

Friends of the Earth response to Defra consultation on due diligence/forest risk commodities

March 2022

Implementing the due diligence requirements

Q21. Should we lay secondary legislation at the earliest opportunity?

Yes.

Q22 What should we take into account when considering how long businesses have to prepare for regulation before it comes into effect?

The urgency of the climate and biodiversity crises should be the key consideration with respect to introducing this legislation. The government made high profile public commitments at COP26 to halt deforestation by 2030 alongside global leaders in recognition of the impact of forest loss on accelerating the climate emergency.

The fact that the Environment Act primary legislation only covers illegal deforestation means that businesses should already be well aware of the risks in relation to their supply chains, and of the local laws that exist, which they should already be complying with.

Companies will also be aware of the numerous investigations by civil society organisations that have uncovered wide ranging poor practice and commodities produced in illegally deforested areas ending up in UK supply chains, for example the use of illegally produced beef¹ and soy² by UK supermarkets.

The timeframe for this legislation to take effect should be based on the external need of the ecological emergency, not on what is pragmatic for business. Evidence from the past have shown that businesses can move very quickly when given clear legislative signals and a level playing field. For example, the shift in farming practices away from use of neonicotinoid pesticides and onto integrated pest management and the shift to low emissions and electric vehicles following the VW emissions scandal.

Foot-dragging by laggard companies must not slow down this response. Progressive businesses will already recognise the importance of cleaning up their supply chains in order to demonstrate to their customers, investors and other stakeholders that they are taking the ecological and climate emergencies seriously.

This regulation should come into force within 12 months of adoption.

Forest Risk Commodities

Q23. Can you provide any further evidence on commodities that drive deforestation?

Note on definition of forests – it is important government includes the widest definition as

¹ <https://friendsoftheearth.uk/climate/corned-beef-being-sourced-company-linked-amazon-destruction>
<https://www.mightyearth.org/2021/12/15/supermarkets-across-europe-drop-brazilian-beef-over-deforestation-linked-to-meat-giant-jbs/>

² <https://www.theguardian.com/environment/2020/nov/25/revealed-uk-supermarket-and-fast-food-chicken-linked-to-brazil-deforestation-soy-soya>

used by the FAO³. This incorporates ‘open forest’ which includes grassland with a discontinuous tree layer (with tree coverage between 10 and 40%). Open forest includes cerrado and chaco in Latin America, and wooded savannahs in Africa. Cerrado and Chaco are under ongoing threat from soy expansion in Brazil, Argentina and Paraguay.

A recent study of deforestation risk linked to UK imports (Pendrill et al, 2020) confirmed the highest risk commodities for the UK are palm oil, beef, (wood products – out of scope), soy, cocoa, and also highlighted coffee, collectively contributing to over 89% of the UK’s overseas deforestation risk (Deforestation risk embodied in production and consumption of agricultural and forestry commodities 2005-2017

<https://zenodo.org/record/4250532#.YiDOnOjP02w>)

Of the commodities included in the scope of the secondary legislation, imported cocoa beans also have a significant deforestation footprint. Coffee and sugar were also identified as emerging commodities with a high deforestation risk, followed by pepper, rubber and nutmeg/mace/cardamoms. As these are not included in scope of the secondary legislation and are much less extensively studied in the literature we suggest that Defra keeps them under review for potential inclusion in future.

WWF and RSPB’s Riskier business report⁴ also looked specifically at the UK role in global deforestation. It found a total of 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).

The report also ranked the countries from which the UK imports directly according to their risk, using four factors: extent of tree cover loss, rate of deforestation, rule of law, and labour standards. They found that of the UK’s total land footprint overseas of 21.3 Mha, 28% is located in those countries to which they assigned as “very high” or “high” risk score. This means there is still a high risk that the commodity supply chains operating within these countries continue to be associated with deforestation, conversion of natural ecosystems and/or human rights abuses.

Globally, the picture is similar – research by the World Resources Institute has shown that the key drivers of deforestation are cattle/beef, palm oil, soy, cocoa, rubber and coffee (as well as plantation wood fibre – out of scope for this legislation), and that these commodities are affecting particular hotspots <https://files.wri.org/d8/s3fs-public/estimating-role-seven-commodities-agriculture-linked-deforestation.pdf>

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

³ <https://www.fao.org/3/y1997e/y1997e1m.htm>

⁴ <https://www.wwf.org.uk/riskybusiness>

- the commodity's impact on global deforestation
- the UK's role in this global deforestation
- ability to deliver effective regulation
- other (please specify)

The primary concern and purpose of the secondary legislation must be the scale and urgency of the problem of global deforestation, and its impact on both the climate emergency and ecological breakdown – along with the subsequent effects on society and the economy. The legislation should come into force for all identified commodities within a year of coming into force – ie there should be no sequencing.

