

Analysis of the Implementation and Enforcement of the EU Timber Regulation in Poland

Warsaw, October 2022

Suggested method of quoting:

R. Łuszczek, Analysis of the Implementation and Enforcement of the EU Timber Regulation in Poland, ClientEarth 2022.

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Cover photo: Unsplash

Photos: Unsplash, Adobe Stock

Publisher:

Fundacja ClientEarth Prawnicy dla Ziemi ul. Mokotowska 33/35, 00-560
Warsaw

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ISBN: 978-83-966357-0-9

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EXECUTIVE SUMMARY

Forests are vital for all life on Earth. There is a significant and increasing body of scientific evidence confirming the crucial role that forests play in tackling global warming¹. However, global deforestation rates have been dangerously high for decades, and the Intergovernmental Panel on Climate Change has stated that global temperatures have already risen considerably due to land cover changes such as deforestation². Regrettably, deforestation continues at an alarming rate, increasing by 12% in 2020 compared to 2019³ despite the global economic downturn from the COVID-19 pandemic.

While deforestation is often associated with the rainforests of South America, Africa and Asia, deforestation as well as forest degradation and illegal logging have long been problems in the EU as well. The unlawful logging of Poland's Białowieża forest is a clear example of how the illegal timber trade persists in Europe despite the existence of EU legislation to halt such practices. It shows that the mere adoption of rules by themselves cannot solve the problem, but that the proper enforcement of these rules is of critical importance.

In November 2021, the European Commission published the results of a fitness check it conducted to assess the EU's rules on illegal logging, including the EU Timber Regulation ('EUTR') – the main tool in the EU's framework to address illegal logging. While the Commission found that the EUTR has had some success in tackling illegal logging, the results of the fitness check pointed out several shortcomings and challenges that undermine the EUTR's impact. At the same time as the publication of the fitness check results, the Commission also published its proposal for a new EU regulation on deforestation-free products ('Deforestation Proposal') that will eventually replace and repeal the current EUTR.

The ongoing EU legislative process for the Deforestation Proposal offers a tremendous opportunity for EU decision-makers to learn from and address the gaps identified in the EUTR as well as its associated implementation and enforcement challenges. To support this effort, this report aims to provide an in-depth analysis of the implementation and enforcement of the EUTR in Poland to identify critical weaknesses in the EUTR framework so that lessons can be learned, and the identified gaps can be addressed in the Deforestation Proposal⁴ and its eventual implementation and enforcement.

Poland is a particularly relevant country in which to investigate the effectiveness of the EUTR: over a quarter of Poland is covered by forest and almost 80% of forests are state-owned and managed by a government organization – State Forests National Forest Holding (*Państwowe Gospodarstwo Leśne Lasy Państwowe*), hereinafter referred to as 'State Forests' – on behalf of the Polish State Treasury. This makes a state-owned entity the largest timber operator subject to the requirements of the EUTR in Poland. It is, therefore, of particular interest to verify whether Poland is capable of balancing the economic use of public forests and fulfilling its responsibility to pro-

1 The Intergovernmental Panel on Climate Change has consistently reported that increasing forest carbon stocks will generate the largest benefit regarding climate change mitigation. See G.J., Nabuurs et al. (2007), *Forestry* [in] B. Metz, O.R. Davidson, P.R. Bosch, R. Dave, L.A. Meyer (eds), *Climate Change 2007: Mitigation. Contribution of Working Group III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change*, p. 543, available at <https://www.ipcc.ch/site/assets/uploads/2018/02/ar4-wg3-chapter9-1.pdf>.

2 The Intergovernmental Panel on Climate Change (2019), *Climate Change and Land: an IPCC special report on climate change, desertification, land degradation, sustainable land management, food security, and greenhouse gas fluxes in terrestrial ecosystems*, p. 8, available at <https://www.ipcc.ch/site/assets/uploads/2019/11/SRCCL-Full-Report-Compiled-191128.pdf>.

3 World Resources Institute (2021), *2021 Must Be a Turning Point for Forests. 2020 Data Shows Us Why*, available at <https://www.wri.org/insights/2021-must-be-turning-point-forests-2020-data-shows-us-why>.

4 If you seek a more detailed analysis of our positions regarding the Deforestation Proposal, please see our briefings: ClientEarth (2022), *What is in the Commission's proposal and what is left out?*, available at <https://www.clientearth.org/latest/documents/the-proposed-eu-law-on-deforestation-free-products-what-does-it-include-and-what-is-left-out/>, and ClientEarth (2022), *How the Deforestation Proposal compares to the EUTR?*, available at <https://www.clientearth.org/latest/documents/the-proposed-eu-law-on-deforestation-free-products-how-does-it-compare-to-the-eutr-framework/>.

tect them by properly enforcing the EUTR and other forest-related legislation, including the conduct of monitoring and enforcement activities against State Forests (and therefore, effectively, against itself).

Based on our assessment of Poland's laws on forest governance, we consider that both the Polish legal framework that purports to implement the EUTR and the enforcement actions taken on its basis are highly ineffective and do not serve the purpose of regulating trade in illegal timber in Poland. Our analysis focuses on the degree of institutional control over State Forests, but the shortcomings we have identified are also applicable to other timber operators in Poland. The main reasons for our conclusions are as follows.

Firstly, the competent authority responsible for the enforcement of the EUTR – the Environmental Protection Inspection ('the EPI') – does not operate within a clear or effective regulatory framework: the scope of activities which the EPI is authorised to conduct is unclear. This results in e.g. a lack of any clear legal basis for performing unscheduled checks, which undermines the EPI's capacity to detect cases of non-compliance. Secondly, the EPI's performance is also highly ineffective: by 2021, the number of checks conducted by the EPI did not exceed 600 (despite the estimated number of operators placing timber on the Polish market being above 8,000). By the same time, more than 80% of forest districts under the management of State Forests had never been checked against the requirements of the EUTR. The quality of the relatively few checks that were conducted is also questionable: the EPI has never detected any illegal timber, despite strong evidence indicating illegality in certain timber operations. Thirdly, the regulatory framework for submitting and handling 'substantiated concerns' (formal complaints about non-compliance under the EUTR) is unclear and does not provide the public with any means to challenge inaction by the EPI. This confusion around the substantiated concerns process is reflected by the very low number of substantiated concerns that the regional inspectorates of the EPI report that they have received in the period since the EUTR has been in force up to 2021: only three in total. Fourthly, the penalty scheme for breaches of the EUTR is inadequate. The penalties – limited to administrative fines only – are low compared to other Member States and are rarely imposed. Penalties do not exceed a maximum level of PLN500,000 (approx. €103,000) and the penalties that have been imposed in practice are often lower than the minimum level required by the law (PLN 5,000, approx. €1,030). Fifthly, the capacity of the EPI to perform its functions is undermined by a lack of resources, as the EPI is understaffed and underfinanced. In 2020, the EPI had only 8.1 full-time equivalent staff and an annual budget of less than €6,000 to enforce the EUTR (bearing in mind that Poland's forests cover an area of approx. 92,420 square kilometers).

