

Response from the Royal Society for the Protection of Birds (RSPB)

Consultation on secondary legislation implementing due diligence on forest risk commodities

About us

The RSPB is the UK's largest nature conservation charity, with over 1.2 million members and more than 200 nature reserves across the UK. We have over 2000 employees, including a policy and advocacy team that covers policy areas ranging from nature-based solutions to climate change, wildlife friendly agriculture, Overseas Territories, conservation projects abroad to invasive species. We also play a leading role in Birdlife International, a worldwide partnership of nature conservation organisations that work together in advocating and carrying out conservation actions.

RSPBs response to the consultation on secondary legislation implementing due diligence on forest risk commodities

Below is a summary of the key points RSPB would like to raise in relation to the consultation on secondary legislation "implementing due diligence on forest risk commodities". This includes evidence on the drivers of deforestation, the UKs global leadership, ambition of the legislation and commodities in scope, certification, enforcement, and a specific section on Northern Ireland. We have also submitted a response via the online questionnaire portal which answers a broader range of the questions.

1. Drivers of deforestation and the UKs footprint

The case for urgent action to end tropical deforestation is indisputable. Over a decade's worth of voluntary corporate initiatives and non-binding public-private commitments have not delivered the changes needed to turn the tide of deforestation. Rates of forest loss are on the rise, and commodity agriculture continues to be the leading cause of global forest loss. Estimates range from 40%¹ to over 70%² for the share of deforestation caused by commodity agriculture (for products such as cattle, soy, palm oil and cocoa). Deforestation and forest degradation account for approximately 15% of global emissions³ and we cannot meet our commitment to 1.5 without tackling this crucial issue.

This UK is a key consumer market for commodities associated with deforestation, ecosystem conversion and human rights risks. The UK's global deforestation footprint is assessed in RSPB and WWF-UK's [Risky Business 2017](#) and [Riskier Business 2020](#) reports. The latest Riskier Business report found that the largest share of the UK's footprint was associated with timber (7.9million hectares), followed by pulp & paper (5.4m ha), beef & leather (3.8m ha), soy (1.7m ha), palm oil (1.09m ha), cocoa (1.06m ha) and rubber (0.2m ha). The UK governments JNCC data and experimental statistic also presents interactive data on the agricultural commodities that are driving the UKs deforestation footprint and its domestic consumption⁴.

¹ <https://www.globalforestwatch.org/topics/commodities/#intro>

² https://www.forest-trends.org/wp-content/uploads/imported/for168-consumer-goods-and-deforestation-letter-14-0916-hr-no-crops_web-pdf.pdf

³ <https://www.nature.com/articles/ngeo671>

⁴ <https://jncc.gov.uk/our-work/ukbi-a4-global-biodiversity-impact/> <https://commodityfootprints.earth/>

2. The UK as a Global Leader

The UK has repeatedly set out its intention to be a global leader on the environment. On deforestation specifically they have recently committed through:

- In 2020 the Leaders Pledge for Nature which, among other actions aiming to halt and reverse the loss of biodiversity, the UK signed up to “shift land use and agricultural policies away from.... harmful practices...and promoting sustainable land and forest management to significantly reduce habitat loss, unsustainable land-use change, deforestation and fragmentation...”
- In January 2021, the Prime Minister [announced](#) that £3bn of the recently doubled £11.6 ICF would be spend on climate solutions that benefit biodiversity.
- In 2021 through the G7 presidency and Nature Compact “Tackling deforestation, including by supporting sustainable supply chains and demonstrating clear domestic action” which also encourages cross ministerial cooperation to share best practice and consider development of DD requirements.
- In 2021 at COP26 governments made significant announcements on nature on forests that help secure political commitment and finance to protect and restore forests including the Glasgow Leaders Declaration on Forests and Land Use and the establishment of the FACT dialogue.

Looking across these commitments, it is therefore imperative that this legislation matches and responds to (and beyond) the scale of ambition and the scale of the challenge, and that sufficient resource and capacities are designated to this challenge to ensure we implement this legislation as robustly and ambitiously as possible.

3. Ambition of the legislation being proposed and commodities in scope

The primary consideration when considering scope, timelines, and capacity, should be the urgent need to tackle the biodiversity and climate crises. There is significant evidence of illegal deforestation risk associated with all commodities that are considered in the consultation and excluding any would leave a large part of the UK’s illegal deforestation footprint out of scope.