[State your reasons:]

It is disappointing to see “ability to deliver effective regulation” in the list of options. This implies certain concessions to companies in what they will be required to do and at what pace. The purpose of the secondary legislation should be to level the playing field and focus minds of companies, bringing them all up to the same standard as quickly as possible given the urgency of the climate and biodiversity crises.

It is hugely concerning that companies may not be ready to implement due diligence in their supply chains when only illegal deforestation is in scope. There is no excuse for delaying any further, and this legislation must set an ambitious timeframe – a legislative cliff edge - rather than allow companies to continue to fail in their legal duties. This should be set at within a year of the legislation coming into force.

This would also be consistent with legislative processes in the EU and US that will apply to cattle (beef and leather), soy, palm oil, cocoa and coffee (in the EU this also includes timber products and potentially also rubber and maize) within 12 months.

Question 25. What data sources or information should be used to consider the proposed factors?

The legislation should come into force for all identified commodities within a year of coming into force – ie there should be no sequencing.

The primary concern and purpose of the secondary legislation must be the scale and urgency of the problem of global deforestation, and its impact on both the climate emergency and ecological breakdown – along with the subsequent effects on society and the economy.

Q26. Do you have any further comments regarding the order in which we introduce key forest risk commodities?

The Impact Assessment and consultation have set out that the commodities to be included are cattle (beef and leather), cocoa, coffee, maize, oil palm, rubber, and soy.

It is unclear what the justification for a phased-in approach is given the law relates only to illegal deforestation, as defined under national-level law. Companies are already obliged to comply with these laws, so it is unclear why a phased implementation is required at all.

The Global Resource Initiative⁵ had recommended to government that an approach combining human rights and environmental due diligence should be adopted. Given that government decided to focus narrowly on the environment alone, we would question why such a gradual approach to implementation is needed.

The secondary legislation should include at least the seven commodities highlighted at the same time and within a year of adoption. Defra should abandon the sequenced approach, given the deforestation risk associated with each one of these. In fact, there is justification for inclusion of further forest-risk commodities highlighted in the research, once the initial seven are implemented, including sugar.

Question 27. Which option for the first round of secondary legislation do you recommend? Please state your reasons.

- Option 1: introduce 2 commodities in the first round of secondary legislation. Officials estimate this would take 18 to 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 to 4 commodities in the first round of secondary legislation. Officials estimate this would take 3 to 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 to 7 commodities in the first round of secondary legislation. Officials estimate this would take 4 to 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.

[Do not select any option, use the box 'Please state your reasons' to insert the following]

None of these options are fit for purpose.

As stated above, companies should already be clear on their obligations, given the Environment Act only includes illegal deforestation.

It is unclear what the limiting factor is in the estimations set out in the options above. Friends of the Earth would urge government to introduce all seven commodities from the start and within 12 months of adoption of the regulation.

⁵https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/881395/global-resource-initiative.pdf

The climate and ecological emergency demand urgent and ambitious action. The government has committed on the global stage to lead on halting deforestation, including via its ‘world leading’ Environment Act.

The potential for illegal deforestation linked to UK company supply chains to continue for up to 5 years under these proposals is unacceptable.

Q28. Should businesses fall in scope of the requirements if they exceed the turnover threshold in the previous financial year?

Yes

Question 29. Should we use UK turnover as the metric to capture UK based businesses?

- No

Q30. 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?

‘other’

No turnover threshold should be set. All companies should be in scope.

We do not agree that there should be any exemptions for companies, whether based on turnover or volume, and whether based in the UK or not.

All companies using forest risk commodities in their UK commercial activities should be subject to the Schedule 17 requirements without exemption.

This would ensure that Schedule 17 requirements are consistent with the UK Timber Regulation which does not specify a turnover threshold and would mitigate the risk of businesses setting up smaller shell companies in order to avoid regulation.

Question 31. Can you provide any data or information that will help identify potential businesses in scope based outside the UK? Please provide details for your answer.

As already stated, we strongly advocate that all companies regardless of size be included in the scope of the regulations. This would remove the need for Defra to undertake complex ‘means testing’ with respect to business eligibility as well as ensure the maximum impact is delivered in terms of the primary purpose of the regulations – to prevent illegal deforestation association with UK supply chains.

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

- policy impact
- burden on business
- deliverability
- other (please specify)

The overriding consideration for Schedule 17 should be the policy impact - ie halting illegal deforestation associated with UK commodity consumption. It follows then that this should require all businesses trading in forest risk commodities to be covered by the scope of Schedule 17 because these businesses, whether small, medium or large, collectively drive demand for forest risk commodities and the UK's resulting illegal deforestation footprint.