Based on our assessment, we consider that Poland fails to exert an appropriate level of institutional control over its timber market to meet its obligations under the EUTR. Although the EUTR has been formally implemented in Poland's legal framework, the relevant provisions are ineffective, insufficient and poorly implemented in practice. We link this failure to wider systemic issues regarding the disfunction of the EPI, whose actions and impact are significantly undermined by an unclear legal framework, ambiguous legal powers, and consistent under-resourcing. In light of this analysis, we propose a series of recommendations for both Poland and the EU that would help to address the identified gaps in Poland's implementation of the EUTR and to strengthen the EUTR rules applicable to all Member States.



1. INTRODUCTION

In the 30-year period between 1990 and 2020, the world lost 420 million hectares of forest due to deforestation⁵ – an area nearly twice the size of Europe’s total forest cover⁶. This loss has had a major detrimental impact on the climate, as forests sequester around 30% of the carbon emitted by human activities each year⁷. The current global demand for agricultural commodities (such as soy, palm oil, beef, leather, cocoa, coffee, rubber, etc.) and timber provides an increased incentive for the illegal use of forests for commercial purposes - especially in places where law enforcement is weak. In addition to illegal logging, deforestation and forest degradation often occur even where forest-related activities are compliant with applicable law.

Although public debate often focuses on deforestation and illegal logging in the Global South (and often for good reason⁸), the problems of illegal logging and forestry crime have become com-

5 FAO (2021), Global Forest Resources Assessment 2020: Main report, p. 18, available at <https://www.fao.org/3/ca9825en/ca9825en.pdf>.

6 According to FAO, Europe is covered by 227 million hectares, which equals to 35% of total Europe’s land area. FAO (2021), State of Europe’s Forests, p. 18, available at https://foresteurope.org/wp-content/uploads/2016/08/SoEF_2020.pdf/.

7 V. Bellassen, S. Luyssaert (2014), Carbon sequestration: Managing forests in uncertain times, available at <https://www.nature.com/articles/506153a>.

8 Some estimates indicate that, as of 2013, around 50% of illegal timber came from Indonesia, 25% from Brazil, and 10% from Malaysia. A. Hoare (2015), Tackling illegal logging and the related trade: what progress and where next?, p. IX, available at <https://www.chatham-house.org/sites/default/files/publications/research/20150715IllegalLoggingHoareFinal.pdf>.

mon across the world. In particular, illegal logging has been found to be a significant and persistent issue within the EU: the Commission has opened official infringement proceedings against both Poland and Romania for illegal logging operations occurring in Natura 2000 sites⁹. Cyprus, Greece and Latvia have also experienced issues with illegal logging¹⁰, as have Bulgaria¹¹ and Slovakia¹². This worrying trend comes at a time when the Commission has acknowledged that forests are under huge pressure, noting in its recent Environmental Implementation Review that of the 27% of EU forest area protected under the EU nature directives, less than 15% have a favourable conservation status and the number of forest habitats with a bad conservation status has increased¹³.

Unlawful forest management practices by government authorities can be harder to detect as they can be concealed within complex legal and political systems, and require more diligence and scrutiny to be uncovered and sufficiently proven. This appears to especially be the case in countries where the majority of forests are under the ownership and management of the state. The massive logging of Poland's and Romania's EU-protected forests, predominantly managed by state-owned operators, shows that balancing the legal obligation to conserve forest resources with the political objective to exploit forests for economic purposes is difficult for governments to achieve in practice. However, given that the market share of timber imported into the EU does not exceed 20% of the whole EU timber market¹⁴, it is essential that timber harvested within the EU – which does not necessarily mean that the harvest comes from legal or sustainable sources – is subject to equal scrutiny and enforcement.

For several reasons, Poland is a particularly relevant example to investigate the gaps in the application of the EU's main legal tool against illegal logging – the EUTR¹⁵. It has a unique structure of forest governance, with almost 80% of its forests – which cover over a quarter of Poland's territory – managed by State Forests¹⁶. This results in a governmental entity being a supplier of more than 90% of timber in Poland¹⁷, and makes the State itself the largest timber operator in Poland subject to the requirements of the EUTR. Moreover, State Forests has a history of forest misgovernance: harvesting in the Białowieża Forest undertaken by State Forests was found to be non-compliant with EU nature protection laws by the Court of Justice of the EU ('CJEU')¹⁸ while the organisation's logging activities in other parts of Poland have also been widely criticised by both public and scientific communities¹⁹. Given this context, one might presume that the competent

9 Read more at <https://www.clientearth.org/latest/latest-updates/stories/saving-bialowieza/> and <https://www.clientearth.org/latest/press-office/illegal-logging-of-romania-s-natural-forests-increases-despite-court-threat-new-report/>.

10 K. Kindji (2021), Internal and external dimension of illegal logging: legal issues and solutions, p. 25, available at [https://www.europarl.europa.eu/RegData/etudes/STUD/2021/700009/IPOL_STU\(2021\)700009_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2021/700009/IPOL_STU(2021)700009_EN.pdf).

11 WWF (2020), EU Forest Crime Initiative. Gap Analysis: Bulgaria, p. 13, available at <https://www.wwf.de/fileadmin/fm-wwf/Publikationen-PDF/EU-Forest-Crime-Initiative-Bulgaria-GAP-Analysis.pdf>.

