44 for business only (we don't respond)

45. Should businesses in scope be required through secondary legislation to 'eliminate risk or reduce risk to as low as reasonably practicable'?
No

Please state your reasons

Businesses in scope will need a clear and precise description of what their due diligence system must achieve in order to comply with the prohibition set out in paragraph 2 of Schedule 17. For this reason, subjective language like "as low as reasonably practicable" should not be used.

EIA further notes that 'eliminate risk' is redundant, as full risk elimination is probably never reasonably practicable. The wording is therefore a weak legal basis and makes the due diligence requirements dependent on what businesses are capable of doing to mitigate the risk, rather than allowing the regulator to dictate what the requirements are. This makes it likely enforcement will be very difficult, as businesses will be able to make claims about what they are practically capable of doing that may not be able to be questioned by the authority.

In the explanation for this, it is stated "In some circumstances there is a zero tolerance of an outcome, and no risk mitigation efforts should be spared to avoid it. In other cases, some occurrence of the undesirable outcome is accepted and therefore there is a lighter risk mitigation requirement." This is not reflected in the risk standard put forward, which makes the mitigation requirement "as low as reasonably practicable" regardless of the nature of the risk. This seems like a significant problem.

Instead operators / businesses in scope must come to a reasonable conclusion that there is no more than "negligible risk". Under the EU and UK Timber Regulations the standard is "negligible risk". This standard would still be more appropriate than "as low as reasonably practicable". The EU has sought to better clarify what is meant by negligible risk in its newly proposed deforestation regulation by defining that it means that a full assessment of compliance of the commodities or products with the relevant articles in the regulation shows no cause for concern. In other words, a negligible level of risk means that all the circumstances indicate there is no cause for concern that relevant local laws were not complied with in relation to the commodity. This approach to risk level would be consistent with other UK due diligence frameworks such as the UKTR framework and would allow better reciprocity for companies that may trade in both jurisdictions.

Risks should be reviewed at least annually and whenever new information indicating a risk of non compliance arises. Where commodities are already in use, the relevant authority should be notified.

Operators should be required to maintain records sufficient for five years to demonstrate how the information obtained was assessed against the risk assessment criteria, how they determined the level of risk, how any decision on risk mitigation was taken and how those measures were implemented.

46. Which of the following should we provide information on in guidance to support businesses to establish effective due diligence systems? Please tick all that apply.

- what is required of eligible business to comply with regulations
- examples of best practice to support businesses in improving their systems

- metrics and indicators to help assess where there are low, medium, or high risks of illegal land use and ownership
- methods that businesses may use to assess and mitigate risk
- available resources to help understand legal frameworks in producer countries
- other (please specify)

EIA notes that there limited questions in this consultation on the due diligence process itself. The due diligence process must be outlined with minimum requirements set out in the secondary including on information gathering, risk level, risk assessment and mitigation. These details should include clear categories of laws specifying the scope of local laws on land use and land ownership that fall under Schedule 17 of the Environment Act such as "laws related to corruption, bribery or fraud" in addition to, for instance, the requirement for commodity traceability legislation (please see response to question 49 below for details).

Guidance should support the minimum obligations contained in the secondary legislation and be maintained as up-to-date infomration. Such guidance should include, for instance, actual lists of laws relevant to each commodity and jurisdiction (as defined via an in country multistakeholder process) and the various tools and methodologies and best practice technologies that can be used to trace commodities in supply chains.

Guidance to business should ensure that monitoring, identifying and responding to human rights concerns is outlined as a key pillar to effective due diligence. The UK already has various obligations to uphold human rights as a signatory to the UN and other international treaties, under the OECD Guidelines on Multinational Enterprises, and also OECD Guidelines on Responsible Business Conduct, and with human rights being emphasized in international climate agreements. The Global Resource Initiative's 2020 report also emphasized the importance of government taking into account human rights and environmental concerns in a due diligence obligation. The UN IPCC has also highlighted the centrality of respecting indigenous peoples rights as key to achieving sound environmental and climate outcomes.

47. Should we set out in guidance how businesses may use existing certifications and standards to help meet the due diligence requirement?
No

Please state your reasons

Certification schemes that are voluntary and should not be utilised to comply with a legal requirement. Part of the reason for introducing due diligence is because such schemes have proven to not be effective and therefore allowing them to be used to show legal compliance is counterproductive.