Setting a turnover threshold would result in illegally produced forest risk commodities continuing to be imported into the UK. Data from the JNCC and elsewhere shows that the single largest commodity from a given country responsible for the UK's deforestation footprint is beef from Brazil. Global Witness looked at the most recent data available (2017 TRASE data) finding that there were 17 UK importers of Brazilian beef. Eight may meet the lower £50 million threshold - however five would not and whether an additional three would is unknown. (One company was excluded as it has since been dissolved).

Along the same lines and in relation to palm oil, an Environmental Investigation Agency analysis provided to DEFRA in 2021 highlighted that based on turnover reported to Companies House - at least half of the non-EU companies importing palm oil into the UK in 2020 were not even listed as 'large' companies in that they fell below the £36 million threshold in the UK Companies Act. This is even lower than the lowest turnover threshold option presented in the consultation – and would mean that the majority of UK palm oil importers would not have to comply with Schedule 17.

The Stockholm Environment Institute also raised similar challenges on soy in their 2020 submission⁶, 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."

This is of primary concern because of the ongoing deforestation this would facilitate in producer countries, but would also set up an unfair system allowing some businesses to trade freely in forest risk commodities while others are subject to legal obligations over those same commodities.

SMEs are not exempt from having deforestation or human rights violations within their supply chains. Defra must quantify and take into account the cumulative impact of many SMEs and the impact exempting them would have on the stated purpose of Schedule 17.

Having some companies in scope of the regulations and others out of scope purely due to their size would result in a serious lack of clarity for the public when trying to understand which commodities and products are associated with potential illegal deforestation.

Paragraph 7(1) of Schedule 17 in the Primary legislation does not require the Secretary of

⁶ <http://www.ngoforestcoalition.org/media/dc2720c7-697b-497b-94a4-faca6005892b>

State to adopt a turnover threshold in the secondary legislation. We strongly advocate that no turnover threshold is set in order to level the playing field and ensure maximum policy impact i.e. prevented deforestation in UK supply chains.

As well as the obvious advantages in delivering more effective policy, this would also remove the administrative burden of assessing company eligibility and prevent companies evading the requirements do undergo due diligence by setting up smaller shell companies – a very real risk under the current proposals.

We recommend the government follow the approach in the UK Timber Regulation which has a similar remit: it regulates trade in a forest risk commodity and derived products; it prohibits the use of those products if they were harvested in contravention of relevant local laws; and it requires UK operators to carry out due diligence on the timber products in their supply chains to ensure they were produced legally.

Qu 33 – don't select any responses

Q34. Do you have any further comments regarding businesses in scope?

Notwithstanding Friends of the Earth's strong view set out above that all companies – regardless of size – should be in scope, the options for turnover thresholds set out in the consultation are extremely concerning. The lowest of £50m is astonishingly high and none of the threshold options are consistent with other laws. It is unclear why Defra have not included a much lower threshold, as well as none.

This implies that government have predetermined that this legislation will only apply to large companies, something that is not specified in the primary legislation. We would urge Defra to reconsider the implications of setting such a threshold.

The Global Resource Initiative recommended that all businesses should be included in the scope of the regulations, along with finance and public procurement⁷. We strongly support the inclusion of public procurement, which would show that the government is getting its own house in order.

We also support the inclusion of UK-based financial institutions, which have been the single biggest source of international finance for six of the most harmful agribusiness companies involved in deforestation in the climate-critical forests of Brazil, the Congo Basin and Papua New Guinea, providing £5 billion over the last six years⁸.

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

⁷https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/876465/gri-taskforce-executive-summary.pdf, page 3

⁸ <https://www.globalwitness.org/en/campaigns/forests/money-to-burn-how-iconic-banks-and-investors-fund-the-destruction-of-the-worlds-largest-rainforests/>

commodity use?

no answer

Question 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? Please state your reasons.

- No

As stated above, businesses should not be exempt from due diligence requirements. There is nothing in the Primary legislation that limits the scope of companies required to comply, either by turnover of volumes traded. All companies involved in the trade and supply of forest risk commodities, and their onward use in manufacturing of food and other consumer products should be subject to these regulations without exemption.

Qu 37 – Should we use the proposed approach for businesses to understand whether they could be exempt?

No

As stated above, businesses should not be exempt from due diligence requirements. There is nothing in the Primary legislation that limits the scope of companies required to comply, either by turnover of volumes traded. All companies involved in the trade and supply of forest risk commodities, and their onward use in manufacturing of food and other consumer products should be subject to these regulations without exemption.

