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The European Union's instruments on fighting illegal logging – selected legal issues

Abstract: Illegal logging is a significant problem of major international community concern because it has a devastating impact on some of the world's most valuable remaining forests and contributes to tropical deforestation and forest degradation. Furthermore, it threatens biodiversity and undermines sustainable forest management, having a negative impact on poverty reduction, sustainable and inclusive economic growth and development. The article presents instruments adopted by the EU in order to combat illegal timber logging. The author describes their material scope and legal character, dividing them into two groups: internal and international legally binding instruments and soft law instruments, in order to answer the question about their legal character and position in the EU legal order and in national orders of the Member States.

Keywords: DEFORESTATION, FOREST CERTIFICATION, ILLEGAL LOGGING, INTERNATIONAL FOREST POLITICS, SUSTAINABLE FOREST MANAGEMENT, TROPICAL TIMBER TRADE

1. Introduction

In the late 1980s and the early 1990s, illegal logging was an international non-recognised issue, because countries viewed as major exporters of timber did not want to accept the sole blame for the problem.¹ Hence, illegal timber trade first appeared as “undocumented trade” in the International Timber Trade Agreement in 1994. The term illegal logging was for

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¹ D. Humphreyes, *Deforestation and the Crisis of Global Governance*, London 2006, S. Leopold, M. Soitiorov, T. Frei, G. Winkel, *Protecting “First World” Markets and “Third World” Nature: The Politics of Illegal Logging in Australia, the European Union and the United States*, “Global Environmental Change” 2016, No. 39, p. 294-304.

the first time promoted by the G8 Action Programme on Forests.² Next, the term became accepted by producer countries because the Action Programme “did not anymore point the finger only at producer countries, but also held the consumers responsible.”³ Illegal logging is a global problem with significant negative economic, environmental and social impact. According to a Chatham House report, while significant progress has been made in reducing illegality in the forest sector over the past decade, the problem remains widespread.⁴ In 2016, more than 80 million cubic metres of timber were thought to have been illegally produced in the nine producing countries assessed.⁵ This is equivalent to nearly one third of their total production of timber.⁶ Illegal logging continues to have a wide range of negative environmental, social and economic impacts. Together with mining, conversion to agriculture, urbanisation and infrastructure building, it is an important driver of deforestation and forest degradation, which are estimated to account for 7% to 14% of total CO₂ emissions from human activities.⁷ It threatens biodiversity and can enhance illegal trade in wildlife. It also undermines the rule of law, may impact the rights of indigenous peoples and local communities, fosters corruption and organised crime as well perpetuates conflicts. Illegal logging can affect world timber prices and undercuts the economic viability of compliant operators. It also results in a significant loss of government revenue.

The objective of this paper is to divide and to analyse the material scope of the Union’s instruments on combatting illegal logging and to answer the question about their legal character and effects within the EU legal system.

2. Types of the Union’s instruments to combat illegal logging

In the typology of instruments, which the EU uses to carry out and to shape its policy aimed at combatting illegal timber logging, we may gen-

² D. Kaimowitz, *Forest law enforcement and rural livelihoods*, “International Forestry Review” 2001, No. 5(3), p. 199-210.

³ S. Leipold et al., *op. cit.*, p. 15-19.

⁴ Alison Hoare, *Tackling Illegal Logging and the Related Trade: What progress and where next?*, July 2015.

⁵ Brazil, Cameroon, the Democratic Republic of the Congo (DRC), Ghana, Indonesia, Laos, Malaysia, Papua New Guinea (PNG) and the Republic of the Congo.

⁶ The vast majority of illegal timber came from Indonesia (around 50%), Brazil (25%) and Malaysia (10%). In other countries such as Ghana, Laos, Papua New Guinea and the Republic of the Congo, which produce less timber overall, illegal timber accounts for a much higher share of their total production.

⁷ Information available at: <https://ec.europa.eu/jrc/en/news/reporting-greenhouse-gas-emissions-deforestation-and-forest-degradation-pan-tropical-biomass-maps>.

erally distinguish two groups of acts. The first one covers internal instruments that are adopted within the Union's legal order: the Forest Law Enforcement, Governance and Trade Action Plan (FLEGT Action Plan) and the Timber Regulation. The second one covers external instruments that are adopted within the international legal order: the Voluntary Partnership Agreements (VPAs).⁸ Moreover, we may divide them into autonomous instruments that are adopted by the EU alone: the FLEGT Action Plan and the Timber Regulation and conventional instruments that are adopted by the EU and third states: the VPAs.

Internal and autonomous instruments

On 21 May 2003 the European Commission (Commission) adopted FLEGT Action Plan to support international efforts to tackle the problem of illegal logging and associated trade in the context of overall efforts of the Union to achieve sustainable forest management.⁹ Its main objective was to ensure that only timber products which have been manufactured in accordance with the national legislation of the timber-producing country enter the EU. To achieve this, the EU may negotiate VPAs with timber-producing countries, or partner countries, which create a legally binding obligation for the parties to implement a licensing scheme and to regulate trade in timber and timber products identified in those agreements. The key regions and countries targeted in the FLEGT Action Plan, which together possess nearly 60% of the world's forests and supply a large proportion of internationally traded timber, are Central Africa, Russia, Tropical South America and Southeast Asia.