12 WWF (2020), EU Forest Crime Initiative. Gap Analysis: Slovakia, p. 14, <https://www.wwf.de/fileadmin/fm-wwf/Publikationen-PDF/EU-Forest-Crime-Initiative-Slovakia-GAP-Analysis.pdf>.

13 European Commission (2022), Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Environmental Implementation Review 2022: Turning the tide through environmental compliance, p. 7, available at [https://ec.europa.eu/transparency/documents-register/detail?ref=COM\(2022\)438](https://ec.europa.eu/transparency/documents-register/detail?ref=COM(2022)438).

14 G.J. Nabuurs, Is de EU voor haar hout afhankelijk van Rusland?, available at <https://www.wur.nl/nl/nieuws-wur/Show/Is-de-EU-voor-haar-hout-afhankelijk-van-Rusland.htm>. For details, see the statistics of Eurostat (<https://ec.europa.eu/eurostat/web/forestry/data/database>) and FAO (<https://www.fao.org/forestry/statistics/84922/en/>). In regards to the period 2006-2016, 25% of the timber placed on the EU market was imported from outside the EU (K. Kindji (2021), Internal and external dimension of illegal logging..., op. cit., p. 25).

15 Regulation (EU) No 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 (OJ L 295, 12.11.2010, p. 23–34).

16 Główny Urząd Statystyczny (2021), Leśnictwo w 2020, p. 1, available at https://stat.gov.pl/files/gfx/portalinformacyjny/pl/defaultaktualnosci/5510/3/2/1/lesnictwo_w_2020_r.pdf.

17 Lasy Państwowe (2022), Sprawozdanie finansowo-gospodarcze za 2021 rok, p. 47, available at https://www.lasy.gov.pl/pl/informacje/publikacje/informacje-statystyczne-i-raporty/sprawozdanie-finansowo-gospodarcze-pgl-lp/sprawozdanie-finansowo-gospodarcze-za-2021-rok.pdf@@download/file/Sprawozdanie%20finansowo-gospodarcze%20PGL%20LP_errata1.pdf.

18 The judgement of the CJEU of 17 April 2018 in Commission v Republic of Poland (C-441/17, ECLI:EU:C:2018:255). See more at <https://www.clientearth.org/latest/latest-updates/stories/saving-bialowieza/>.

19 Apel w sprawie Puszczy Karpackiej Komitetu Biologii Środowiskowej i Ewolucyjnej Polskiej Akademii Nauk – PAN (2021), available at <https://naukadlaprzyrody.pl/2021/03/31/apel-w-sprawie-puszczy-karpackiej-komitetu-biologii-srodowiskowej-i-ewolucyjnej-pan/>. M. Suchorabski (2019), Wycinka starodrzewów w Karpatach trwa. „Za dziesięć lat Bieszczadzki Park Narodowy stanie się wyspą”, available at <https://serwis.gazetaprawna.pl/ekologia/artykuly/1425235.puszcza-karpacka-wycinka-starodrzewow-bieszczadzki-park-narodowy-jak-wyspa.html>.

authorities responsible for enforcing the EUTR in Poland would be especially interested in checking whether State Forests complies with its obligations as a timber operator under the EUTR. However, this appears not to be the case, and this lack of EUTR enforcement has knock-on effects for the proper control of the national timber market as a whole.

This report is based on a thorough review of Polish statutory and case law, the information obtained from Polish competent authorities and other relevant entities, as well as on publicly available information, such as the obligatory national reports submitted by Poland to the European Commission regarding EUTR implementation and enforcement²⁰. Annex I to this report provides an overview of the applicable Polish law in this regard and provides context for the gaps in the enforcement of the EUTR in Poland that are described in detail in Section 3.2. Annex II includes two comprehensive case studies (regarding logging activities in the Białowieża Forest and in the Carpathians) that demonstrate how the identified gaps in the enforcement of the EUTR manifest in practice.

20 Annual national reports on the EUTR implementation and enforcement submitted by Member States to the European Commission are available at https://ec.europa.eu/environment/forests/eutr_report.htm.



2. THE EU FRAMEWORK TACKLING ILLEGAL LOGGING AND RELATED TRADE: THE EU TIMBER REGULATION

The EUTR is the EU's main legal tool against illegal logging. It obliges timber companies to verify whether the timber they place on the EU market is legal, and requires national competent authorities to check if these obligations are fulfilled and impose penalties where necessary. Unfortunately, the overall enforcement of the EUTR across Member States has been inconsistent, with relatively weak enforcement in some Member States that has limited the Regulation's effectiveness at preventing illegal timber entering the EU market.

As one of the largest consumers of timber and a significant producer of timber worldwide, it is within the EU's potential to take measures to reduce the global practice of illegal logging and incentivise the demand for legal and sustainable timber. In recognition of this potential impact, the EU adopted the EUTR in 2010 to tackle the trade in illegal timber – both imported and harvested in the EU. The EUTR was adopted as a part of the Forest Law Enforcement, Government and Trade ('FLEGT') Action Plan, and became binding in all Member States, Iceland, Liechtenstein and Norway in 2013. It covers a broad range of timber and timber products, including roundwood, fuelwood, sawn, plywood and veneers, as well as wooden furniture, pulp and pa-

per²¹. It sets out a range of obligations on both companies active in the EU timber market and on national competent authorities designated to enforce its provisions.

Timber companies subject to the requirements of the EUTR are called '**operators**' (actors who first place the timber or timber products on the EU market) and '**traders**' (actors who further circulate the timber that has already been placed on the EU market). The obligations on operators are far broader than those placed on traders: operators have to adopt and regularly evaluate a **due diligence system**²², and to use it on each of the products they place on the EU market. The goal is for an operator to **investigate and determine the legality of its timber entering the EU**. On the other hand, traders are only obliged to keep records of purchases and sales of timber for five years and to share them with competent authorities if requested. Designated competent authorities in each Member State are responsible for implementing the EUTR and checking whether operators and traders comply with their obligations. According to Article 10 of the EUTR, they are required to do this by conducting compliance checks (which can be either scheduled or unscheduled) on companies trading in timber, triggered by any information that suggests a risk of non-compliance. These checks can also be conducted on the basis of relevant information included in a '**substantiated concern**' (a quasi-complaint mechanism established in Article 10(2) of the EUTR that allows members of the public to report to competent authorities on potential cases of non-compliance).