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

- policy impact
- burden on business
- deliverability
- other (please specify)

As stated above, businesses should not be exempt from due diligence requirements. There is nothing in the Primary legislation that limits the scope of companies required to comply, either by turnover of volumes traded. All companies involved in the trade and supply of forest risk commodities, and their onward use in manufacturing of food and other consumer products should be subject to these regulations without exemption.

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

No response selected

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

As stated above, businesses should not be exempt from due diligence requirements. There is nothing in the Primary legislation that limits the scope of companies required to comply, either by turnover or volumes traded. All companies involved in the trade and supply of forest risk commodities, and their onward use in manufacturing of food and other consumer products should be subject to these regulations without exemption.

It would be logical if an exemption threshold were put in place to exclude larger companies that trade in small volumes, to also include the reverse – ie small companies outside the scope of the turnover threshold that trade in larger volumes.

However, setting up such a system would be unnecessarily complicated. Requiring all companies to comply with Schedule 17 regardless of size or volumes of relevant commodities handled would reduce the administrative burden for Defra, bring greater clarity to business, increase public confidence, and above all, result in the greatest impact in terms of preventing illegal deforestation driven by UK supply chains.

Exemption

Q41. Do you have any further comments on the exemption?

We do not support any exemptions as already stated above.

EarthSight has undertaken a preliminary analysis that suggests that, even with a minimum 1 tonne annual trading volume threshold, a majority of UK trade in all considered commodities would be exempted from Schedule 17. Their assessment indicates that:

- For beef importers, the highest proposed threshold (1,000 tonnes) would mean that only three of the top 17 importers would be covered: JBS, Princes and Weston (Marfrig). While those three companies represent around 90% of total beef imports by weight, this would result in a failure to capture 10% of beef imports. Noting that beef imports constitute the largest share of the UK's agri-commodity deforestation footprint, 10% of which represent an annual overseas land footprint of almost 400,000 ha (based on figures from WWF and RSPB: <https://www.wwf.org.uk/riskybusiness>).
- For palm oil, there is no trade data available to identify the annual trading volumes for any UK importers, though it is likely that the main trading companies, such as ADM, AAK and probably also Cefetra import more than 1,000 tonnes/yr. However, a large proportion of the nearly 100 firms importing raw palm products would not be covered if the upper threshold were to be chosen (1,000 tonne/year) as they almost certainly import less than that threshold.

We share the concerns set out by Client Earth that the assessments presented in the Impact Assessment do not include projections of the proportion of UK imports or trade in the targeted forest risk commodities at the annual trading volume thresholds considered. On that basis, it seems that DEFRA is itself unclear on what portion of UK trade in beef, soy, palm oil, etc would be covered if even a 1 tonne annual trade volume threshold was

adopted. In this regard, the Impact Assessment presents many potential impacts for businesses in terms of potential costs but fails to assess the potential policy impact and benefits to forests and natural ecosystems worldwide of the various options being considered (or even more ambitious options that should be considered, such as the absence of any turnover or trade volume exemptions). This would seem to be a significant shortfall that prevents a balanced assessment of the range of potential options and their impacts.

Qu 42-44 for businesses - ignore

Due diligence system

Q45. Should businesses in scope be required through secondary legislation to ‘eliminate risk or reduce risk to as low as reasonably practicable’?

No.

Businesses should be required to eliminate risk, but the wording “as low as reasonably practicable” is extremely vague, subject to a range of different interpretations and ultimately entirely unhelpful in terms of guiding business as to exactly what is required of them. It could also provide a convenient and even reasonable excuse for businesses not striving to eliminate deforestation in their supply chains, a helpful get-out clause for failure to comply.

Instead, businesses should be required to reduce the risk of illegal deforestation in their supply chains to a “negligible level”. This is consistent with the requirements of the UK Timber Regulation. Further details of exactly what is meant by “negligible level” should be clearly laid out to avoid any ambiguity or misinterpretation – i.e. along the lines of ‘a reasonable person, equipped with all the information of which the regulated person was or should have been aware, would conclude that there is no cause for concern that any relevant local laws were not complied with in relation to the commodity’. Accompanying Guidance could helpfully also provide some real-world examples.

In addition to prescribing the level of acceptable (negligible) risk, it is vital that the secondary legislation sets out detailed and specific requirements of the due diligence system with which companies must comply. These requirements must not be left to guidance.

In fact, the effectiveness of the Schedule 17 framework depends on robust and clear due diligence requirements being included in the secondary legislation and for this to be unambiguous and understood by operators – particularly given that they will be legally obliged to establish and implement a due diligence system.