The FLEGT Action Plan is the first step towards tackling the issue of illegal logging and trade, because it puts an emphasis on governance reforms and capacity building, supported by actions aimed at developing multilateral cooperation and complementary demand-side measures designed to reduce the consumption of illegally harvested timber and contributing to the wider objective of sustainable forest management in timber producing countries.¹⁰ Moreover, it identifies the setting up of a licensing scheme as a measure to ensure that only timber products that have been legally produced in accordance with the national legislation of the producing coun-

⁸ B. Van Vooren, R.A. Wessel, *EU External Relations Law. Text, Cases and Materials*, Cambridge 2014, p. 34.

⁹ Communication from the Commission to the Council and the European Parliament, Forest Law Enforcement, Governance and Trade (FLEGT): Proposal for an EU Action Plan, COM(2003) 251 final.

¹⁰ S. Ozinga, H. Mowat, *Strategies to Prevent Illegal Logging*, [in:] *A Handbook of Globalisation and Environmental Policy*, F. Wijten, K. Zoeteman and J. Pieters (eds.), Edward Elgar publishing 2013, p. 180-203.

try may enter the EU market, and emphasizes that the licensing scheme should not impede legitimate trade. Furthermore, it combines measures in producer and consumer countries to facilitate trade in legal timber and eliminate illegal timber trading with the EU, through measures such as: support for reforms to improve forest governance and law enforcement in timber-producing countries, regulatory measures and partnership agreements to promote trade in legal timber, responsible public procurement policies that favour legal timber, support for private-sector initiatives to promote corporate social and environmental responsibility, safeguards and transparency measures for financing and investment and measures to address the problem of conflict timber.¹¹

The FLEGT Action Plan focuses on seven broad areas: support for timber product exporting countries, including action to promote equitable solutions to the illegal logging problem and activities to promote trade in legal timber, promotion of public procurement policies, including actions that guide contracting authorities on how to deal with legality when specifying timber in procurement procedures, support for private sector initiatives, including action to encourage private sector initiatives for good practice in the forest sector, including the use of voluntary codes of conduct for private companies to source legal timber, safeguarding for financing and investment, including action to encourage banks and financial institutions investing in the forest sector to develop due care procedures when granting credits, making use of the existing legislative instruments or adopting new legislation to support the FLEGT Action Plan, and addressing the problem of conflict timber.¹²

The second instrument in this group is the Timber Regulation to combat trade in illegally harvested timber, which was adopted on 20 October 2010 by the European Parliament and the Council. It laid down the obligations of operators who place timber and timber products on the internal market for the first time, as well as the obligations of traders.¹³ The Timber Regulation counters the trade in illegally harvested timber and timber products through three requirements for European operators: prohibition, a traceability obligation and a due diligence system. Firstly, it prohibits placing of illegally harvested timber and products derived from such tim-

¹¹ R. Jonsson, A. Giurca, M. Maseiro, E. Pepke, D. Pettenella, J. Prestemon, G. Winkel, *Assessment of the EU Timber Regulation and FLEGT Action Plan, From Science to Policy*, European Forest Institute, http://www.efi.int/files/attachments/publications/efi_fstp_1_2015.pdf (25.7.2019).

¹² B. Pillon, D. Pettenella, *EU FLEGT initiative: Analysis of national legislation of relevance to excluding illegal timber from EU market: Italy study*, http://www.illegallogging.info/item_single.php?it_id=109&it=presentation (25 July 2019).

¹³ Regulation No. 995/2010 of the European Parliament and the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market, OJ L 295/23. It entered into force on 3 March 2013.

ber on the EU's market.¹⁴ On the basis of a systemic approach, operators, i.e. any natural or legal person that places timber or timber products on the market, while placing timber and timber products for the first time on the internal market should take the appropriate steps in order to ascertain that illegally harvested timber and timber products derived from such timber are not placed on the internal market. Its provisions also apply to imported timber as well as timber produced within the EU. To that end, operators should exercise due diligence through a system of measures and procedures to minimise the risk of placing illegally harvested timber and timber products derived from such timber on the internal market. Secondly, traders, i.e. any natural or legal person who, in the course of a commercial activity, sells or buys on the internal market timber or timber products already placed on the internal market – have the obligation to keep all records of their suppliers and customers.¹⁵ According to Article 5, timber traders throughout the supply chain should be able to identify the operators or the traders who have supplied the timber, and, if applicable, should be able to identify the traders to whom they supplied timber. It is generally assumed that these requirements will ensure proper traceability throughout the entire supply chain.¹⁶ Thirdly, it requires that European Union's traders who place timber products on the EU market for the first time should exercise 'due diligence'.¹⁷

To implement these provisions, the Commission adopted its Implementing Regulation No. 607/2012 on the detailed rules concerning the due diligence system.¹⁸ The core of the 'due diligence' notion is that operators have to undertake a risk management exercise so as to minimise the risk of placing illegally harvested timber, or timber products containing illegally harvested timber, on the EU market. Article 6 of the Timber Regulation specifies three key elements of the "due diligence system" which are: (1) information – the operator must have access to information describing the timber and timber products, country of harvest, quantity, details of the supplier and information on compliance with national legislation, (2) risk assessment – the operator should assess the risk of illegal timber

¹⁴ Article 4 Timber Regulation.