Timber companies found to be in breach of their obligations should be subject to penalties, which are required to be '*effective, proportionate and dissuasive*'²³. If a competent authority comes to the conclusion that a certain provision of the EUTR has been breached, it is obliged to proceed with enforcement measures available under the national framework and take all measures necessary to ensure that penalties for infringement of the EUTR are imposed. However, application of the EUTR in practice has been quite different and has led to starkly uneven implementation of the EUTR among Member States, as evidenced in the Commission's own recent evaluation of the EU's laws on illegal logging²⁴.

Some of the provisions of the EUTR have also given rise to ambiguities – especially when translated into national languages and incorporated into national legal frameworks – that have contributed to the inconsistent application of the EUTR amongst EU Member States. The structure of regulatory frameworks vary significantly between Member States, as well as the numbers of checks conducted and penalties imposed by competent authorities. Inconsistencies in the implementation and enforcement of the EUTR between Member States can lead to market disruption by disadvantaging timber companies who properly fulfil their obligations against companies who do not and therefore avoid the associated compliance costs. Such differences between the implementation practices of Member States also create incentives for unethical operators to place high-risk timber on the EU market in Member States with weak enforcement, creating a pathway

21 All timber and timber products covered by the EUTR are enlisted in the Annex to the EUTR. They account for 75%-90% of the value/ volume of wood based products placed on the EU market (European Commission (2021), Commission Staff Working Document – Fitness Check..., op. cit. , p. 7).

22 Due diligence is a process of identifying, assessing and mitigating the risk of placing illegally harvested timber on the EU market. First, operators have to search for information that may sufficiently prove legality of the timber (identification). Second, operators must assess the materials they have gathered in the previous stage to determine whether they are reliable and demonstrate the legality of products (assessment). At this point, if they have not raised any non-negligible doubts, they can place the product on the EU market. Conversely, if they have come across any issues that deem further investigation, they are obliged to continue with the third phase of the due diligence process, which is reducing the identified risks to a negligible level (mitigation).

23 The concept of an 'effective, dissuasive and proportionate' penalty has been elaborately defined in the case law of the CJEU. An 'effective' penalty means that it ensures the goal set by the legislator is reached, despite the infringement, and intends to prevent future harm from happening. In the context of the objectives of the EUTR, the main role of a penalty is to prevent illegally harvested timber from being placed on the EU market and to disadvantage operators who are not willing to comply with the law. A 'dissuasive' penalty means that it is commensurate with the seriousness of the infringements and has a genuinely dissuasive effect. In other words, the threat of repressive action must generate sufficient pressure on regulated parties to ensure that the situation envisaged under EU law is realised in practice and that non-compliance becomes economically unattractive. A 'proportionate' penalty requires that it does not go beyond what is necessary to achieve the desired objectives. See more at ClientEarth (2018), National EUTR penalties: are they sufficiently effective, proportionate and dissuasive?, available at <https://www.clientearth.org/latest/documents/national-eu-tr-penalties-are-they-sufficiently-effective-proportionate-and-dissuasive/>.

24 European Commission (2021), Commission Staff Working Document – Fitness Check..., op. cit. , p. 20 et seq.

for illegal timber to access the EU market and hindering enforcement efforts of the other Member States.

Data on EUTR enforcement shows a wide variation across Member States in the number of checks and subsequent enforcement actions taken by competent authorities, most of them having low enforcement levels in common²⁵. Whereas the number of EU operators is estimated at 3-4 million²⁶, only a fraction of them – **51,056 entities exactly, or less than 1.5%** – were checked by EUTR competent authorities in the five years between 2015 and 2020²⁷. Similarly, in this period, **3,177 infringements** of the EUTR were found, although only **38 court cases** were reported²⁸. The same goes for penalty schemes – not only do they significantly vary in terms of types and severity, but also in application²⁹. Whereas certain Member States lead the way in enforcement actions (e.g. Lithuania, with 228 enforcement actions taken between 2017 and 2018), others lag behind (Croatia and Greece did not impose any penalties in the same period, following no infringement detected)³⁰. These poor enforcement statistics seem to stem from the **insufficient personnel and financial capacity**³¹ of national competent authorities, most of them having **less than 20 full-time equivalent staff** working on the enforcement of the EUTR and at least 10 Member States having no specific budget for it³². In addition, the main obstacles to effective environmental law enforcement found in Member States – very relevant also in the context of the EUTR – are i.a. a lack of effective enforcement strategies of environmental competent authorities, prevalence of box-ticking and incident-based inspections, as well as ineffective penalties³³. But despite these shortcomings, the Commission's 2021 evaluation of the EUTR found that it did have some limited positive effect and the Regulation is estimated to have decreased EU imports of illegally harvested timber by between 12% and 29%³⁴. This is an important finding that supports the need to improve and build on – rather than abandon – the current due diligence-based legal framework of the EUTR.

25 Annual national reports on the EUTR implementation and enforcement submitted by Member States to the European Commission are available at https://ec.europa.eu/environment/forests/eutr_report.htm.

26 European Commission (2021), Commission Staff Working Document – Fitness Check..., op. cit., p. 15.

27 Ibidem, p. 13.

28 Ibidem, p. 14-15.

29 Some Member States have adopted a penalty regime relying mainly on administrative penalties. Other Member States rely on criminal penalties, while some have adopted a combination of these two systems. Penalties include administrative fines while seizures (available in 23 Member States), criminal fines (available in 16 Member States), imprisonment (available in 17 Member States), suspension of trade (available in 15 Member States) and other types of penalties (available in 11 Member States). Differences also emerge with regards to the level of financial penalties, which range from €50 to unlimited amounts (European Commission (2021), Commission Staff Working Document - Fitness Check..., op. cit., p. 14).

30 UNEP-WCMC (2020), EUTR Analysis 2019, p. 44-45, available at <https://ec.europa.eu/environment/forests/pdf/EUTR%20Analysis%202017-2019.pdf>.

31 European Commission (2020), Report from the Commission to the European Parliament and the Council on the EU Timber Regulation. Biennial report for the period March 2017 - February 2019, point 2.6, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1601880684249&uri=COM:2020:629:FIN>.