These minimum requirements should require businesses to:

- show that they can trace forest risk commodities to “the land on which the source organism was grown, raised or cultivated” through providing evidence – including identifying companies involved at all points of the supply chain

- verify whether or not that land has been subject to deforestation – including by identifying the relevant local laws and be able to show that they have complied with the obligations contained within them.
- Put in place risk assessment criteria to enable companies to assess the risk of non-compliance with relevant local laws, and put in place mitigation measures if the risk of non-compliance is not nil or negligible
- Review their due diligence and risk assessments regularly as well as if and when they become aware of new information indicating that the relevant commodities were not produced in compliance with the relevant local laws.

The secondary legislation should set out a list of the categories of laws that could fall within the definition of “relevant local laws” (e.g., laws on environmental protection, permit allocation, agricultural activities, Indigenous and customary land tenure etc) and types of laws (e.g., statutory instruments, executive decrees, judicial precedent etc).

Authoritative guidance on what due diligence is and how to implement it is clearly set out in the UN Guiding Principles and OECD guidelines. OECD-FAO guidance for responsible agricultural supply chains is also already extensively used by businesses and as such would be a helpful starting point for government in setting out the requirements in UK legislation.⁹

Q46. 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

Select all and Other.

It is surprising that this consultation does not include specific questions on what the due diligence system should look like and fails to specifically seek feedback over what should be included in the primary legislation vs the guidance.

As noted in answer to question 45, the detail about what is legally required of businesses in terms of setting up a due diligence system should be set out in the secondary legislation, not in guidance.

⁹ <https://www.oecd.org/daf/inv/investment-policy/rbc-agriculture-supply-chains.htm>

The purpose of the guidance should be to elaborate and provide examples of how businesses should comply with the requirements set out in the legislation, e.g. how the due diligence system should be set up and used, examples of best practice, as well as contain information that requires regular updating, for example specific new laws or information about at-risk areas or operations.

Guidance should include:

1. Prevention of human rights abuses

Human rights abuses in supply chains are always extremely concerning and companies will want good information on how to prevent them taking place in their supply chains. Abuses can also be indicators of wider illegality - including environmental crime, corruption and a lack of law enforcement.

Guidance should ensure that monitoring, identifying and responding to human rights concerns is outlined as a key pillar to effective due diligence. It is important that this includes taking the rights of Indigenous Peoples and local communities into account – as highlighted in the GRI Taskforce report in 2020. The Intergovernmental Panel on Climate Change has also recognised the importance of respecting Indigenous Peoples' rights as key to achieving positive climate and wider environmental outcomes.

2. More detailed information on relevant local laws which would accompany the broad categories set out in the Primary legislation (see answer to Qu 45 above). This should, for example, focus on individual commodities and the main jurisdictions in which they are produced.
3. Guidance on how due diligence should be enhanced – beyond the minimum legal requirements set out in primary legislation – for commodities from high-risk areas.
4. Alongside examples of best practice, guidance should also provide a system of sharing examples of non-compliance to help inform companies of areas where they may need to enhance their due diligence checks and risk assessments.

Q47. Should we set out in guidance how businesses may use existing certifications and standards to help meet the due diligence requirement?

No.

Guidance should make it clear that businesses cannot rely on voluntary certification schemes to verify compliance with due diligence requirements.

Certification schemes are not a proxy for good practice, they are voluntary tools that have not been set up to prove business compliance with relevant local laws.

There have been numerous cases of harmful practice by companies certified by voluntary schemes including RSPO, RTRS and others. One of the main reasons these schemes have failed to prevent deforestation and clean up supply chains is their voluntary nature, lack of

enforcement, lack of robust penalties or sanctions for failure to comply, and reliance on self-governance by companies, including the entire schemes being overseen by industry itself.

A 2021 report by Greenpeace documents concerns over the robustness of a number of commodity certification standards including how the governing bodies are failing to enforce their own standards, concluding: “certification is a weak tool to address global forest and ecosystem destruction”.

(<https://www.greenpeace.org/international/publication/46812/destruction-certified/>)

To illustrate with one example, a Friends of the Earth International investigation found major palm oil producer IOI, (operating in Indonesia and Malaysia and one of the co-founders of the RSPO), involved in numerous breaches of law, as well as requirements set out in the RSPO. This included expanding plantations into forest and peatland without Environmental Impact Assessments¹⁰. It took 6 years and concerted NGO campaigning for the RSPO to suspend the company in 2016, and then only for 5 months¹¹.

At most, certification or other voluntary verification schemes should be suggested only as complementary to the due diligence process.

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.