¹⁵ Article 5 Timber Regulation.

¹⁶ Y. Levashova, *How effective is the New EU Timber Regulation in the Fight against Illegal Logging?*, "Review of European Community & International Environmental Law" 2011, No. 20 (3), p. 292-293.

¹⁷ Article 6 Timber Regulation.

¹⁸ Commission Implementing Regulation No. 607/2012 of 6 July 2012 on the detailed rules concerning the due diligence system and the frequency and nature of the checks on monitoring organisations as provided for in Regulation (EU) No. 995/2010 of the European Parliament and of the Council laying down the obligations of operators who place timber and timber products on the market, OJ 7.7.2012 L 177/16.

in his supply chain, based on the information identified above and taking into account criteria set out in the regulation, and (3) risk mitigation – when the assessment shows that there is a risk of illegal timber in the supply chain that risk can be mitigated by requiring additional information and verification from the supplier.¹⁹ Due diligence requires the operator to gather information about the timber and timber products they are handling and about the suppliers in order to carry out a full risk assessment. Article 6 (1) specifies the following two categories of information that must be assessed: specific information related to the timber or timber product itself – a description, the country of harvest, the supplier and trader, and documentation showing compliance with applicable legislation and general information that provides the context for assessing the product. The level of risk can only be assessed on a case-by-case basis, as it depends on a number of factors. Although there is not a single accepted system for risk assessment, as a general rule the operator has to address the following questions: Where was the timber harvested? Is the level of governance a concern? Are all documents showing compliance with applicable legislation made available by the supplier, and are they verifiable? Are there indications of a company in the supply chain being involved in practices related to illegal logging? Is the supply chain complex?²⁰ The list of risk assessment criteria is not exhaustive, since operators may choose to add further criteria if these should help determine the likelihood that the product's timber had been illegally harvested, or if it helped prove legal harvesting. Two categories of timber will automatically be considered legally harvested for the purposes of the Timber Regulation. The first category consists of timber embedded in timber products covered by VPAs, hence products originating in a VPA partner country and listed in the VPA. The second category comprises timber of species listed in Annex A, B or C to the Council Regulation No. 338/97 and which comply with the Regulation and the corresponding implementing provisions.²¹ The Timber Regulation covers a wide range of timber products which are listed in all the three Annexes, e.g. solid wood products, flooring, plywood, pulp and paper using EU Combined Nomenclature. Not included are recycled products, as well as rattan, bamboo and printed papers such as books, magazines and newspapers. Moreover, it does not cover timber products derived from timber or timber products already placed on the internal market.

¹⁹ Articles 2,3,4,5 of Implementing Regulation No. 607/2012.

²⁰ Commission Notice of 12.2.2016 Guidance Document for the EU Timber Regulation, C(2016) 755 final.

²¹ Council Regulation (EC) No. 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein, OJ 03.03.1997 L 61.

Finally, Member States are also obliged to determine the type and range of penalties that will apply in case of non-compliance with this Regulation. The penalties must be effective, proportionate and dissuasive and may include, *inter alia*: fines proportionate to the environmental damage, calculating the level of such fines in such a way as to make sure that they effectively deprive those responsible of the economic benefits derived from their serious infringements, and gradually increasing the level of such fines for repeated serious infringements, seizure of the timber and timber products concerned and immediate suspension of authorisation to trade.²² If, upon a check on operators, the competent authority of a Member State detects any shortcomings, it has the competent authority, depending on the level of seriousness, to issue interim measures including: seizure of timber and timber products, or prohibition of marketing of timber and timber products.

External and conventional instruments

On the basis of Article 207 TFEU, the EU may conclude bilateral international trade agreements with countries and regional organisations, which are to place a legally binding obligation on a partner country or regional organisation to implement the FLEGT licensing scheme within the schedule stipulated in each VPA. Each VPA includes commitments to stop trade in illegal timber, notably with a license scheme to verify the legality of timber exported to the EU.²³ Its main objective is to provide a legal framework aimed at ensuring that all imports into the Union's market of timber products covered by it have been legally produced and in doing so to promote trade in timber products. However, the central part of each VPA is legality assurance system which is designed to identify, monitor and license legally produced timber, to ensure that only legal timber is exported. In addition, VPAs provide a basis for dialogue and cooperation between the parties to facilitate and promote the full implementation of its provisions and to enhance forest law enforcement and governance.