32 UNEP-WCMC (2020), EUTR Analysis 2019, op. cit., p. 62.

33 IEEP, Bio Intelligence Service and Ecologic Institute (2013), Information collection and impact assessment of possible requirements for environmental inspections in the area of EU legislation on water, nature protection and trade in certain environmentally sensitive goods, p. 165 et seq., available at <https://ec.europa.eu/environment/legal/law/pdf/Final%20report%20inspections.pdf>.

34 European Commission (2021), Commission Staff Working Document - Fitness Check..., op. cit., p. 21.



3. EUTR IMPLEMENTATION AND ENFORCEMENT IN POLAND

3.1 THE TIMBER MARKET IN POLAND AND THE POSITION OF STATE FORESTS

The timber market in Poland is dominated by a single state-owned organisation: State Forests. This means that most of the timber being placed on the EU market through Poland comes from this single entity, which – as this section describes – enjoys a privileged position within Poland's legal order. Considering the scale of State Forests' operations, its lack of accountability for its activities presents a serious challenge to the overall effectiveness of the EUTR in Poland.

Given the size and value of forested land owned and managed by the Polish State, the forestry-wood sector is a flagship of Poland's economy. In 2021, State Forests harvested and sold 40.5 million m³ of timber, earning PLN8.9 billion (approx. €1.8 billion)³⁵. To reflect the scale of this

35 Lasy Państwowe (2022), Sprawozdanie finansowo-gospodarcze za 2021 rok, op. cit., p. 39, 10. According to the newest data available, the wood logged by State Forests has more than doubled over the last 30 years – from 20 million m³ in 1990 to 49 million m³ (gross large timber) in 2019, with a large share of it harvested without approved forest management plans and environmental impact assessments (Stowarzyszenie Pracownia na Rzecz Wszystkich Istot (2021), Out of control: The worrying rise of logging in Polish forests, p. 1, available at <https://pracownia.org.pl/upload/filemanager/pracownia.org.pl/Dokumenty/Out-of-control-The-worrying-rise-of-logging-in-Polish-forests.pdf>).

business, compare it to the major – and most beneficial – coal producer in Poland: Jastrzębska Spółka Węglowa ('JSW'). In 2021, JSW's sales revenues amounted to PLN13.6 billion (approx. €2.8 billion)³⁶. **State Forests has provided for more than 90% of timber demand in Poland**³⁷, with the remainder provided by imports, predominantly from Belarus, Ukraine and Russia³⁸. Poland is also a large exporter of industrial roundwood, responsible for approx. 3% of the total global exports in 2020³⁹.

State Forests operates within a structure comprising the General Directorate, 17 regional directorates and 430 forests districts. The General Directorate is headed by the General Director appointed by the Minister of Climate and Environment, while the regional directorates are managed by regional directors appointed by the General Director. Both the General Director and regional directors have planning and organisational functions⁴⁰, while the smallest units – forest districts headed by managers – are tasked with the execution of forest management plans. Forest district managers are responsible for the general state of forests under their supervision, which gives them fundamental importance within the structure of State Forests⁴¹. **In 2021, State Forests employed 25,520 people and spent PLN4,150 million (approx. €880.98 million) on staffing and administrative support costs**⁴². Out of the employees dedicated to the tasks of forest management and forest protection⁴³, 954 of them (forest rangers) had legal access to firearms in 2015⁴⁴. This means that the forest rangers of State Forests are one of the uniformed services in Poland with large access to firearms and coercive powers⁴⁵. In contrast, the EPI⁴⁶ – the body designated as the competent authority responsible for the implementation of the EUTR in Poland which monitors the activities of State Forests – employed a mere 8.1 full-time equivalent staff to conduct checks of the timber market with an annual budget of less than PLN29,000 (approx. €6,000) in 2020⁴⁷ (see more in Section 3.2.4). Additionally, in contrast to the forest rangers of State Forests, the EPI is not considered a uniformed service which significantly limits its capacity to fight environmental crime. Although the EPI has been granted some investigative powers dedicated to uniformed services (such as the use of electronic surveillance, gathering and securing evidence of committed crimes, and conducting interviews and visual inspections⁴⁸), these can be only exercise in environmental crime cases. The EPI cannot, therefore, exercise these powers when examining the compliance of State Forests with the EUTR, because trade in illegal logging is not expressly considered an environmental crime under Polish law.

State Forests can be considered neither a public authority nor a classic state-owned entity. Its legal status is unique in Poland and across the EU, combining responsibilities of a public authority (forest management) with specialised tasks falling outside public administration (timber trade) – the distinction between these two functions is uneasy to draw⁴⁹. State Forests does not

36 JSW, Sprawozdanie finansowe Jastrzębskiej Spółki Węglowej S.A. za rok obrotowy zakończony 31 grudnia 2021 roku, p. 15, available at https://www.jsw.pl/fileadmin/user_files/raporty-okresowe/pl/2021/1y/jednostkowy_html/SF_JSW_2021.pdf.

37 Lasy Państwowe (2022), Sprawozdanie finansowo-gospodarcze za 2021 rok, op. cit., p. 47.

38 According to Comtrade data, in 2021, Poland imported wood (products of HS code: 44) from Belarus of a value of approx. 430 million, Ukraine - €396 million, and Russia - €244 million. Free access to detailed global trade data is available at <https://comtrade.un.org/>.

39 See the statistics of FAO, available at <https://www.fao.org/forestry/statistics/80938@180724/en/>.

40 Such as appointing managers of forest units, managing land property sectioned off the forest units, initiating, coordinating and supervising the activities of forest units and other entities. See Article 34 of the Act on Forests.

41 M. Tyburek (2011), Status prawny i zadania Państwowego Gospodarstwa Leśnego Lasy Państwowe [in] B. Rakoczy (ed.), Wybrane problemy prawa leśnego, p. 132-133.

42 Lasy Państwowe (2022), Sprawozdanie finansowo-gospodarcze za 2021 rok, op. cit., p. 6, 11.

43 Ibidem, p. 6.

44 The report of the Supreme Audit Office (Najwyższa Izba Kontroli) of 3 February 2016, Wykorzystanie broni przez wybrane służby i strażę oraz nadzór organów państwa nad jej reglamentacją, p. 51, available at <http://www.nik.gov.pl/kontrola/P/15/041/>.

