

RESPONSE TO THE UK GOVERNMENT SUBMISSION ON IMPLEMENTING DUE DILIGENCE ON FOREST-RISK COMMODITIES

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

Yes.

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

Our chief concern should be the urgency of the situation. For at least a decade, communities, local organisations, international NGOs and even businesses have been sounding the alarm about deforestation and human rights concerns with forest-risk commodities. Forests are being destroyed at an alarming rate - deforestation rates in Brazil last year reached their highest levels in 15 years.

In 2010, the Consumer Goods Forum (comprising leading suppliers and consumer brands) committed to eliminating deforestation from supply chains of key commodities (soy, palm oil, cattle and pulp/paper) by 2020. We're now in 2022 and those voluntary commitments have failed. Greenpeace analysis suggests that some 50 million hectares of forest - an area the size of Spain - are likely to have been destroyed for production since the original commitments were made in 2010.

In early 2019, Greenpeace challenged over 50 traders, retailers, producers and consumer goods companies to demonstrate their progress towards ending deforestation by disclosing suppliers for key commodities. Not a single company was able to demonstrate meaningful efforts to eradicate deforestation. Data from the handful of companies which disclosed their suppliers indicated they all source from traders or producer groups involved in forest destruction.

Businesses should already be taking steps to ensure that the commodities they use are not linked to environmental harms, human rights abuses, or corruption. This new legislation focuses on ensuring that forest-risk commodities are produced in compliance with relevant local laws - i.e. not on illegally deforested or grabbed land. Any responsible business should already be complying with local laws. A year is therefore more than sufficient lead-in time.

Similar proposals in the EU and US regulating six forest-risk commodities give business 12 months lead-in time from the date of the law passing.

Q. 23 - Can you provide any further evidence on commodities that drive deforestation?

The UK government's JNCC data identifies the top 10 agricultural commodities that are driving the UK's deforestation footprint in its domestic consumption.

Q. 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
- ✓ Other - If you ticked other, please specify

We do not agree that a sector's readiness for regulation should determine the Government's willingness to enact effective legislation. Legislation should be designed according to identified policy objectives to effectively drive sectoral transformation, particularly where adequate economic incentives do not exist, not the other way around. The legislative agenda should not be captive to industry 'readiness' and should not be used merely to rubber stamp existing industry practices. Instead, the secondary legislation should both set the goalposts and define the boundaries for industry behaviour.

There have been numerous UK business and industry associations as well as individual businesses that have held commitments to achieve deforestation-free supply chains for years, some for almost a decade. Yet market forces alone have been insufficient to drive industry change. Rather than more time to 'get ready', a clear and imminent legal deadline – a legislative 'cliff edge' – is needed to drive industry change. To be effective and really catalyse a change in business practices, this legal deadline needs to be in the immediate term, rather than the medium term of three to five years.

Q. 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.

The primary objective of the UK legislation should be to dramatically reduce the UK's contribution to deforestation – and related issues like land grabs and threats to land and environmental defenders – as quickly and swiftly as possible. Global Witness has undertaken analysis of the potential impact of the consultation proposals on the UK's deforestation footprint which suggests that even the most ambitious application of Option 1, 2 or 3 would likely still see the UK contribute to roughly 100,000 hectares of deforestation between 2023 and 2030 in the top 8 agricultural commodities alone.

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

Given the urgency of halting global deforestation, the Schedule 17 framework should come into effect as soon as possible and cover at least cattle (beef and leather), palm oil, soy, maize, coffee, cocoa, pulp and paper, nuts and rubber from commencement. Resourcing constraints should not be a justification for delaying the urgent and necessary action that is in the national interest and to which the UK Government has been committed for over a decade.

We urge the Government to list all of the above identified commodities as forest risk commodities with the secondary legislation becoming effective within 12 months of enactment. We challenge the proposition that the proposed sequencing options presented in the consultation are the only options available.

There is ample evidence that all commodities considered are driving illegal (and legal) deforestation and conversion. Excluding any of them would leave a large part of the UK's illegal deforestation and conversion footprint out of scope. Any proposed exclusions should be justified with a clear and convincing rationale and reasons (which have not been presented).