The VPAs established between the parties a FLEGT licensing scheme which establishes a set of procedures and requirements aiming at verifying and attesting, by means of FLEGT licences, that timber products shipped to the EU area were legally produced. In accordance with the Council Regulation No. 2173/2005, the EU will only accept such shipments from part-

²² Article 19 Timber Regulation.

²³ Fifteen tropical countries are implementing or negotiating the VPAs. Together their forests cover an area the size of the EU and they account for 80% of EU tropical timber imports. The first VPA was signed was with Ghana, followed by the Republic of Congo, Cameroon, Indonesia, the Central African Republic and Liberia. Negotiations are ongoing with Côte d'Ivoire, Democratic Republic of the Congo, Gabon, Guyana, Honduras, Laos, Malaysia, Thailand and Vietnam.

ner countries if they are covered by FLEGT licences, which is only applicable to the timber products listed in Annex IA.²⁴ A legality assurance system includes five components: a definition of legally-produced timber based on the laws and regulations of the partner country, control of the supply chain – requirements for systems to trace wood products through the production chain from harvesting to the point of export, verification – each partner country government chooses a governmental or non-governmental body to verify that timber or timber products are legal, issuance of licenses – details of who will issue licenses and how it will be done independent monitoring of the systems by a third party. There are two approaches to developing and implementing legality assurance systems: shipment-based and operator-based. Within the first system, each consignment of timber products to be exported to the EU is individually licensed by the Licensing Authority.

3. Legal effects of the European Union's instruments

All the instruments which have been analysed above may be divided into hard law instruments, which are legally binding: the VPAs and the Timber Regulation, and soft law instruments, which have no legally binding force: the FLEGT Action Plan.

Every international agreement concluded by the EU is binding on it under international law as against the other contracting parties. The Court of Justice (Court) answers in its case-law that, from the moment they enter into force, the provisions of international agreements concluded by the EU form an essential ('integral') part of the legal order of the EU.²⁵ It follows, moreover, from Article 216(2) TFEU that such agreements are binding on the EU institutions and Member States, which means that the parties are obliged to perform them in good faith. However, international agreements concluded by the EU prevail over provisions of secondary Union legislation.²⁶ Therefore, the Court reviews the legality of acts of the EU institutions in the light of the provisions of such agreements, subject to the reservation that neither the nature nor the broad logic of the agreement in question precludes such application. In any event, where individuals seek to rely thereon, the provisions in question must, as regards their content, be unconditional and sufficiently precise.²⁷ Where that invalidity is pleaded before

²⁴ Council Regulation (EC) No 2173/2005 of 20 December 2005 on the establishment of a FLEGT licensing scheme for imports of timber into the European Community, OJ L 347, 30.12.2005, p. 1-6.

²⁵ Case 181/73 Haegeman, EU:C:1974:41, para 5; and Case C-240/09 Lesoochránárske zoskupenie, EU:C:2011:125, para 30.

²⁶ Case C-61/94 Commission v Germany, EU:C:1996:313, para 52.

²⁷ Case 12/86 Demirel, EU:C:1987:400, para 14; Case C-162/96 Racke, EU:C:1998:293, para 31.

a national court, the Court thus reviews, pursuant to Article 267 TFEU, the validity of the Union measure concerned in the light of all the rules of international law, subject to two conditions. First, the EU must be bound by those rules.²⁸ Second, the Court can examine the validity of the Union's legislation in the light of an international treaty only where its nature does not preclude this and its provisions are unconditional and sufficiently precise. Moreover, provisions of the secondary Union's law must be interpreted in a manner that is consistent with the international agreements. Secondary law may not infringe them. They have primacy over secondary law, and over national law.²⁹ However, this is an exceptional situation for the Court to find that a national provision is incompatible with an international agreement concluded by the European Union.³⁰

However, the effects within the Union's provisions of an international agreement concluded by the European Union with third countries may not be determined without taking account of the international origin of the provisions in question. If an agreement does not contain an express rule on the effects its provisions are to have in the internal legal order of the contracting parties, it is for the courts having jurisdiction in the matter to so determine by way of interpretation, on the basis in particular of the agreement's spirit, general scheme or terms.³¹ Moreover, in order to serve that application of the provisions of an international agreement can be sought before a court, an international agreement must be capable of judicial application. So, it must be capable of being relied upon before the courts, that is to say 'be capable of conferring rights on citizens of the Union which they can invoke before the courts', that is to say again to have a 'direct effect'.³² In *International Fruit Company and Others* the Court had expressly ruled that the condition of direct effect had to be met 'before invalidity can be relied upon before a national court'.³³ International agreements may be accorded a direct effect by the signatories to the agreement who have so agreed, just as they may agree the opposite. If that question has not been settled explicitly by the agreement, it falls to the courts

²⁸ Joined Cases 21/72 to 24/72 *International Fruit Company and Others*, EU:C:1972:115, para 7.