45 Ibidem, p. 115.

46 The two statutory obligations of the EPI are exercising control over compliance with the environmental law, and assessing the environment. It operates within a two-tier structure, consisting of the General Environmental Protection Inspector on the one hand, and 16 regional environmental protection inspectors on the other hand. While the General Environmental Protection Inspector holds mainly organisational and planning functions, regional environmental protection inspectors are assigned with the majority of the actual inspections.

47 The national report on the EUTR implementation and enforcement for 2020 submitted by Poland to the Commission, section II.II. point 7.

48 Such activities are available under Article 10b of the EPI Act, which grants competent authorities the right to undertake investigative measures in cases where there is a substantiated suspicion that a crime or offense against the environment has been committed.

have legal personality, but the law does entitle it to represent the State Treasury in relations under civil law with other entities with respect to public forests (e.g. concluding contracts on timber sales)⁵⁰. **This means that each of the activities undertaken by State Forests in relation to forest management and timber trade must be considered as an activity undertaken by the State itself⁵¹.**

State Forests holds a **dominant, near-monopoly position** in the Polish timber market⁵² – being responsible for approx. 96% of domestic logging in Poland⁵³ – while also being tasked with the responsibility of protecting public forests, including the protection of wildlife. According to Article 7 of the Act on Forests of 28 September 1991, sustainable forest management – the main task of State Forests – must take into consideration the conservation of forests and their environmental functions, the protection of forests, the protection of soil and vulnerable sites, the protection of water, and the rational production of wood. Additionally, the Regional Administrative Court in Gorzów Wielkopolski confirmed in its ruling of 30 May 2018 that the goal of State Forests is to carry out forest management for the public interest, not to make a profit⁵⁴. Similarly, the Court of Appeal in Wrocław ruled that forest management and protection should be considered the main responsibility of State Forests⁵⁵. This suggests that the conservation of natural forest resources should be State Forests' main goal. In reality, however, logging and timber sales – essentially the exploitation of forests – seem to be the primary reasons for State Forests' existence, powers, resources and activities. Indeed, State Forests' two competing objectives – the conservation of forests' wildlife and logging activities – are clearly contradictory and are given starkly unequal treatment by State Forests: **in 2021, the budget that State Forests allocated for nature protection (PLN18.9 million, approx. €3.9 million) amounted to less than 1% of its annual budget for timber harvesting (PLN2.2 billion, approx. €457 million), and constituted a mere 0.2% of the total State Forests budget (PLN9.4 billion, approx. €1.9 billion)⁵⁶.** This approach is reflected in State Forests' Strategy for the years 2014–2030 adopted by State Forests in 2013, where the protection measures imposed on nearly 50% of the area managed by State Forests are considered an obstacle towards full realisation of the social and economic functions of forests⁵⁷. This contradicts the fundamental legal responsibility of State Forests, being the protection of forests through sustainable management⁵⁸.

The close and blurred relationship between State Forests and the government is also reflected in advocacy positions pursued at EU level, where the stance taken by State Forests often matches the positions adopted by the Polish government. An example of this is the way State Forests and Poland responded to the EU Forest Strategy for 2030⁵⁹, where EUSTAFOR – the Eu-

49 'Forest management' is defined as both managing forest areas (including their protection) as well as timber sale (Article 6(1)(1) of the Act on Forests). See also ruling of the Supreme Administrative Court of 6 January 2010, ref. no. II GSK 277/09, ruling of the Regional Administrative Court in Rzeszów of 17 July 2019, ref. no. II SA/Rz 556/19, and ruling of the Court of Appeal in Wrocław of 23 April 2012, ref. no. I ACz 709/12.

50 Article 32(1) of the Act on Forests.

51 M. Tyburek, Status prawny..., op. cit., p. 121. K. Leśkiewicz (2019), Prawne aspekty zarządzania lasami Skarbu Państwa, p. 133.

52 In 2008, the Polish Competition Authority (Prezes Urzędu Ochrony Konkurencji i Konsumentów – UOKiK) found that State Forests had abused its dominant position on the Polish timber market. In 2011, the decision was upheld by a Polish court, who expressly confirmed that State Forests held 'a very strong dominant position' in the Polish timber market (ruling of the Court of Competition and Consumer Protection of 21 January 2011, ref. no. XVII AmA 115/10).

53 UNECE Committee on Forests and the Forest Industry, 78th Session (2020), Poland – Statement on the wood market, Review and prospects, p. 5, available at <https://drupal-main-staging.unece.org/fileadmin/DAM/timber/country-info/statements/poland2020.pdf>.

54 Ruling of the Regional Administrative Court in Gorzów Wielkopolski of 30 May 20, ref. no. II SA/Go 1182/17.

55 Ruling of the Court of Appeal in Wrocław of 23 April 2012, ref. no. I ACz 709/12.

56 Lasy Państwowe (2022), Sprawozdanie finansowo-gospodarcze za 2021 rok, op. cit., p. 11–12.

57 Lasy Państwowe (2013), Strategia Państwowego Gospodarstwa Leśnego Lasy Państwowe na lata 2014–2030, p. 7, available at <http://zlpwpr.pl/wp-content/uploads/2014/08/strategia-LP.pdf>.

58 M. Tyburek, Status prawny..., op. cit., p. 130. See also ruling of the Court of Appeal in Wrocław of 23 April 2012, ref. no. I ACz 709/12.

59 European Commission (2021), Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: New EU Forest Strategy for 2030, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52021DC0572>.

ropean State Forest Association (which represents i.a. State Forests)⁶⁰ – followed by Poland⁶¹, jointly attempted to water-down the forest-protective plans in the Forest Strategy.