The RSPO explicitly said last year that its standards were voluntary and "do not extend to enforcing or confirming the legal standing of a company's use of land (which is a mandate only held by the national authority)"

https://www.theguardian.com/environment/2021/oct/21/indonesia-palm-oil-sites-forests-greenpeace

For example, there are multiple certified units where the estates do not have the cultivation right permit (Hak Guna Usaha – HGU) for all the areas that are part of that estate, which is a legal requirement in Indonesia. The HGU permit completes the acquisition of land rights and the permitting process.

A review of the 24 companies with palm oil permits in West Papua province in Indonesia was completed by the provincial government in conjunction with the Anti-Corruption Agency (KPK) and the NGO Econusa in 2020. It found 13 of the 24 companies had not completed the permitting process, and not obtained HGU, and therefore were in violation of the law.
(https://auriga.or.id/cms/uploads/pdf/related/4/6/laporan_hasil_evaluasi_perizinan_en.pdf)

The remaining 11 companies, although they had HGU permits, had operational violations or violations relating to their legality or licensing. These ranged from not having got a Timber Utilisation Permit (Izin Pemanfaatan Kayu, IPK – the permit required before forest is cleared for timber) to not reporting changes in ownership; not having fulfilled the requirement to allocate 20% of land to smallholders (plasma plantations); planting on prohibited peatland areas; planting in Forest Estate areas (such areas must first be authorised for release from the Forest Estate); and planting in a larger area than they have a permit for, among others.

Some of these concessions are certified. For example, PT Putera Manunggal Perkasa and PT Permata Putera Mandiri are RSPO certified. Yet, they were found by the permit review process to have planted on prohibited peatlands and not completed the land acquisition process for some areas, as well as other violations, and were recommended to return some land to the local government. .

It is vitally important that instead of relying on existing certification schemes that the UK government instead work with producer countries to review and support legal compliance. This may be through processes like the permit review done in West Papua – which issued a series of recommendations for each company to address the illegalities – and/or through processes similar to the FLEGT/VPA process done for timber. Any process must be inclusive, transparent and a multi-stakeholder process.

In terms of guidance for companies on due diligence, the focus should be on providing a list of relevant laws (please see response to question 49 below). This should be developed through a multistakeholder approach working all relevant in a country to set out the relevant laws, and also determine where there are conflicting or overlapping laws that need to be addressed through governance reforms, and then working to help ensure the relevant laws are actually compiled with.

Question 48. Which of the following criteria should we set out in guidance to support the use of existing certification schemes and standards? Please tick all that apply and state your reasons.

- proof of legality
- chain of custody
- robustness
- transparency
- other (please specify)

Third party certification or verification schemes should at most be allowed as complementary information in the due diligence process and must not absolve companies of their due diligence obligations. Instead of just relying on existing schemes, the guidance should set out the laws to be complied with, and work with producer countries through a multi-stakeholder process to define these, improve land governance and address corruption.

Setting out criteria for certification schemes is not sufficient and would risk guidance being turned into an inadequate tick-box exercise for companies. Where certification schemes are mentioned, the guidance should clearly state not only criteria, but also the shortcomings of existing certification schemes and this should be regularly updated to inform businesses of common loopholes and existing problems.

Many voluntary certification schemes have indicators on legality, have chain of custody requirements, have audits undertaken by independent, third-parties, and have transparency of audit reports, complaints, etc. However, this does not mean they are robust or can assure legality. This is in part because this remains the domain of authorities within a country, rather than auditors that are looking at compliance with a voluntary scheme. Unfortunately, national certification schemes have often also yet to be proven effective in this regard. For example, while the Indonesian Sustainable Palm Oil (ISPO) certification scheme is a legality standard it has not been developed through a multi-stakeholder process, and despite a revision in 2020, still has numerous weaknesses. It also is highly untransparent, and there is no longer even a website and list of all ISPO certified concessions.

EIA also notes the other proposed due diligence regulations in the EU and US on forest-risk commodities are not proposing to rely on the use of existing certification schemes. In addition, any mass balance supply chain model should not be utilised as it is allows mixing with uncertified supplies.