Analysis shows that what is currently being presented as ambition still leaves the UK with a substantial deforestation footprint by 2030. Evidence gathered by Global Witness in their submission estimates that the current options presented in the consultation paper could still see the UK contribute around or over 100,000 hectares in deforestation risk between 2023-2030 in its consumption of the highest risk commodities alone. According to WWF and RSPB’s Riskier Business⁵, a total of 21.3 million hectares of land is required, every year, to meet the UK’s demand for only seven forest-risk commodities, a third of this being in countries with high rates of deforestation and conversion and poor records of labour rights and rule of law. If the government wants to more than halve its deforestation footprint, then it needs to be more ambitious than what is being currently proposed.

Within this consultation, prioritisation seems to be placed on what is perceived as possible for business over an ambitious approach to halt deforestation. We must not make decisions on commodities in scope and timing based on businesses perceived preparedness to implement the legislation. We should not develop and implement this legislation in a way that matches the lowest

⁵ https://www.rspb.org.uk/globalassets/downloads/documents/risky-business/riskierbusiness_july2020_updated-1.pdf

common denominator - basing these decisions on the sector's readiness to deliver effective regulation will reward the most unprepared in the system, those that should have been taking steps to tackle (especially illegal) deforestation in their supply chain.

A wider scope of commodities and a more rapid implementation timeframe than proposed in the sequencing options of this consultation document should be implemented. Resourcing constraints (inside government departments) should not be a justification for delaying urgent and necessary action, and sufficient resources must be committed to ensure that the legal requirements cover the majority of the deforestation and conversion risk currently associated with UK consumption and within an urgent timeframe. EU and US proposals for comparable due diligence legislation include both a similar or wider scope of commodities and would come into effect within 12 months of the regulation being passed, suggesting that more rapid implementation is possible if adequate resources are provided.

Due to the UK's influence and responsibility to lead by example and the commitment to make this world-leading legislation we should at a minimum match or go beyond the scope and ambition of similar processes in the US and EU. If we do not, we risk locking in deforestation and place our commitments made at COP26 and elsewhere at risk of failure. Given the urgency of the issue, the obligations should come into effect as soon as possible – even if this has higher resourcing implications than anticipated by government. More time is not what will mobilise action.

The government's proposals are already limited in scope by just considering illegal deforestation. We would also like to highlight the key points made in our response to the primary legislation consultation response that we still feel: all deforestation, not just illegal deforestation, should be included in the measure, given the very real and live risk of deregulation in forest countries such as Brazil and Indonesia.

4. Certification Schemes

Guidance from government is necessary around the proper use of existing certification schemes and standards in order to make clear the obligations of businesses and to ensure that the regulatory provisions neither recognise inappropriate schemes as evidence of compliance nor inadvertently endorse less than credible ones. While voluntary standards and certification schemes are widely used, market-based tools to demonstrate compliance with a range of criteria, not all certification schemes will be appropriate as a tool for the new due diligence regulation.

Because in many cases voluntary certification schemes are developed to go beyond legal minimums or are international in scope, they are not necessarily themselves evidence of compliance with nationally or locally relevant laws. While many scheme will require legal compliance as a criterion, specific legal requirements are not necessarily components of the standards themselves or assessed as part of their inspection regimes. Instead, monitoring and enforcement of national and local laws are considered the purview of the state. This means that only those standards which set out specifically requirements that can be equated to legal compliance and which employ a credible and robust system of conformity assessment should be utilised for the purposes of compliance with due diligence regulations. Certification schemes are well placed to assess compliance of existing operations but less well positioned to assess the history of land use, ownership and acquisition and whether land has been illegally converted from forest or other valuable habitat.

Clear criteria and support for understanding which standards and certification schemes help demonstrate compliance with due diligence requirements is key. As set out in question 48, proof of legality, chain of custody, robustness and transparency are all welcome criteria for assessing the

appropriateness of any certification scheme in this regard. However, it is important that such assessments also consider the various facets of what constitutes a credible standard or certification scheme through rigorous benchmarking exercises. This matters because while for the purposes of compliance with due diligence regulations those criteria set out in the consultation may suffice, government acceptance of the use of particular schemes can have indirect, knock-on market effects. Schemes that can demonstrate legality while conforming to the bare minimum of criteria expected credible practice (in transparency, accessibility, accreditation, standard setting, monitoring and evaluation) are likely to see increased uptake. Regulations and their guidance should actively seek to avoid such a race to the bottom.