Formally under the supervision of the Minister of Climate and Environment, State Forests functions with a **broad level of operational independence**. This is possible as State Forests operates on a self-financing basis: the costs of its activities are fully covered by the profits it accumulates (mainly from timber trade), allocated in the Forest Fund and managed by the General Director⁶². The instruments of supervision available to the Ministry of Climate and Environment are limited to the appointment and dismissal of the General Director and approval of forest management plans for each forest district⁶³. The system falls short of real control, as these decisions have been found to usually be politically motivated⁶⁴. This monitoring gap is expected to be filled by other public authorities, who can inspect certain aspects of the operation of State Forests as a market player, and their compliance with the relevant laws on environment, competition, labour etc., such as the Polish Competition Authority (Prezes Urzędu Ochrony Konkurencji i Konsumentów – UOKiK), which in the past found that State Forests was abusing its dominant position on the Polish timber market⁶⁵.

3.2 DETECTED SHORTCOMINGS

The following sections present in detail the shortcomings regarding the implementation and enforcement of the EUTR that we have observed within Poland's legal order. To fully understand the background of this analysis, please check Annex I to this report which provides an overview of the applicable and relevant Polish law.

3.2.1 COMPLIANCE CHECKS

A. UNCLEAR LEGAL BASIS FOR UNSCHEDULED CHECKS

The scope of activities which the EPI is authorised to carry out lacks clarity under the existing legal framework: it does not unequivocally provide that the EPI is empowered to carry out unscheduled checks on timber operators. While the law remains unclear, the EPI itself reports that it does not conduct unscheduled checks on the basis of the EUTR.

The EPI's main task is to carry out inspections on entities who exploit the environment (public authorities, individuals and entrepreneurs)⁶⁶. Inspections by the EPI can be either scheduled (carried out in accordance with yearly inspection plans) or unscheduled (carried out on one of the ad hoc bases set out in the law)⁶⁷. The differences between scheduled and unscheduled inspections are mostly about the rights of the inspected entity. Most importantly, scheduled inspections must be notified, whereas unscheduled checks can be conducted without prior notice⁶⁸.

60 The position of EUSTAFOR on the EU Forest Strategy for 2030 is available at https://www.cepf-eu.org/sites/default/files/document/20211004_The%20New%20EU%20Forest%20Strategy%20for%202030%20-%20Position%20of%20European%20Forest%20Owners%20and%20Managers.pdf. The position of State Forests on the EU Forest Strategy for 2030 is available at https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12674-Forests-new-EU-strategy/F1300575_en.

61 The Joint Letter of Ministers responsible for Forestry of Austria, Czech Republic, Estonia, Finland, Germany, Hungary, Latvia, Poland, Romania and Slovakia on the EU Forest Strategy post-2020 is available at <https://www.skog.no/wp-content/uploads/2021/07/Joint-Letter-on-EU-Forest-Strategy-post-2020.pdf>.

62 Articles 56 et seq. of the Act on Forests. See also the report of the Supreme Audit Office (Najwyższa Izba Kontroli) of 8 July 2009, available at <https://www.nik.gov.pl/plik/id,68,vp,68,pdf>. The authors negatively assessed the overall functioning of the Forest Fund.

63 In regards to approving forest management plans, see K. Leśkiewicz (2019), *Prawne aspekty...*, op. cit., p. 161.

64 K. Leśkiewicz (2019), *Prawne aspekty...*, op. cit., p. 192.

65 See footnote 54.

66 Article 47(1) of the Act on Entrepreneurs of 6 March 2018 (Consolidated text: Journal of Laws 2021, item 162).

67 Article 9(1) of the EPI Act.

68 Article 48(2) of the Act on Entrepreneurs.

An open question is whether the 'ad hoc bases' set out in the law are applicable to EUTR checks. Polish law remains unclear in this matter, the reason behind this being the co-existence of two potentially **conflicting provisions** in the Act of the Environmental Protection Inspectorate of 20 July 1991 (the 'EPI Act').

Unscheduled checks are mentioned in two places in the EPI Act: Article 9(1b) and (1c) – in force since 2018, and Article 5a(7) – in force since 2014. According to Article 9(1b) and (1c) of the EPI Act:

- 1b** Unscheduled inspections are inspections:
 - 1** carried out at the request of public administration bodies or entities, provided that special provisions provide for the possibility of submitting such a request;
 - 2** interventional.
- 1c** Interventional inspections are inspections carried out in the course of handling complaints and requests for intervention regarding environmental pollution or the risk of such pollution, serious accidents, or in order to prevent the commission of a crime or offense.

Therefore, on the basis of this provision, it appears that unscheduled checks can be performed:

- I** at the request of public authorities or entities which are entitled to log such a request by the law,
- II** in the course of handling complaints relating to environmental pollution or the risk of occurrence of such pollution,
- III** or in the course of handling complaints regarding the occurrence of serious accidents,
- IV** or in order to counteract commitment of a crime or offense.

However, despite the different scenarios listed above, it is unclear whether the regional inspectorates have the authority to perform unscheduled checks under Article 9(1b) or (1c) when in possession of information about potential illegal timber flows. This lack of clarity stems from the fact that breaches of the EUTR do not directly concern environmental pollution (in accordance with point (II) above), serious accidents (in accordance with point (III) above), and Polish law does not consider them as crimes or offenses (in accordance with point (IV) above). Additionally, the possibility of performing an unscheduled check at the request of other entities (in accordance with point (I) above) is limited to entities performing public obligations and, in any case, excludes civil society organisations and individuals⁶⁹.

Unscheduled checks are also mentioned in Article 5a(7) of the EPI Act (adopted in 2014), according to which:

*Unscheduled inspections shall be carried out, **in particular**, in order to investigate at the shortest notice possible complaints and requests for intervention, serious accidents, violations of the requirements set out in integrated permits and, where appropriate, before issuance or revision of an integrated permit⁷⁰.*

Through this provision, it seems that the legislature introduced an open catalogue of scenarios when an unscheduled check can be performed. Before Articles 9(1b) and (1c) were introduced in 2018, it had been clear that the presence of the term 'in particular' in Article 5a(7) of the EPI Act implied that unscheduled inspections were not limited to the purposes explicitly mentioned in the text. This interpretation was confirmed by administrative courts⁷¹.

69 A. Haładaj (2018), Uprawnienia kontrolne Inspekcji Ochrony Środowiska a problem udatności jej struktury organizacyjnej [in] W. Federczyk (ed.), Stulecie polskiej administracji. Doświadczenia i perspektywy, p. 271-272, available at https://ksap.gov.pl/ksap/sites/default/files/publikacje/ksap_stulecie_pl_adm_publikacja_dosieci_skladki_int.pdf.