Certification schemes have so far not proved to be nearly effective enough. See reports:

Who Watches the Watchmen, 2015 https://eia-international.org/report/who-watches-the-watchmen

Who Watches the Watchmen 2, 2019 https://eia-international.org/report/who-watches-the-watchmen-2/

A False Hope? An analysis of the new draft Indonesia Sustainable Palm Oil (ISPO) regulations, 2020 https://eia-international.org/report/a-false-hope-an-analysis-of-the-new-draft-indonesia-sustainable-palm-oil-ispo-regulations/

Destruction Certified, 2021
https://www.greenpeace.org/international/publication/46812/destruction-certified/

Deforestation and Deregulation, 2021 https://eia-international.org/report/deforestation-and-deregulation-indonesias-policies-and-implications-for-its-palm-oil-sector/

The RSPO itself also lists research and evidence of its impact on its website: https://rspo.org/impact/research-and-evidence/research-library/. Unfortunately, many of these also show its limited impact, with a selection of papers highlighted below:

"No significant difference was found between certified and non-certified plantations for any of the sustainability metrics investigated, however positive economic trends including greater fresh fruit bunch yields were revealed. To achieve intended outcomes, RSPO principles and criteria are in need of substantial improvement and rigorous enforcement." https://iopscience.iop.org/article/10.1088/1748-9326/aac6f4

"While forest loss and fire continued after RSPO certification, certified palm oil was associated with reduced deforestation. Certification lowered deforestation by 33% from a counterfactual of 9.8 to 6.6% y−1. Nevertheless, most plantations contained little residual forest when they received certification. As a result, by 2015, certified areas held less than 1% of forests remaining within Indonesian oil palm plantations. Moreover, certification had no causal impact on forest loss in peatlands or active fire detection rates." https://www.pnas.org/doi/full/10.1073/pnas.1704728114

"The certification scheme's complaints system is ineffective and does not provide NGOs with the necessary mechanisms to address breaches of the standard and restore the rights of local communities" https://www.bioinequalities.uni-jena.de/sozbemedia/WorkingPaper8.pdf

"due to the lack of data from any counterfactual non-certified estates for comparison, there is insufficient information to attribute the observed biodiversity benefits solely to RSPO certification. Furthermore, it is also not possible to conclude whether non-certified estates may or may not be just as important for biodiversity conservation. The key attribute to ensuring positive biodiversity outcomes in oil palm settings appears to be the commitment from owners and senior managers, as well as the governance system under which a company was developed"
https://www.rspo.org/library/lib_files/preview/1487

"Our analysis suggests that, rather than undermining public policy objectives, secondary effects of RSPO certification may reduce illegal deforestation outside of certified supply bases. However, any net benefit of RSPO certification for forest protection is extremely small in comparison to the scale of the deforestation challenge... While certification has reduced illegal deforestation, stronger sector-wide action appears necessary to ensure

that oil palm production is no longer a driver of forest loss."
https://iopscience.iop.org/article/10.1088/1748-9326/ab7f0c

49. Please provide any relevant evidence on current business practices, methods, and metrics available to assess and mitigate risk. Please provide details about your answer, or use the file upload feature.

Schedule 17 of the Environment Act imposes two key obligations: a prohibition and a due diligence requirement (like the UKTR/EUTR). Experience under the UKTR/EUTR shows enforcing the prohibition is extremely challenging and resource intensive.

Therefore, clear, detailed and robust due diligence obligations are essential for operators and enforcement authorities alike. The effectiveness of the entire Schedule 17 framework depends on strong and clear due diligence requirements. These requirements should be specified in as much detail as possible. Schedule 17 para. 3(3) allows for "further provision" of the due diligence system in secondary legislation.

Due diligence obligations enshrined in the secondary legislation

The due diligence obligations contained within the secondary legislation must establish clear minimum requirements regarding the information that must be obtained from companies, risk assessment criteria, level of acceptable risk, and risk mitigation. These minimum requirements must include (but not be limited to):

- That information should be supported by evidence and allow operators to fully trace products to "the land on which the source organism was grown, raised or cultivated". Traceability requirements should be enshrined in the secondary legislation (geolocation) and the tools and commodity specific information regularly update in the guidance document. Without understanding where commodities come from, it will impossible to know if they were produced illegally.
- The need to identify and name "relevant local laws" that apply (this can draw on regulator guidance - see below), to also to list the obligations that apply under those laws (and related statutes, regulations etc) and show evidence of compliance with each legal obligation under those laws.
- Specific risk assessment criteria that ensure a reasonable and reliable assessment of the risk that "relevant local laws" were not complied with. Furthermore, a clear statement that only negligible risk is acceptable, otherwise mitigation measures required.
- A requirement to verify whether that land has been subject to deforestation;
- Due diligence is an ongoing process there must be a requirement on operators to continuously review their due diligence system, regularly review its application, and revise risk assessments whenever new information arises.
- Minimum due diligence requirements should be 'commodity agnostic' and apply uniformly across all commodities within scope of the regulation. This is to ensure the regulation is both effective and simple.
- Minimum record keeping obligations