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

No box has been ticked - as none of these options will make sufficient progress in tackling the UK's deforestation footprint, as highlighted in question 25. The options presented (Option 1: the UK regulates 2 commodities within 18-24 months; Option 2: it regulates 3-4 commodities within 3-4 years; or Option 3: it regulates 5-7 commodities within 4-5 years) do not measure up to the scale or urgency of the challenge.

These options are also dramatically less ambitious than regulatory action being discussed in other consumer countries. The EU's legislative proposal on forest-risk commodities and the US proposed FOREST Act would apply to a list of key commodities within 12 months.

Questions 28-39 of the consultation are narrowly defined. The response below should be considered as a response to each of these questions:

To ensure policy coherence with existing precedents, for example the UK Timber Regulation and the OECD guidance, requirements on forest-risk commodities should apply to all businesses without exemptions based on volume or company size. This is also simpler to implement, avoids creating loopholes, and creates clearer market conditions. The legislation should be applicable to the following undertakings, irrespective of their legal form, size or turnover:

- Operators, defined as any natural or legal person placing forest and ecosystem risk commodities (FERCs), or products derived from or containing FERCs, on the UK market for the first time.
- Traders, defined as any natural or legal person who, in the course of a commercial activity, sells or buys FERCs and related products already on the UK market.

Questions 40 & 41 - Not applicable.

Questions 42-44 - Not applicable, as these questions are only for business respondents.

Q. 45 - Should businesses in scope be required through secondary legislation to 'eliminate risk or reduce risk to as low as reasonably practicable'?

No. The inclusion of the words 'reasonably practicable' in this phrase is legally ambiguous and could allow companies to use 'practicality' as an excuse for not ensuring that forest-risk commodities or goods they are using have been produced in compliance with relevant local country laws and broader due diligence.

Companies should be required to ensure that they face no risk that they are using products or goods which do not comply with local laws or broader due diligence obligations.

Q. 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
- Metrics and indicators to help assess where there are low, medium, or high risks of illegal land use and ownership
- Other - If you ticked other, please specify

On 'other':

Human rights abuses, including threats, are deeply concerning in and of themselves. They also often serve as a pre-indicator of illegality - including environmental crime, corruption and extra-judicial violence. Guidance to businesses should ensure that monitoring, identifying and responding to human rights concerns is outlined as a key pillar of effective due diligence.

The UK already has various obligations to uphold human rights as a signatory to UN and other international treaties, under the OECD Guidelines on Multinational Enterprises, and also Responsible Business Conduct, and with the emphasis on human rights emphasized in international climate agreements. The Global Resource Initiative 2020 report also emphasized the importance of governments taking into account human rights in due diligence obligations. The UN IPCC has also highlighted the centrality of respecting Indigenous peoples' rights as key to achieving sound environmental and climate outcomes.

On land rights:

Schedule 17 of the Environment Act requires companies to comply with relevant local laws on land use and land ownership.

Companies should be required to:

1. **Name the relevant laws, and underlying statutes, regulatory structures, etc. that apply to the areas their forest-risk commodities and derivatives are sourced from.**
2. **Specifically name and list the legal obligations that apply under these applicable laws.**
3. **Show how they are complying with the obligations described in the relevant laws, statutes and regulatory structures that apply.**
Companies should be able to evidence how the legal obligations described under the relevant laws, statutes and regular structures are met. The existence of permits or licenses is insufficient, as in high-risk jurisdictions documentation such as permits or licenses may be issued without a company or supplier having met the underlying legal requirements.
4. **Disclose whether they have been made aware of concerns regarding compliance.** This may be through being alerted via direct communication - or through measures such as media reports, etc.

Schedule 17 of the Environment Act requires companies to only use commodities, and products derived from those commodities, if they were produced in compliance with relevant laws which relate to land use. In order to deliver this aspect of the Environment Act, an important first step is to provide a working definition of the category of laws that constitute a *'relevant law on land use'*.

Laws pertaining to 'land use', for example, include those that cover: the rights of land users (including Indigenous peoples and local communities) including against unfair eviction or other harms; environmental protections and requirements; land-related corruption, fraud or bribery; and integration of international legal obligations into national law, such as those pertaining to the rights to use or make decisions over land and its use such as ILO 169 and human rights frameworks.

The secondary legislation should include a non-exhaustive list of the categories of laws which come under this definition.

Q 47 - Should we set out in guidance how businesses may use existing certifications and standards to help meet the due diligence requirement?