²⁹ Case C-308/06 *Intertanko*, EU:C:2008:312, para. 42; case 104/81 *Kupferberg*, EU:C:1982:362, para. 14.

³⁰ Case C-465/01 *Commission v Austria*, EU:C:2004:530, paras. 44-53 (infringement of the EEA Agreement); Case C-239/03 *Commission v. France*, EU:C:2004:598, paras. 78-87 (infringement of the Convention for the protection of the Mediterranean Sea against pollution); case C-13/00 *Commission v Ireland*, EU:C:2002:184, paras. 14-23 (infringement of the EEA Agreement).

³¹ Case 104/81, para 17; Case C-149/96 *Portugal v. Council*, EU:C:1999:574, para 34.

³² Joined Cases 21/72 to 24/72, para. 8; Joined Cases C-300/98 and C-392/98 *Dior and Others*, EU:C:2000:688, para. 44.

³³ Joined Cases 21/72 to 24/72, para. 8.

of each contracting party to do so.³⁴ The direct effect of an international agreement determines the ability to rely on it not only before a national court, but also before the Court, in other words that this condition applies irrespective of the nature of the action in support of which a plea based on infringement of an international agreement is adduced.³⁵ As the guardian of the Union's legal order, the Court must, if a rule deriving from the international legal order is relied upon, define its effects in an all-embracing and uniform manner that is valid for the entire Union's legal order. When the Court rules, in proceedings under Article 267 TFEU, that a measure adopted by the EU institution is invalid, its decision has the legal effect of requiring the competent institutions to take the necessary measures to remedy that illegality, as the obligation laid down in Article 266 TFEU in the case of a judgment annulling a measure applies in such a situation by analogy.³⁶ By virtue of Article 288 TFEU, the EU has the competence to adopt regulations. The Timber Regulation is an example of an internal and autonomous act which organises an important internal policy aspect; however, it also has a degree of external relevance.³⁷ A regulation has general application, meaning that it is addressed to an indeterminate situation and involves legal consequences for categories of persons viewed in a general and abstract manner.³⁸ Secondly, it applies directly in every Member State in all its parts, which means, that there is no need for any implementation into national law or an executive order by institutions of the Member States. So, a regulation forms part of the provisions of a Member State's legal order. Moreover, it is applicable regardless of any measures adopting it into national law. Finally, it is binding in its entirety.

The second group, covers soft law instruments. In the EU external policy, the institutions adopt many instruments which are generally referred to as soft law instruments: conclusions, communications, strategies, resolutions, action plans, reports, programmes, declarations and so on. We may define this term as "rules of conduct that are laid down in instruments which have not been attributed a legally binding force as such, but nevertheless may have certain, indirect legal effects, and that are aimed at and may produce practical effects."³⁹ Soft law instruments express common expectations concerning the conduct of special policy, like combatting illegal logging. However, the intention of their drafters was to establish stand-

³⁴ Case 104/81, para. 17.

³⁵ Case C-280/93 *Germany v Council*, EU:C:1994:367, paras. 103 to 112.

³⁶ Case C-421/06 *Fratelli Martini and Cargill*, EU:C:2007:662, para. 52.

³⁷ B. Van Vooren, R.A. Wessel, *op. cit.*, p. 36.

³⁸ Case 6/68 *Zuckerfabrik*, EU:C:1968:43, at 415.

³⁹ L. Senden, *Soft Law in European Community Law*, Hart Publishing 2004, p. 112.

ards outside the formal sources of the Union's law. Soft law instruments do not possess the legal effects of a regulation, mainly because they have not been adopted through procedures laid down in the Treaties. However, the precise legal effects of such an instrument must be determined in the light of its content. So, soft law instruments have legal effects if they create a legitimate expectation in individuals that the institution will adhere to this policy line.⁴⁰ This rule also applies in the relationship between institutions and the Member States.⁴¹ In *Grimaldi case*, the Court stated that recommendations are not intended to produce binding effects, so they cannot create rights upon which individuals may rely before a national court. However, since recommendations cannot be regarded as having no legal effect at all, the national courts are bound to take them into consideration in order to decide disputes submitted to them, in particular where they cast light on the interpretation of national measures adopted in order to implement them or where they are designed to supplement binding Union's provisions.⁴² The FLEGT Action Plan is an example of a preparatory and informative instrument which was adopted with a view to preparation of the Union's policy and provision of information on the Union's actions in the area of combatting illegal logging, fulfilling the para-law functions.⁴³ What is important, instruments falling within this category are being used by the EU as alternative to legislative instruments, because, the EU simply has not competence to adopt legally binding acts. In the analysed case, the FLEGT Action Plan informs Member States and third parties of how this policy is going to be conducted and developed, about its objectives and principles.