- other (please specify)

As we have set out in answer to question 47, guidance should make it clear that businesses cannot rely on voluntary certification schemes to verify compliance with due diligence requirements. Voluntary certification schemes are not a proxy for good practice, they are voluntary tools that have not been set up to prove business compliance with relevant local laws.

Qu 49 – for business

Q50. Can you provide any evidence on the cost of carrying out due diligence? Please provide details including how this relates to business size

This consultation is overly focused on costs to business of carrying out due diligence, rather than costs of continuing deforestation and the impacts on future climate stability, ecosystems, human rights and wider society. These impacts are being felt now and will be more keenly felt by future generations if we do not act with urgency.

The impacts of harmful business practice on communities and the environment are disproportionately felt by people who are already marginalised, including women, indigenous peoples and other forest-dependent communities.

¹⁰ https://www.foei.org/wp-content/uploads/2014/01/Too_Green_to_be_True0310.pdf

¹¹ <https://www.theguardian.com/environment/2016/aug/08/palm-oil-giant-roi-group-regains-rspo-sustainability-certification>

In any case, research carried out by the European Commission found that recurrent company level costs for implementing full human rights due diligence are a tiny proportion of their revenue: for SMEs it is estimated to be around 0.14% of their revenue and for larger companies, around 0.009%.¹²

Although these costs to business are small, we recognise the potential disproportionate burden on smallholders if these costs are passed onto them by companies further up the supply chain, and the subsequent impact on livelihoods. The secondary legislation and guidance should explicitly state that companies may not pass these costs onto smallholders and should fully support them in obtaining the information required to carry out due diligence.

Qu 51 – for business

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.

There is increasing public demand for action from business and government to address the climate and nature crises. The benefits to business are difficult to quantify, but public expectation is for action, and companies that continue to exploit resources and people and exacerbate the climate crisis will be left in a vulnerable position.

The OECD report 'Quantifying the Costs, Benefits and Risks of Due Diligence for Responsible Business Conduct: Framework and Assessment Tool for Companies' (<https://mneguidelines.oecd.org/Quantifying-the-Cost-Benefits-Risks-of-Due-Diligence-for-RBC.pdf>) provides detail of the benefits of conducting due diligence and for responsible business conduct, including improved performance and shareholder returns, improved reputation and brand image and customer loyalty, lower risk management costs (eg costs of litigation), and better relationships with customers, investors and suppliers.

Qu 53 If you answered Question 52, can these benefits be quantified?

The benefits are difficult to quantify because they are wide-ranging and do not simply relate to financial costs. We have listed some of the benefits above.

Companies have resorted to 'greenwashing' precisely because they can see the huge reputational benefits to be seen to be sustainable.

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

It is our strong view that the costs of not conducting due diligence are far greater than the costs of doing so. We have already showed that the costs to business are very low and should be easily absorbed by businesses without passing them on to customers.

There is high public demand for deforestation-free and climate-friendly products, and for products that have been produced to high social and human rights standards for workers

¹² <http://corporatejustice.org/wp-content/uploads/2021/03/debating-mhrdd-legislation-a-reality-check.pdf>
p.14

and for better information to enable consumers to make informed ethical choices.

Numerous surveys back this up, for example:

- over 99% of respondents to the Government's 2020 consultation on 'due diligence on forest risk commodities' supported the introduction of legislation to reduce all deforestation
- YouGov polling late in 2021 found that 77% of the public agree that companies promoting more environmentally friendly practices has a very big or significant role to play in how the world addresses climate change
https://docs.cdn.yougov.com/hgo8eifaad/Copy%20of%20Internal_PostCOP26_211116_w.pdf
- research found that 87% of European consumers are demanding deforestation-free products (<https://www.foodnavigator.com/Article/2019/07/17/Start-taking-bold-action-Food-companies-urged-to-step-up-deforestation-efforts>,)
- a recent WWF-EU poll found that 7 in 10 EU citizens want confidence that their groceries are not linked to deforestation or biodiversity loss
(<https://www.wwf.mg/?4933816/7-in-10-Europeans-want-deforestation-off-the-EU-market---new-poll>).

Fairtrade is one of the best established certification systems guaranteeing fair treatment, pay and conditions of smallholders and workers. This has proven benefits to the wider communities, as well as to the brands themselves <https://friendsoftheearth.uk/sustainable-living/benefits-fairtrade>. A 2019 survey found that 84% of consumers have trust in the Fairtrade Mark. Fairtrade's work in providing fair prices, a living income and helping farmers to escape from poverty is crucial to this trust <https://www.fairtrade.org.uk/media-centre/news/consumers-see-fairtrade-as-a-reflection-of-their-personal-values/>

Considering the costs of undertaking due diligence are likely to be very low for most businesses as a proportion of annual turnover (see our response to Question 32 above), any costs that could be passed on to the public are likely to be tiny by extension, and easily absorbed by business.