- Alignment with proposed EU requirements and existing international supply chain due diligence standards (UNGPs, OECD, FAO) as much as possible.
- The need for companies to complete declarations when importing commodities that adequate due diligence on the commodity has been completed, referencing how that due diligence has been done. This will immediately alert the regulator to what needs to be checked, and simplify prosecution in cases where due diligence is not completed, as it may be easier to prosecute for misdeclaring the product (please see response to question 60 on enforcement).

Information gathering

Companies should be required to identify, obtain, and verify information, supported by evidence, regarding for instance as a minimum:

- Legal and trading names of the commodity and supply chain actors;
- Details of the shipment and importer;
- Country of origin and sub national jurisdiction of production;
- Geo location details of the area where the source organisms was grown, raised or cultivated and date or time range;
- Prior land use and date of conversion to agricultural production;
- Adequate and verifiable information identifying the "relevant local laws" (eg. statutes, regulatory structures, executive decrees, jurisprudence, and any other applicable legal obligations);
- Details of the right to use the land and any arrangement conferring that right, including in relation to customary tenure rights and the right to free, prior and informed consent;
- Adequate and verifiable information obtained via independent sources and appropriate consultation processes that the land is not subject to any claims on the basis of indigenous, customary or other legitimate tenure rights or subject to any dispute regarding its use or ownership;
- Adequate and verifiable information that the "relevant local laws" were complied with. In high risk jurisdictions, documentation such as permits or licenses may be issued without a company or supplier having met the underlying legal requirements.

Risk assessment, level and mitigation

The following should be included as minimum risk assessment criteria:

- The extent and proximity of forest and prevalence of deforestation;
- Concerns such as the level of corruption; prevalence of document and data falsification, incompleteness or irregularities; lack of law enforcement; prevalence of undocumented or overlapping tenure claims; land conflicts, armed conflict and international sanctions;
- The prevalence of industry practices, such as purchasing and pricing practices, that undermine the capacity of producers to comply with relevant local laws

- The completeness and reliability of information registers, in particular regarding land administration, environmental approvals and land use permissions
- The complexity of the supply chain and the risk of mixing with commodities or products of unknown origin;
- The extent of third party reports indicating non compliance with relevant local laws, deforestation, conflict, community protest or grievances, violence, or threats to land and environmental defenders;
- The availability of evidence that the rights of indigenous peoples and local communities, including where relevant the right to free, prior and informed consent, have been respected.

On the level of risk, please see our further comments in question 45 above. The subjective "low as reasonably practicable" provides a weak legal basis and makes the due diligence requirements dependent on what businesses are capable of doing to mitigate the risk, rather than allowing the regulator to dictate what the requirements are. Instead operators / businesses in scope must come to a reasonable conclusion that there is no more than "negligible risk". In other words, a negligible level of risk means that all the circumstances indicate there is no cause for concern that relevant local laws were not complied with in relation to the commodity.

Risk mitigation - unless the application of the due diligence system allows a reasonable conclusion that there is no more than negligible risk, a regulated person should be required to undertake risk mitigation measures that are adequate to reduce the risk to a negligible level. Regulated persons should be free to determine the risk mitigation measures that are adequate to address the risks identified and that are appropriate for their business. The secondary legislation should include a non exhaustive list of possible risk mitigation measures, including obtaining additional information, undertaking independent surveys or audits, consulting with local stakeholders in relation to the production of the relevant commodity, and other measures.

The scope of local relevant laws

The scope of laws needs to be clearly articulated - a non exhaustive list of category of laws (see below) should be included in secondary legislation. The Guidance should then detail specific laws as relevant on a country-by-country basis and the legal obligations that fall under them. It is vital that there is clear communication with all producer country stakeholders. The multistakeholder process for testing the regulatory details and enforcement infrastructure must include all relevant stakeholders, including smallholders, NGOs, Indigenous Peoples and relevant local communities and companies, and be based on objective analysis.

Please find below a non-exhaustive list of categories of laws that must be considered and suggested legal obligations and laws that might fall under such categories.