4. Evaluation of the European Union's instruments: added value and critical assessment

The relevance of the Timber Regulation was confirmed in the Seventh Environmental Action Programme (2013-2020), which refers explicitly to it "as a legal basis for the Union to address the global problem of illegal logging through its demand for timber and timber products."⁴⁴ It was adopt-

⁴⁰ Case C-313/90 CIRFS v Commission, EU:C:1993:111, paras. 34, 36; Case T-105/95 WWF UK v. Commission, EU:T:1997:26, paras. 61-62.

⁴¹ Case C-288/96 Germany v Commission, EU:C:2000:537, paras. 62-65; case C-91/01 Italy v. Commission, EU:C:2004:244, para. 45.

⁴² Case C-322/88 Grimaldi, EU:C:1989:646, paras. 12,13,16,18.

⁴³ L. Senden, *op cit.*, p. 118.

⁴⁴ Decision No. 1386/2013/EU of the European Parliament and of the Council of 20 November 2013 on a General Union Environment Action Programme to 2020 'Living well, within the limits of our planet' Text with EEA relevance, OJ L 354, 28.12.2013, p. 171-200.

ed as an overarching instrument to ensure that only products made of legally harvested timber are marketed in the EU. In my opinion, it can be regarded as an instrument adding significant value to the international efforts to stop deforestation and forest degradation, conserve biodiversity and address climate change by reducing emissions from deforestation, enhancing the conservation role of forests, the sustainable management of forests and the enhancement of forest carbon stocks in developing countries, thus contributing to compliance with the EU's international obligations. By establishing uniform rules at the EU level, it allows the Union and its Member States to take full advantage of their combined market leverage to ensure demand for only legally harvested timber and avoid distortions of the EU market, which would occur if varying rules were to be put in place by individual Member States⁴⁵. The Timber Regulation aims at creating an equal and uniform requirements for legality on both domestically harvested timber and imported timber products and introduces an additional control layer applicable to all operators across the EU. Without it, the process of establishing a level playing field for economic operators would be discontinued, leaving operators that already apply due diligence requirements in a disadvantaged position, especially as cheaper illegal timber would freely enter the EU market. Moreover, the Timber Regulation, as a text with EEA relevance, has been included in the Agreement on the European Economic Area is currently implemented also by Norway, Iceland and Lichtenstein, so its provisions are applied not only by Member States, but also by other European States.

However, there are a lot of challenges to ensure an effective implementation and uniform application of the Union's law, both at the EU level and at international level. There still exist the necessity of improving cooperation, communication and coordination between authorities in Member States that intervene at different stages of the process; secondly, there still exist varying types and different level of sanctions across Member States, that should be harmonised; thirdly, there is a lack of uniform understanding and application of it provisions by the Member States, that should be applied in the same manner and interpreted in good faith; fourthly, there are difficulties in gathering information on applicable legislation in producer countries; and finally, there is a lack of cooperation with suppliers and appropriate risk assessment and mitigation measures. However, in my opinion, the most important challenges are: to ensure coherence between the Timber Regulation provisions and between the different areas of

⁴⁵ Report from the Commission to the European Parliament and the Council, Regulation EU/995/2010 of the European Parliament and of the Council of 20 October 2010, laying down the obligations of operators who place timber and timber products on the market (the EU Timber Regulation), COM(2016) 74 final, p. 11.

the EU external action and between these and its other policies, to revise the product coverage and to improve and to extend international cooperation (both bilateral and multilateral), to include not VPAs countries, but also other producer states like: Russia, China and Brazil to consolidate efforts, create synergies and establish cooperation against illegal logging. The Timber Regulation covers a significant number of timber-based products, but not all are included in its scope. Some of them, such as printed books, newspapers, pictures and other products of the printing industry, manuscripts, typescripts, plans, musical instruments, wooden coffins or wooden seats, are not covered by it. Unlike domestically printed media, imported printed media do not undergo due diligence and are not subject to checks for the legality of wood fibres embedded in them. Therefore, they may carry a higher risk of originating from illegally harvested timber. The difference in treatment of domestically produced and imported printed products would be overcome if printed paper were included in the product scope. In my opinion, the product coverage should be necessary expanded. Finally, in my opinion, all Member States should develop a public procurement policy on timber/wood ensuring sourcing of legal timber.

5. Conclusion

The Timber Regulation is a very important legally binding act to combat and reduce illegal logging and trade in illegal timber and timber products. As the European Commission underlined, it represents the necessary demand-side complement to the main supply-side instrument: the VPAs.⁴⁶ In 2017, 26 Member States (except Latvia and Luxembourg) received FLEGT licences. A total of 28,826 FLEGT licences was reported to have been received, with the numbers of licences varying considerably across the Member States.⁴⁷ Over 98% (28,467) of the FLEGT licences received were validated/approved by the Competent Authorities. Over 658 million kg of FLEGT-licensed timber and timber products were reported on validated FLEGT licences in 2017.⁴⁸ The main FLEGT-licensed prod-

⁴⁶ Ibidem, p. 16.