Supporting effective third-party benchmarking of standards and schemes has proven a useful approach, as demonstrated by the UK Timber Regulations and the Centrepoint for Expertise in Timber (CPET)⁶. This provided confidence in the credibility and use of specific certification schemes and served as wider signal to companies and the market (beyond just the scope of the regulations). Conversely, the EU Renewable Energy Directive enabled the use of voluntary, third-party schemes to demonstrate compliance but through an arguably insufficient benchmarking process, allowing the use of a range of schemes with varying levels of performance and credibility⁷. There are a range of tools and good practice guides to inform benchmarking and assess the relative quality and appropriateness and the Government should clearly set out expectations of how this should be undertaken⁸.

With regards chain of custody criteria, only systems of segregated or identified preserved commodity supply should be used as evidence of compliance with due diligence requirements. Unlike certification models such as mass balance or book and claim, only segregation or identity preservation models can ensure that the materials passing through company operations are indeed free from deforestation or habitat conversion. Segregated and identity preserved supply should also only be considered compliant if form part of credible schemes providing assurance that no deforestation/conversion has occurred.

Guidance will be sufficient to support companies in some aspects of this but it is vital that key aspects of this framework are set out in secondary legislation with detailed guidance to support understanding of requirements. This is needed to ensure companies are clear on their responsibilities and liabilities when using standards and certification schemes to demonstrate their compliance, while avoiding the use and support of schemes that are not fit for purpose – either in regards due diligence obligations or as sustainability tools used in the wider market.

5. Enforcement Authority

Without effective enforcement the obligation will be meaningless. Therefore, the enforcement authority should have a UK-wide remit, capacity to regulate, capability and experience to deliver and strong deterring enforcement powers – these are all necessary criteria for the system and enforcement to be effective. Adequate resourcing of the enforcement authority and independence

⁶ <https://www.gov.uk/government/collections/cpet-resources-for-government-procurers-suppliers-and-businesses>

⁷ https://wwfeu.awsassets.panda.org/downloads/wwf_searching_for_sustainability_2013.pdf

⁸ Good practice can include national and international norms, including [ISO standards](#), WTO [Annex 3 of the Technical Barriers to Trade Agreement](#), ISEAL [Codes of Good Practice](#), as well as criteria and insight from the initiatives such as the [Accountability Framework Initiative](#) and the [State of Sustainability Initiatives](#), and benchmarking [specific guidance](#).

are equally necessary for the due diligence obligations and requirements to be truly effective in reducing the UK's overseas illegal deforestation and conversion footprint.

UK Wide Remit – this is vital due to the geographical scope of the requirements. However, we would urge that further discussions are had with Devolved Administrations and any new regulator/enforcement body is codesigned with them (we discuss the unique requirements of Northern Ireland below). This will ensure and enable better integration of the new system within existing administrations and aid the work of the regulator going forward.

Capacity to Regulate – the secondary legislation must be clear on potential enforcement action that could be taken not just because a new system is being created and therefore legislative underpinning is required but also to be clear to all needing to comply with the new system that enforcement action can and will be taken. As discussed above part of the reason why voluntary measures for environmental protection simply do not work is due to the lack of tangible consequences for non-compliance. Also, where civil sanctions, fines etc. for offences are low some commercial entities will simply *take the risk* knowing they can easily afford any penalty given. Therefore, we strongly recommend maximum fines possible are set at a deterring level to increase the incentive to comply with requirements but also that other sanctions are included.

We support WWF's comments and recommendations as set out in answer to questions 58-60 in its response to this consultation and would join WWF in advocating for the inclusions of non-monetary civil sanctions especially due to the challenges of prosecutions as well as the need for the Government to come forward with further details of the proposed regime and seek feedback on these to ensure enforcement is robust and fair. It is also critical that these details are set out clearly in secondary legislation.

As set out in detail within WWF's Potential impacts of a UK due diligence regulation on deforestation, land conversion, biodiversity and associated carbon emissions technical report, 2021¹³. *"In order to prevent activities that lead to deforestation or habitat conversion, the penalties for infringement of the due diligence regulation must be appropriately dissuasive. In other words, the severity of the penalty and risk it represents for offenders must have a genuinely deterrent effect by being economically risky¹⁴. To date, most discussion of penalties has been framed around monetary fines. However, if fines are to be used, they must be scaled to the economic size of the actor in question and sufficiently large to be genuinely dissuasive. If fines are too low, they effectively become an absorbable cost of infringement for large businesses and disproportionately penalise small businesses...."* The enforcement body should be required to set out enforcement policy publicly including steps it will take to ensure compliance. This will be another opportunity for clarity to be provided to companies.

In addition, to be able to deliver effective and deterring enforcement, it is vital that the enforcement authority has adequate powers and is adequately resourced to enforce the schedule 17 framework and investigate non-compliance including receiving information by way of third-party complaints. Sufficient resourcing is needed to ensure the body can respond and act quickly in the case of non-compliance.