Rights or protections for specific populations

- These include for example, usufruct rights, protections and rights that relate to Indigenous Peoples traditional communities, afro-descendant communities and landless peoples and others with customary land rights

Laws that relate to the rights of those using the land

- Including customary land rights, the rights of subsistence land users and laws that cover rights against unfair eviction
- Prevention of illegitimate land claims, titles or other forms of land transactions being issued - for example, by failing to recognise the pre-existing rights of others under law or through fraudulent means
- Obligations to identify existing land users or rights holders, and to undertake consultations or negotiations with affected communities and/or the general public.

Environmental protections, permits and licensing conditions

- Environmental protection, restrictions on or conditions on the use of land
- Prevention of specified areas from being used for the commercial production of commodities
- Laws that outline specific conditions, obligations and procedures that must be met by companies to legally obtain or maintain lease rights or permits to use land for specified activities
- Procedural and substantive requirements, including before concessions are granted

Commodity or industry-specific requirements

Zoning and development permissions

- These include spatial and land use planning at different jurisdictional levels like national/provincial so as to ensure there are no for instance overlapping claims.
- Social protections surrounding access to land and natural resources, evictions and resettlement, privatisation, expropriation or eminent domain or other adverse impacts on land users
- Restrictions on the total area of land area that a company, entity or individual can control or access (which equally applies to land ownership)

Requirements to produce impact assessments

- Obligations and requirements that must be met in environmental and social impact assessments
- Obligations that relate to the meaningful participation of potentially affected peoples in decision-making, including but not limited to the right to Free, Prior and Informed Consent (FPIC)

Laws related to corruption, bribery or fraud

- Prevention of fraudulent land transactions
- Corruption, such as relating to the correct permitting process, and that the acquisition of permits is not obtained by bribery or corruption
- Requirements intended to prevent bribery, corruption, fraud, or other malpractice in relation to upholding the legal obligations and/or provision delivery of government services related to relevant land use
- Requirements specifically designed to prevent bribery, corruption or fraudulent practices in that relate to Tax or duty obligations related to ownership or land use

Land-related human rights protections – such as where international human rights law is ratified into local law, and parallel processes for international environmental treaties

- The integration of international legal obligations into national law, such as pertain to the rights to use or make decisions over land and its use such as ILO 169 and international human rights frameworks

Case studies: Examples of why a focus on obligations, and not permits alone, is necessary in Indonesia and Papua New Guinea

In general, the issuance of permits and concessions that do not meet the legal obligations described in law are a particular risk for corruption and fraud. For this reason, it is crucial that the scope of laws is locally determined by a multistakeholder process that includes all relevant local stakeholders, especially affected communities and civil society organisations.

In Indonesia for instance, there is a term known as "clean and clear" that specifies that palm oil plantations, and other sectors, must must obtain all relevant requirements and permits to operate but crucially must also conform with other articulated legal obligations including spatial and land use planning, ensure that there are no overlapping use of the land, no overlapping claims of the land tenure, has clear boundaries and also there is no dispute or conflict related to lands by third parties .

A recent EIA report (https://eia-international.org/wp-content/uploads/EIA-Deforestation-and-Deregulation-FINAL.pdf) on Indonesia provides concrete case studies of how land use permits and concessions may be issued without meeting the legal obligations described under law. This is why it is important that companies be required to show that they have met *the articulated legal obligations* (rather than simply evidence of the issuance of permits or concessions etc).

The report also references recent work in Indonesia, that finds that half of the 24 plantation concessions in West Papua, Indonesia did not have the required land rights permit. This is in a context of high, and predictable, risk given this is a highly forested area, on indigenous lands, in a context with militarised violence against civilian populations.

In Papua New Guinea, a 2013 government Commission of Inquiry into the SABL lease scandal found that only 4 of 42 Special Agriculture and Business Leases complied with legal obligations. Additionally, the Commissioner tasked with investigating a further set of leases in highly contested areas never submitted his report – raising concerns as to why.

Under PNG law, the issuing of leases requires the Free, Prior and Informed Consent of traditional owners – in essence, recognising that indigenous peoples have existing governance structures for making decisions about land use.

A recent Global Witness report (https://www.globalwitness.org/en/campaigns/forests/true-price-palm-oil/) used undercover footage to capture palm oil company executives and business partners discussing bribing ministers and using police to beat up villagers trying to exert their rights over their lands. It also highlighted serious concerns about how land concessions were issued – and traditional owners stating that the due process described in law have not been followed. This also detailed violence against local communities raising related concerns. The palm oil from the PNG companies was found in the supply chains of major global brands, including those operating in the UK.