Q55. What should businesses be required to report on to enable a regulator to identify areas for further scrutiny?

The secondary legislation should set out the reporting requirements for companies. Businesses should be required to submit a publicly available annual report including (but not limited to) the following in relation to each commodity – and should also be encouraged to make this information available on their websites:

Details of the due diligence system set up, and any changes and improvements made since the previous year.

Details of the risk assessment carried out, including steps taken to mitigate identified risks and the outcomes.

Datasets with full traceability of commodities – including geo-location data of production sites, volumes produced and sourced, production dates and onward movement through the

supply chain, legal and trading names of all direct and indirect suppliers and the buyer of each relevant commodity or product.

A list of the company's products that contain the commodities applicable under the law, this includes a list of products that contain derivatives.

Details of indigenous peoples and territories within the sourcing area and any customary land rights applicable.

The relevant local laws identified and proof of compliance with them, including laws on land use and land ownership and rights relied on to use the land to produce the source commodity.

A list of the main financiers of their company or company group.

Details of any grievances, complaints or concerns raised and any resolutions or ongoing cases.

Details of any evidence found of non-compliance, what steps were taken to address it and the outcome.

Any known human rights concerns or land conflict linked to the supply chain.

Total land footprint for each commodity.

Any known links to environmental harm through its supply chain - including legal harms.

Supplier exclusion criteria and how unintended consequences for smallholders have been taken into account.

The 'due diligence system' set out under Schedule 17 should set out a minimum standard, but the legislation should make clear that companies are expected to strive for continual improvement through the implementation of broader human rights and environmental due diligence as set out under the UNGPs and OECD guidelines and anchored in internationally recognised human rights and environmental legal obligations.

Q: 56. Should non-commercially sensitive information about businesses' due diligence exercises be made public to increase sector transparency and accountability?

Yes

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

All information provided by the company to the regulator should be made publicly available. This is important in order to:

- improve transparency and information sharing in supply chains
- allow responsible stakeholders to make informed decisions
- raise the bar for businesses

- facilitate compliance and improve enforcement
- allow scrutiny from wider stakeholders including civil society

If done well, it will also provide operational, reputational and financial benefits for businesses.

Question 58. Which criteria should the enforcement authority fulfil? Please tick all that apply and state your reasons.

- UK-wide remit
- capacity to regulate
- capability and experience to deliver
- other (please specify)

(Choose all and other)

The power to set out an enforcement framework in secondary legislation is granted to the Secretary of State in paragraph 8 of Schedule 17. This should include setting out the role of the regulator and its obligations around transparency. The regulator should have relevant expertise and be given sufficient resources and powers to both monitor compliance and address complaints, including proactively investigating potential incidences of non-compliance.

Expertise: The regulator will need to comprise of a team of people with relevant expertise in the environment, human rights, supply chain management, corporate accountability, and law (including land use, land ownership and customary land tenure in the relevant countries). It will also need knowledge of local languages and access to interpreters.

The role of the regulator should include:

Maintaining a register of companies, and monitoring compliance through analysis of companies' annual due diligence reports, cross-referencing with third party information, including any complaints

Undertaking spot checks as well as more in-depth investigations where evidence points to potential non-compliance

Issuing fines commensurate with the damage incurred and placing sanctions on non-compliant companies

Publishing details of any non-compliance found through routine monitoring, spot checks, through the complaints system or pro-active investigations.

Providing regularly updated guidance to companies to support compliance, including information on relevant local laws and company best practice.

Providing guidance to assist civil society, indigenous peoples, forest communities and others in the complaints system and how to access it. The regulator should be proactive in engaging

with communities in this regard, and not rely simply on publishing material on a website in English.

Publishing its own annual report on levels of compliance by sector/commodity, enforcement actions taken, including complaints received and actions taken in response, fines and sanctions issued and investigations conducted.

Maintaining a searchable database of information provided by companies (see below)

Transparency obligations: Improving transparency in forest risk commodity supply chains is a stated objective of the Environment Act.¹³ An effective enforcement system requires transparency by companies and the regulator to support compliance and secure public trust.