The enforcement body should be independent to ensure it is able to fulfil its functions without bias or interference.

Capability and Experience to Deliver – as mentioned above we strongly recommend discussions are had with the Devolved Administrations. We also recommend that there are dedicated country officials within the enforcement body to understand country specific issues and/or requirements and aid implementation and compliance within each Country.

We also recommend early and sustained engagement with stakeholders including commercial, academic and non-government organisations. This will aid the enforcement body in its establishment and help identify potential issues along with possible solutions benefitting from a wide range of expertise and experiences.

In addition though the enforcement body must have access to required expertise ideally in house or by way of an expert panel to call on when needed with an adequate budget specifically for that expertise.

6. Due diligence in the context of Northern Ireland

A focus on enforcement raises questions regarding Northern Ireland and its position relative to the proposed system of due diligence. RSPB welcomes the inclusion of Northern Ireland within the UK's system of due diligence responsibilities subject to wider comments made in response to this consultation. We are, however, disappointed that the consultation does not refer to, clarify, or provide space for consideration of the unique position of Northern Ireland.

Several key matters relating to Northern Ireland remain unexplored and unexplained. Beyond identifying the consent granted by the NI Assembly to be included within the UK-wide system, the complexities of the Protocol on Ireland/Northern Ireland (NI Protocol) and opportunities to discuss engagement with the NI Executive and European Commission are absent within this consultation. All of which are of central importance to implementing due diligence on forest risk commodities. We do not seek to provide answers to exactly *how* Northern Ireland's position should be addressed, as it is a complex and developing situation, rather we recommend attention is paid to, and clarification is provided on, matters including:

Compliance with legislation contained within the NI Protocol: Included within the NI Protocol are two pieces of regulation relevant to the focus of this consultation - FLEGT 2173/2005 and Illegal Timber Regulation 995/2010 (Annex 2). Whilst the proposed UK system does not include in scope timber, to "avoid overlapping" (p.1) of the due diligence and timber regimes (incl. UK Timber Regulations, UK FLEGT), there remains the matter of Northern Ireland's compliance with relevant EU regulations. We would then question:

- Who is responsible for the enforcement of FLEGT and Illegal Timber regulations in Northern Ireland?
- How will enforcement of the above-mentioned regulations be coordinated and/or align with enforcement of the UK Illegal Timber regulations UK FLEGT regulations, and due diligence system?

Dynamic alignment of legislation contained within the NI Protocol: as required by the NI Protocol, Northern Ireland must remain dynamically aligned with a potentially evolving body of legal and other agreed obligations and commitments that apply to, and in, EU member states (Article 13 (3) & (4)). Of relevance to the focus of this consultation are two regulations discussed above - FLEGT and Illegal Timber. Noting that, unlike the UK proposal, the planned EU system of due diligence includes in scope timber products⁴, it is reasonable then to question how Northern Ireland will be included/impacted

by the forthcoming EU system. UK and NI Departments must cooperate to ensure that enforcement of the respective UK and EU systems of due diligence to ensure that Northern Ireland does not become a back-door entrance for illegal forest products. Therefore, on the matter of dynamic alignment, we question:

- How have the relevant UK departments - including BEIS, Defra, DAERA, and the Department for Economy⁵ - engaged with the European Commission to understand:
 - their proposal for a regulation on deforestation-free products, and
 - how Northern Ireland may be included or impacted by the forthcoming EU system?
- What if any role have the Joint Committee, as provided for by Article 13 (4) of the NI Protocol, had in relation to the alignment of Northern Ireland with the forthcoming EU system of due diligence?
- If Northern Ireland is to be included within both UK and EU systems, clarification should be provided as soon as practicable including how differences in commodity scope and enforcement of regimes will be accommodated, and unnecessary duplication will be minimised?
- How will the relevant departments within the UK (as listed above) ensure that Northern Ireland complies and remains aligned to two systems?
- What assessment has been carried out on the impact of both the proposed UK and EU due diligence systems on the function of the UK Internal Market and provisions of associated legislation (UK Internal Market Act 2020), with particular reference to the unique position of Northern Ireland?

Action to reduce and minimise the impact of overseas land footprint must be coordinated across global markets to be effective. Northern Ireland's unique situation should be perceived and used as an opportunity to foster ambition and coordinated action, but to do so greater clarification must be provided on several key matters. We are concerned by the lack of engagement on this complex issue and would welcome the opportunity to engage further on due diligence in Northern Ireland with the relevant departments.

END of response

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