(Questions 50 to 54 aimed at businesses)

Question 50. Can you provide any evidence on the cost of carrying out due diligence? Please provide details including how this relates to business size.

Costs for SMEs of new due diligence are estimated to be 0.074% of their revenue (this assumes they are starting from zero whereas many companies already have some due diligence system in place) (source: EU study on due diligence requirements throughout the supply chain, p.427-9, https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en)

This study also notes if all the companies in a supply chain were to exercise appropriate due diligence, SMEs' costs would be significantly lower as they would mainly need to focus on their own risks. The study also estimates the annual cost of new reporting requirements under the EU Non-Financial Reporting Directive to be 155,000 to 604,000 EUR for large companies, while SMEs additional costs were estimated around 8,000 to 25,000 EUR (p. 298).

Question 51. Can you provide any evidence on the cost of carrying out due diligence for specific commodities? Please provide details about your answer.

Question 52. Can you provide any evidence on the benefits to businesses of conducting due diligence for specific commodities? Please provide details about your answer.

Research indicates that companies that are more sustainable have greater financial returns. See: https://www.spott.org/wp-

content/uploads/sites/3/dlm_uploads/2019/12/Palm-oil-a-business-case-for-sustainability-1.1.pdf

Question 53. If you answered Question 52, can these benefits be quantified? Please provide details about your answer.

See: https://www.spott.org/wp-content/uploads/sites/3/dlm_uploads/2019/12/Palm-oil-a-business-case-for-sustainability-1.1.pdf

Question 54. Can you provide any evidence on the costs to consumers of businesses conducting due diligence? Please provide details about your answer.

Large companies are often able to absorb the costs and not pass them onto consumers. For example, IKEA have reported this. https://www.eco-business.com/news/whos-using-sustainable-palm-oil/. Equally, it is reported that if Procter & Gamble spent money on a best-in-class process in palm oil policy execution, due diligence and verification, the price of Procter & Gamble's Head and Shoulders shampoo would have to increase by only 0.12% to cover the costs: https://www.eco-business.com/news/can-only-western-buyers-afford-sustainable-palm-oil/. In general, companies with better ESG performance have better financial performance and profitability, so the costs of due diligence may also be mitigated by financial benefits to company.

55. What should businesses be required to report on to enable a regulator to identify areas for further scrutiny?

Secondary legislation should require that annual reports detail the action taken to establish and implement the due diligence system in relation to each commodity, as well as each application of the due diligence system including for instance:

- which commodities and derived products were traded
- the volume of each commodities and products to which the due diligence system was applied and when
- legal and trading names of supplier and buyer of the relevant commodity or product
- country of origin and sub national jurisdiction of production
- geo location details of the area of production and date or time range of production
- the rights relied on to use the land
- the "relevant local laws" and a description of the evidence relied on to determine whether they were complied with the risk assessment, including any mitigation measures and their results
- any complaints or concerns received and the action taken in response
- any review of a risk assessment and the result. Many companies already publish traceability data and mill lists on their own platforms. Eg. RSPO member companies are required to publish their mill lists. Transparency on supply chains can better enable monitoring by NGOs and others through providing information needed to hold companies accountable.

56. Should non-commercially sensitive information about businesses' due diligence exercises be made public to increase sector transparency and accountability?
Yes No

57. What information should be made public about businesses' due diligence exercises to support accountability and decision making?

Information must be published for independent scrutiny. Companies should have to be proactive in presenting their due diligence, rather than relying on inspections by an authority. There has been much criticism of the modern slavery statements that companies are required to publish under the Modern Slavery Act 2015, including poor content and companies not publishing them at all, with no sanctions on this. It must be ensured that the annual reporting as envisioned specified under the Environment Bill does not have the same fate.

There is a vital need for companies to complete legal declarations when importing commodities that adequate due diligence on the commodity has been completed, referencing how that due diligence has been done.

Secondary legislation should require that annual reports detail the action taken to establish and implement the due diligence system in relation to each commodity, as well as each application of the due diligence system, including:

- the commodities and products to which the due diligence system was applied and when legal and trading names of supplier and buyer of the relevant commodity or product
- country of origin and sub national jurisdiction of production
- geo location details of the area of production and date or time range of production
- the rights relied on to use the land
- the "relevant local laws" and a description of the evidence relied on to determine whether they were complied with the risk assessment, including any mitigation measures and their results
- any complaints or concerns received and the action taken in response
- any review of a risk assessment and the result.