To aid this, the regulator should set up and maintain a publicly available, centralised supply chain database drawing from companies' annual due diligence reports. This database should be fully searchable and contain:

- details of companies covered by the legislation, commodity data (eg geolocations, volumes traded, supply chain details).
- Full company due diligence reports (published within 28 days of receipt).
- Lists of the relevant local laws for both national and sub jurisdiction levels (where relevant), and evidence of compliance with each, with details given in relation to how compliance with land use and ownership laws have not undermined the rights of indigenous peoples and other forest-dependent communities to their customary lands or their free, prior and informed consent.
- Details of enforcement action taken and details of any operators and products found to be non-compliant, including geolocation of affected sites.
- Complaints received via the third-party complaints system (subject to complainants' requests for confidentiality) and action taken in response to them including fines, sanctions and remediation
- Information on non-compliance, findings of spot checks and outcomes of investigations;
- Supplier exclusion criteria and how unintended consequences for smallholders has been taken into account.
- details regarding the enforcement authority's own capacity, including budget and staff, and its own annual reports.

Complaints system: A mechanism should be set up for input and complaints by third parties, giving impacted people a form of redress and support. It should give indigenous peoples, forest-dependent communities, workers and smallholders and civil society a

¹³ https://consult.defra.gov.uk/international-biodiversity-and-climate/implementing-due-diligence-forest-risk-commodities/supporting_documents/duediligenceconsultationimpactassessment.pdf

confidential mechanism to make complaints. The system should be responsive and accessible and enable complaints to be handled in people's own language.

The system needs to be sensitive to potential reprisals and ensure staff with the appropriate skills and knowledge are handling complaints. Disclosures related to whistle-blowers should be protected as set out by the Public Interest Disclosure Act 1998.¹⁴

The regulator should make public the procedure for receiving, assessing and acting on information, details of complaints brought, and the outcome of any resulting investigation including if any penalties or sanctions were applied, and if so, the details of those.

Powers and resources: the regulator must be given both sufficient power to be able to investigate complaints and issue appropriate fines and sanctions, as well as the resources to carry out its key functions (see role of the regulator above).

It is crucial that the regulator is given powers to conduct proactive investigations and to gather the evidence needed from companies. This should include the powers of entry, inspection, examination, search and seizure.

These powers can be modelled on those given to the UK's Competition and Markets Authority (CMA). This regulator has wide-ranging powers which include: the ability to enter premises with a warrant to seize relevant material; the ability to disqualify directors for up to 15 years; the ability to issue fines of up to 10% of a company's turnover.

We strongly advocate the regulator having 'market investigation' powers like those given to the CMA. In this case, these powers would enable the regulator to undertake in-depth investigations when a whole market sector (e.g. a specific commodity sector) does not appear to be working satisfactorily – this shifts the focus on industry-wide behaviours and practices rather than the workings of individual companies.¹⁵

The Enforcement Authority will need to have the powers to investigate on the ground in countries where commodities produced. Visits to producer-countries will help ensure proper compliance with the law and facilitate investigations into complex grievances that have been reported.

Q59. Should the maximum variable monetary penalty be £250,000?

No.

Fines should primarily act as a deterrent, encourage full compliance with the relevant law. They should also deprive companies of economic benefits derived from any infringements and be proportionate to the environmental and social damage caused by incidences of illegal deforestation, and the wider impacts of climate breakdown and biodiversity loss.

A maximum fine of £250,000 would not be dissuasive for many large companies. Many companies operating in deforestation risk commodities have an annual turnover of over £50

¹⁴ <https://www.legislation.gov.uk/ukpga/1998/23/contents>

¹⁵ <https://www.business-humanrights.org/en/latest-news/report-of-research-into-how-a-regulator-could-monitor-and-enforce-a-proposed-uk-human-rights-due-diligence-law/>

million – a £250,000 fine would only represent around 0.5% of their annual turnover. For bigger companies with turnover around £200 million, it would be a tiny fraction, just 0.13%.

The Data Protection Act (2018) has provision for fines up to a maximum of £17.5 million or 4% annual global turnover (whichever is greater). The EU Deforestation regulation proposal states (in Article 23) that fines should be at least 4% of annual turnover.¹⁶

Friends of the Earth supports a penalty of a minimum fixed percentage of revenue with no maximum level set. This is consistent with the UK Timber Regulation which also has no maximum.

Penalties should also go beyond fines and should include civil sanctions, such as the temporary disqualification of non-compliant companies from public contracts and stop notices at customs clearance rendering companies unable to fulfil contracts. Continued and repeated infringements should be met with increased financial penalties and civil sanctions, such as the exclusion of businesses from public procurement contracts and imprisonment of company directors. The proposed Dutch Child Labour Due Diligence Act will supplement fines with making company directors liable for two years imprisonment if their company gets two fines within five years.

Q60. Do you have any further comments on the enforcement regime?

¹⁶ https://ec.europa.eu/environment/publications/proposal-regulation-deforestation-free-products_en