⁴⁷ Report from the Commission, Annual Synthesis Report for the year 2017 on the implementation of the FLEGT licensing scheme provided for in Regulation (EC) No 2173/2005 of 20 December 2005 on the establishment of a FLEGT licensing scheme for imports of timber into the European Community (Report 2019), COM(2019) 249 final, p. 3.

⁴⁸ Over 99% (28,331) of validated FLEGT licences reported the weight of the commodity in trade; in the 136 instances where weight was not reported, a further 443 m³ and 801,913 items were reported. To prevent double-counting, where quantity was reported in more than one metric, the weight was taken preferentially over the volume or number of items because it was the most frequently reported metric. Where weight was not reported, volume was taken preferentially over the number of items.

uct types imported into the EU by weight included paper products, furniture, plywood, veneered panels and similar laminated wood, builder's joinery and carpentry, and continuously shaped wood. The main importing Member States for these products are: the United Kingdom, the Netherlands, Slovenia, Germany, France, Belgium and Romania.⁴⁹ In order to stop the import of illegal timber, and to combat illegal logging in timber producing countries, the EU adopted two groups of instruments: hard law instruments – the Timber Regulation and soft law instrument: the FLEGT Action Plan, but also international instruments: the VPAs, that complement each other. This specific hybrid legal system establishes a control system for certain timber products exported from countries that have concluded a VPAs with the EU. Timber products exported from those countries must be covered by a FLEGT licence issued at the Partner Country assuring the legality of the timber. In order to ensure the effectiveness of the FLEGT licensing scheme, customs authorities in the Member States shall not release for free circulation timber products subject to this scheme unless a FLEGT licence is presented and accepted by the Competent Authority in the given Member State. To sum up, to combat illegal logging, which is a global challenge, at the universal level, the international community should consider adoption of a global forest convention on sustainable forest management to promote the verification of the legality of timber. However, the EU and its Member States have taken the first step, by establishing uniform rules at the EU level to ensure the legality of timber and timber products on the EU market. This is not a perfect system, there still exist gaps that should be filled up, but in general it is a good step in the right direction.

Bibliography

Legal acts

- Commission delegated Regulation of 23.2.2012 on the procedural rules for the recognition and withdrawal of recognition of monitoring organisations as provided for in Regulation (EU) No 995/2010 of the European Parliament and of the Council laying down the obligations of operators who place timber and timber products on the market, OJ L 115/12, 27.4.2012.
- Commission Implementing Regulation No 607/2012 of 6 July 2012 on the detailed rules concerning the due diligence system and the frequency and nature of the checks on monitoring organisations as provided for in Regulation (EU) No 995/2010 of the European Parliament and of the Council laying down the obligations of operators who place timber and timber products on the market, OJ L 177/16, 7.7.2012.
- Council Regulation (EC) No 2173/2005 of 20 December 2005 on the establishment of a FLEGT licensing scheme for imports of timber into the European Community, OJ L 347, 30.12.2005, p. 1–6.
- Council Regulation (EC) No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein, OJ L 61, 03.03.1997.

⁴⁹ Report 2019, p. 5.

Decision No 1386/2013/EU of the European Parliament and of the Council of 20 November 2013 on a General Union Environment Action Programme to 2020 'Living well, within the limits of our planet', OJ L 354/171, 28.12.2013, p. 177– 200.

Regulation No 995/2010 of the European Parliament and the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market, OJ L 295/23, 12.11.2010.

Case law

Case 104/81 Kupferberg, EU:C:1982:362.

Case 181/73 Haegeman, EU:C:1974:41.

Case C-13/00 Commission v Ireland, EU:C:2002:184.

Case C-149/96 Portugal v Council, EU:C:1999:574.

Case C-162/96 Racke, EU:C:1998:293.

Case C-280/93 Germany v Council, EU:C:1994:367.

Case C-288/96 Germany v Commission, EU:C:2000:537.

Case C-313/90 CIRFS v Commission, EU:C:1993:111.

Case C-322/88 Grimaldi, EU:C:1989:646.

Case C-61/94 Commission v Germany, EU:C:1996:313.

Case T-105/95 WWF UK v Commission, EU:T:1997:26.

Case C-239/03 Commission v France, EU:C:2004:598.

Case C-240/09 Lesoochránárske zoskupenie, EU:C:2011:125.

Case C-308/06 Intertanko, EU:C:2008:312.

Case C-421/06 Fratelli Martini and Cargill, EU:C:2007:662.

Case C-465/01 Commission v Austria, EU:C:2004:530.

Case 6/68 Zuckerfabrik, EU:C:1968:43.

Case 12/86 Demirel, EU:C:1987:400.

Case C-91/01 Italy v Commission, EU:C:2004:244.

Joined Cases 21/72 to 24/72 International Fruit Company and Others, EU:C:1972:115.

Joined Cases C-300/98 and C-392/98 Dior and Others, EU:C:2000:688.

Literature

Hoare A., *Tackling Illegal Logging and the Related Trade: What progress and where next?* London 2015.