✓ No

While a business may choose to use various tools to undertake due diligence, it should be legally responsible for its own legal compliance and due diligence obligations.

Letting businesses off the hook for failed due diligence – simply because they outsourced due diligence to third parties such as a certification scheme – is highly problematic and not consistent with the Environment Act.

A recent Greenpeace report, *Destruction Certified*, also provides detailed information documenting how certification bodies are failing to enforce their own standards.

Q 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.

✓ Other - If you ticked other, please specify

Guidance needs to be clear that businesses are ultimately responsible for their own due diligence obligations and legal compliance - and cannot outsource their legal obligations to third parties.

Businesses should be required under UK legislation to show proof of compliance with local laws, chain of custody, robustness, and full traceability, as well as other factors that are indicative of heightened risks - such as deforestation, human rights abuses, conflict, and local communities not providing their free, prior, and informed consent. There should be no loophole that exempts a business from meeting its own legal requirements.

Questions 50-54 - I do not wish to register any response to these questions.

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

Below are some of the highest-priority examples of data that the secondary legislation should legally require companies to provide to regulators. The most valuable and useful data is that which can be individually verified and scrutinised by regulators, as well as interested third parties accessing public data.

- **Full traceability.** The secondary legislation needs to clearly state that companies are required to submit full datasets or links to datasets that track the geolocation of a commodity to the site of production to regulators. Companies should also be obligated to make these datasets available to any business operating in the UK that they sell commodities or derived goods to. Regulators should then make these datasets publicly available online. Traceability is the cornerstone of ensuring the effectiveness of the legislation and its impact. If companies themselves do not have this data, they have no way of verifying that goods were produced in compliance with local laws.
- **Naming relevant local laws, the legal obligations under those laws, and evidence that those legal obligations have been met.** See answer to question 46.
- **Identifying Indigenous territories or peoples in sourcing areas.**

- **Public datasets of grievances.** Companies should immediately alert the regulator at any point that it is made aware of complaints or other information that relates to concerns in its supply chain that relate to environmental, social, or legal concerns - as these may be found to be linked to illegal sourcing in the supply chain.

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?

Public datasets fully tracing supply chains back to the site of production should be publicly available. This is critical to allow data to be independently verified, establish trust in the due diligence process, and create early warning systems to alert companies of potential legal or other violations on the ground. It also assists businesses, NGOs, and others to cross-check local reports on risks. It will also help build a reliable picture of the global task at hand.

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

- ✓ Capability and experience to deliver

Q. 59 - Should the maximum variable monetary penalty be £250,000?

No. Penalties should be fixed as a percentage of annual global turnover, not as a fixed maximum.

Fines of max. £250,000 are not dissuasive for very large companies. The Data Protection Act has a provision for fines of maximum £17.5 million or 4% of annual global turnover (whichever is greater) and the EU Deforestation proposal sets it as at least 4% of annual turnover.

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

Enforcement requires a well-resourced regulator with sufficient expertise and powers, 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.

Provisions should be made to ensure that proportionate, effective and dissuasive penalties are used if violations of the due diligence obligation occur. While monetary sanctions could play a role in some contexts of minor violations

to the due diligence obligation, these should not be used as the only enforcement mechanism, and should be used alongside:

- Suspension of the authorisation to trade: Instead of placing the burden on Government and civil society to have to check whether company claims to be deforestation-free through their supply chains are actually correct, the burden should be shifted onto the companies to have to transparently and publicly prove, traceable back to source, that their FERCs and products containing FERCs are completely free from deforestation, forest and natural ecosystem degradation and conversion, and human rights abuses - and that the risk of breaching these criteria are, at most negligible. This should be a condition for being able to operate and trade on the UK market. If FERC-related products or commodities cannot be proved to be free from these things throughout the supply chain then they should be banned from entering the UK market. Robust public scrutiny and enforcement mechanisms should be put in place to deliver this.
- The permanent seizure of commodities and derived products concerned.
- Criminal sanctions against individuals and, where allowed, legal entities, for the case of the most serious offences.
- In addition (and without prejudice) to penalties, the enforcement of the regulation should envisage:
 - The possibility of adopting measures (including provisional ones) to prevent the further circulation in the UK market of products and commodities not complying with the regulation's requirements.
 - The possibility to issue orders towards operators to bring their due diligence system, and application thereof, in compliance with the regulation.