Many companies already publish traceability data and mill lists on their own platforms e.g. Unilever https://www.unilever.com/files/origin/e84d22e1c71e43033d21b63a172143c2f54595c8.pdf/unilevers-palm-oil-mill-list-declared-by-ul-suppliers-2020.pdf . In addition, all RSPO member companies are required to publish all the certified and uncertified mills they source from (https://www.rspo.org/news-and-events/announcements/mill-list-submission-in-myrspo). Transparency on supply chains can better enable monitoring by NGOs and others through providing the information needed to hold companies accountable.

Company annual reports should be submitted digitally to a central information register in a standard form that can be machine read and that allows proactive risk based

categorisation for enforcement purposes according to indicators of non compliance risk. Reports should be made public by the relevant authority in their entirety within 28 days of receipt via a central and publicly accessible online database such as a "Central Information System" that is searchable by commodity name, company name, date of import, and country of production.

The Central Information System should maintain and make the following information publicly available:

- Complaints received
- Action taken and details of operator found in non compliance
- Annual reports of companies
- Traceability data on supply chains
- Volume traded by commodity and per company
- Information on relevant national laws at country and local level with which companies need to ensure compliance. Contents should not be considered exhaustive, but should reflect objective guidance for compliance requirements under the Act, supporting better compliance and a more level playing field between companies.

In addition, the relevant authority should:

- Assess annual reports based on indicators of non compliance risk, **develop a risk based monitoring programme to check at least 10% of** companies and 10% of trade volumes for each commodity;
- Establish an impartial, accessible, and transparent mechanism to receive complaints and concerns from the public about potential non compliance;
- Publicly report annually on complaints/concerns received, action taken in response, and the details of any regulated persons and commodities/products found to be in non compliance.

58. Which criteria should the enforcement authority fulfil? Please tick all that apply.

- **UK-wide remit** to ensure that the enforcement authority has powers to operate across the territory of application of the regulations.
- **Capacity to regulate** through established centres of expertise to deliver effective enforcement of the regulations.
- **Capability and experience** to deliver the functions of monitoring and investigating compliance and imposing civil sanctions when the requirements have been breached.
- other

The enforcement authority will need to have independent capacity to assess risks in relation to commodity supply chains to give it the ability to launch investigations and scrutinise due diligence statements by companies.

Moreover, there is an urgent need to secure long term funding for the regulation at a reasonable level – for example, at least equivalent to EUTR for each regulated commodity.

As suggested by the EU proposed regulation, companies who are found to be non-compliant should be required to pay for the cost of their investigation and prosecution including storage and testing of products.

59. Should the maximum variable monetary penalty be £250,000?
Yes No Do not know

60. Do you have any further comments on the enforcement regime?

Enforcement regime

The enforcement regime should be based on a well-resourced regulator with sufficient expertise and powers and robust penalties. Moreover, enforcement should be facilitated by strong information-sharing obligations on companies as well as mechanisms for input by third parties. This enforcement system relies on transparency and provision of public information to support regulatory function.

The enforcement authority will need to have independent capacity to assess risks in relation to commodity supply chains to give it the ability to launch investigations and scrutinise due diligence statements by companies.

Penalties

Civil sanctions should be effective, proportionate and dissuasive, and include the full range of potential sanctions available (fines, discretionary requirements, stop notices, enforcement undertakings).

Civil fines should be fixed as a percentage of annual global turnover not as a fixed maximum. This is particularly important if the scope of companies is already to be limited by volume or turnover - fines of max £250,000 are simply not dissuasive for very large companies. Some examples of this approach include the Data Protection Act which has a maximum of £17.5 million or 4% of annual global turnover (whichever is greater) and the EU Deforestation proposal, which is at least 4% of annual turnover.

Other examples include anti money-laundering laws (Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017) which provide for unlimited fines for businesses that don't comply with the risk assessment and reporting requirements.

The regulator should be able to set expectations for how companies will have changed their practices when the regulation comes into force, and check if those changes have been made. If they have not, the regulator should be imposing penalties. Penalties under

the UK Timber Regulation for failures to complete adequate due diligence have not topped £5,000 per breach. This level of penalty would have no deterrent effect on large companies dealing in significant quantities of commodities.