Humphreyes D., *Deforestation and the Crisis of Global Governance*, London 2006,

Illegal Logging and Global Wood Markets: The Competitive Impacts on the U.S. Wood Products Industry, Seneca Creek Associates & Wood Resources International, http://www.illegal-logging.info/sites/default/files/uploads/1_AF_and_PA_summary.pdf (12.5.2019).

Illegal Logging and Related Trade: Indicators of the Global Response, Chatham House, 01 July 2010, http://awsassets.panda.org/downloads/chatham_house_illegallogging_2010.pdf (6.6.2019).

Jonsson R., Giurca A., Maseiro M., Pepke E., Pettenella D., Prestemon J., Winkel G., *Assessment of the EU Timber Regulation and FLEGT Action Plan, From Science to Policy*, European Forest Institute, http://www.efi.int/files/attachments/publications/efi_fstp_1_2015.pdf (25.7.2019).

Kaimowitz D., *Forest law enforcement and rural livelihoods*, "International Forestry Review" 2001, No. 5(3).

Leopold S., Soitiorov M., Frei T., Winkel G., *Protecting „First World” Markets and „Third World” Nature: The Politics of Illegal Logging in Australia, the European Union and the United States*, "Global Environmental Change" 2016, No. 39.

- Levashova Y., *How effective is the New EU Timber Regulation in the Fight against Illegal Logging?*, "Review of European Community & International Environmental Law" 2011, No. 20 (3). <http://www.research/publications/publications-repository/trade-and-deforestation-a-literature-review> (28.6.2019).
- Ozinga S., Mowat H., *Strategies to Prevent Illegal Logging*, [in:] *A Handbook of Globalisation and Environmental Policy*, F. Wijen, K. Zoeteman and J. Pieters (eds.), Edward Elgar publishing 2013.
- Pillon B., Pettenella D., *EU FLEGT initiative: Analysis of national legislation of relevance to excluding illegal timber from EU market: Italy study*, http://www.illegallogging.info/item_single.php?it_id=109&it=presentation (25.7.2019).
- Rice T., Marijnissen C., Ozinga S., *Trade liberalisation and the impact on forests*, <http://www.fern.org/node/536> (12.5.2019).
- Robalino J., Herrera L.D., *Trade and Deforestation*, <http://www.efdinitiative>
- Senden L., *Soft Law in European Community Law*, Hart Publishing 2004.
- Van Vooren B., Wessel R.A., *EU External Relations Law. Text, Cases and Materials*, Cambridge 2014.

Other sources

- Commission Notice of 12.2.2016 Guidance Document for the EU Timber Regulation, C(2016) 755 final.
- Communication from the Commission to the Council and the European Parliament, Forest Law Enforcement, Governance and Trade (FLEGT): Proposal for an EU Action Plan, COM(2003) 251 final.
- Report from the Commission to the European Parliament and the Council, Regulation EU/995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market (the EU Timber Regulation), COM(2016) 74 final.
- Report from the Commission, Annual Synthesis Report for the year 2017 on the implementation of the FLEGT licensing scheme provided for in Regulation (EC) No 2173/2005 of 20 December 2005 on the establishment of a FLEGT licensing scheme for imports of timber into the European Community, COM(2019) 249 final.
- World Bank, Strengthening Forest law Enforcement and Governance: Assessing a Systematic Constraint to Sustainable Development, World Bank, August 2006, <http://documents.worldbank.org/curated/en/330441468161667685/pdf/366380REVISED010Forest0Law01PUBLIC1.pdf> (6.6.2019).

INSTRUMENTY UNII EUROPEJSKIEJ MAJĄCE NA CELU PRZECIWDZIAŁANIE HANDLOWI NIELEGALNIE POZYSKANYM DREWNIEM – WYBRANE ASPEKTY PRAWNE

Streszczenie: Nielegalne pozyskiwanie drewna oznacza, iż jego pozyskanie nastąpiło z naruszeniem przepisów kraju pozyskania. Jest to problem o charakterze globalnym, wywołujący poważne i negatywne skutki nie tylko o charakterze środowiskowym, ale również gospodarczym i społecznym. Niniejszy artykuł prezentuje instrumenty Unii Europejskiej mające na celu przeciwdziałanie handlowi nielegalnie pozyskanym drewnem na rynku Unii Europejskiej. Instrumenty te podzielone zostały na dwie grupy: wewnętrzne i międzynarodowe. Następnie została dokonana analiza ich zakresu materialnego, ale również podjęto próbę odpowiedzi na pytanie, jaki jest ich charakter prawny, zarówno w prawie Unii Europejskiej, jak i w systemach krajowych państw członkowskich. Innymi słowy, czy mogą one efektywnie przyczynić się do przeciwdziałania handlowi nielegalnie pozyskanym drewnem na unijnym rynku wewnętrznym.

Słowa kluczowe: UNIA EUROPEJSKA, SYSTEM FLEGT, WYLESIANIE, NALEŻYTA STARANNOŚĆ, NIELEGALNE POZYSKIWANIE DREWNA