Under the EUTR, the most effective enforcement action for due diligence failures has been orders to stop sourcing from supply chains where adequate due diligence is not possible or has not been consistently conducted. A similar power to this will be necessary to have real effect, with substantial financial penalties if such an order is not complied with. The need for more state-based enforcement mechanisms and sanctions has been a key recommendation from the UK Modern Slavery Act 2015, including fines as a percentage of a company's turnover. As described above, civil fines should be fixed as a percentage of annual global turnover not as a fixed maximum.

Moreover, criminal offences should be included as per Sch 17 para. 3. Consideration should also be given to creating criminal offences for deliberate or repeated non-compliance with obligation, with strong penalties (cf UK Bribery Act (2010) which includes up to 10 years' imprisonment and unlimited fines). Sanctions against directors should also be considered.

The Regulatory authority

The regulator's role involves monitoring compliance via due diligence reports (taking into account also third party information), investigations, sanctions, and collating and publishing materials to support compliance, monitoring (including by third parties) and enforcement.

Enforcement authority obligations should include:

- **Assessing company due diligence reports based on indicators of non-compliance risk.** Reports should be submitted digitally and made publicly available. Risk-based monitoring should be used to verify data from a minimum percentage of companies and trade volumes for each commodity.

- **Operating an accessible and transparent mechanism for the public to submit complaints and concerns about potential non-compliance.** This is critical to support enforcement as well as providing some form of access to justice for people affected by non-compliance.

- **Developing and maintaining a public searchable online register of key information (the Central Information System)** supporting compliance and enforcement, including:
  - Names of all companies subject to / covered by the regulation
  - Company due diligence reports
  - Collated information on relevant local laws in different jurisdictions, compiled and updated on the basis of wide consultation with stakeholders.

- Complaints or concerns raised with the authority regarding non-compliance, action taken in response, and the details of any regulated persons and commodities/products found to be in non compliance.
- Traceability data

- **Publishing guidance to support company compliance.**

- **Publishing an annual report on enforcement actions taken,** including complaints/concerns received and actions taken in response, and investigations conducted.

- **Maintaining a public list of non-compliant companies.**
- Full range of powers of investigation, including powers of entry, inspection, examination, search and seizure.
- Full range of powers to sanction (civil and criminal).
- The regulations should provide for regulator cost recovery for enforcement activities
- Regulations should also enable third party/private enforcement i.e. civil liability or civil enforcement arising from non-compliance with statutory duty.

- **Require companies found to be non compliant to pay for the cost** of their investigation and prosecution including storage and testing of products.

- **Develop and maintain a network of agencies, an inter-agency group** to ensure the regulation enforcement is coordinated closely with agencies such as Defra, OPSS, Kew, CPET, FCDO and Customs and include the possibility of having expert group meetings with all relevant stakeholders including civil society organisations like the EU Expert Groups that occur or the US Lacey Interagency Group.

- Assess annual reports based on indicators of non compliance risk, **develop a risk based monitoring programme to check at least 10% of** companies and 10% of trade volumes for each commodity;

Obligations on companies:

- **Complete declarations when importing commodities (or otherwise when placing them on the UK market) confirming that adequate due diligence on the commodity has been completed, referencing how that due diligence has been done.** This will immediately alert the regulator to what needs to be checked, and simplify prosecution in cases where due diligence is not completed, as it may be easier to prosecute for misdeclaring the product.
- **Annual reports detailing the company's due diligence approach,** actions and outcomes. This should detail how the company has undertaken its risk assessment, what its exclusion criteria are, and how they have avoided or addressed unintended negative consequences.
- **Annual declarations of the amount each forest-risk commodity traded,** based on volume or turnover, to facilitate assessment and monitoring of due diligence.

- **Provide a traceability dataset to regulators,** which allows the production sites of commodities to be traced back to their geolocation of production. The secondary legislation should also require that companies selling commodities or derivative products make this available to clients and/or potential clients on an ongoing basis
- **Requiring companies to make overall declarations** as the quantity of commodities they have traded, based on either volume or turnover. This would force companies to be transparent about whether their due diligence is truly comprehensive.
- **Maintaining all due diligence records for at least 5 years.**

Enforcement and third party information

Third party information will be critical to ensure effective oversight and enforcement of activities in supply chains, particularly those linked to production outside the UK. Information from affected indigenous peoples
and local communities as well as civil society organisations will provide a critical check on (otherwise) self-reported company information.

Regulatory authorities must provide an accessible, credible and responsive mechanism for receiving, assessing and acting on this information.