70 Ibidem.

71 See e.g. ruling of the Voivodeship Administrative Court in Warsaw of 24 May 2016, ref. no. VIII SA/Wa 1022/15.

Now however, the co-existence of Articles 9(1b) and (1c) and 5a(7) of the EPI Act creates major uncertainty about when an unscheduled check can be performed. Prior to 2018, it was clear that Article 5a(7) of the EPI Act set out a non-exhaustive list of reasons that could trigger unscheduled checks. In 2018, the EPI Act was amended by adding Articles 9(1b) and (1c) which listed specific reasons on the basis of which an unscheduled check may be performed. The new provisions do not include the term ‘in particular’, which arguably makes them exhaustive. At the same time, Article 5a(7) of the EPI Act has remained unchanged, leaving both articles non-aligned. **It is, therefore, unclear whether the EPI can perform unscheduled checks on timber operators, leaving the responsible authorities in a state of uncertainty regarding the scope of their powers and mandate.** This conclusion corresponds with the information submitted to the Commission by the EPI, according to which compliance checks on the EUTR are performed during business hours, after having informed the operator, trader or monitoring organisation in advance⁷² – **these are requirements that must be fulfilled when performing a scheduled check.** It is also aligned with the information disclosed by the EPI in response to our environmental information requests, according to which **the overwhelming majority of the checks conducted were performed on the basis of previously prepared plans**⁷³.

This gap in the legal framework is also reflected in **the way substantiated concerns are handled by the EPI.** On 22 July 2019, ClientEarth submitted a substantiated concern to the General Environmental Protection Inspectorate on the basis of a report by Global Witness entitled ‘Buyers beware’ describing suspicious timber imports from the Democratic Republic of Congo by several European companies, including one that operated in Poland⁷⁴. The General Environmental Protection Inspectorate informed ClientEarth that, after reviewing the evidence, the substantiated concern had been handed over to the relevant regional inspectorate that was supervising the suspected company in order to include this company in its annual plan for checks. Despite the report and evidence being accepted by the General Inspectorate, **no unscheduled check was performed.** Similarly, on 22 November 2017, ClientEarth submitted a substantiated concern regarding timber coming from the Białowieża Forest. The investigation performed by the EPI as a result – roughly nine months after the submission of the substantiated concern – **also took the form of a scheduled check,** despite the competent authority admitting the importance of the information included in the concern (see more details in Annex II).

Although Article 10(1) of the EUTR does not explicitly require competent authorities to conduct unscheduled checks, Recital 21 of the preamble to the EUTR stipulates that competent authorities should endeavour to carry out such additional checks when in possession of relevant information. Poland should therefore at least establish a clear legal, regulatory or administrative framework that would enable the authorities to perform immediate and unscheduled inspections. An approach that increases the level of control over timber operators is supported by the legal basis of the EUTR and its primary purpose – the protection of forests as a common heritage – but also corresponds with the size of the timber market in Poland and its financial value. Reliance on scheduled checks alone **significantly impedes** the goal of prohibiting illegal timber from being placed on the internal market, as potentially illegal timber flows are only investigated following a delay and after having provided prior warning. Inspections carried out under such terms allow compliant timber operators to prepare for the inspection but perversely also allow non-compliant operators to **potentially hide or destroy evidence** of non-compliance, thereby rendering any subsequent investigation of such operators obsolete.

72 The national report on the EUTR implementation and enforcement for 2020 submitted by Poland to the Commission, section III.I. point 2.

73 The only competent authority that claimed performing unscheduled checks on the basis of the EUTR was the Mazowieckie Regional Environmental Protection Inspectorate in Warsaw, Poland.

74 Global Witness (2019), Buyers Beware, available at <https://www.globalwitness.org/en/campaigns/forests/buyers-beware/>.

B. THE EPI GUIDELINES ARE NOT ADEQUATE

In November 2015, the General Environmental Protection Inspectorate shared guidelines with the regional inspectorates (the 'EPI Guidelines')⁷⁵ on the risk-based approach to be pursued in carrying out checks – as required by Article 10(2) of the EUTR. However, although these Guidelines specify a minimum number of checks that must be carried out, they do not offer any guidance for the competent authority in how to plan and conduct checks in an effective manner. Specifically, although State Forests provides for more than 90% of timber demand in Poland, the EPI Guidelines require checks to be conducted in only 16 of the 430 forest districts managed by State Forests per year.

According to the EPI Guidelines, each of the regional inspectorates has to perform a certain number of checks on both importing and domestic operators per year depending on the rules in place in each administrative division⁷⁶. Out of the total number of checks that each regional inspectorate must undertake, only one must be performed on a domestic operator (the remaining number being performed on importing operators).

The obligatory numbers of checks established in the EPI Guidelines **do not take into account the actual numbers of operators** active in a specific area⁷⁷. The situation worsens with particular regard to domestic timber operators. The timber market in Poland is dominated by State Forests, responsible for approx. 96% of roundwood harvested in Poland (41.6 million m³ out of the total 43.5 million m³ harvested in Poland in 2019)⁷⁸. It operates within 430 forest districts located in nearly 80% of Polish forests, in each of which it is considered a separate 'operator' for the purposes of the EUTR. Considering that the EPI Guidelines state that the 16 regional inspectorates of the EPI are only required to conduct one check each on a domestic operator each year, this means that only a maximum of 16 of the 430 'operators' within the structure of State Forests are checked annually (less than 4%)⁷⁹.

C. THE RISK-BASED APPROACH CONTAINED IN THE EPI GUIDELINES IS NOT UP TO DATE

The EPI Guidelines are also outdated and do not consider the actual numbers of operators placing timber on the EU market through Poland. This is another factor that prevents the EPI from planning checks effectively.

The generic content of the EPI Guidelines does not give any practical recommendations that would enhance the enforcement of the EUTR. Although they include a remark that they shall be subject to a 'systematic evaluation' (but no more than once every three years)⁸⁰, no information about any evaluation has been disclosed. Most of the regional inspectorates in their responses to the requests for environmental information submitted by ClientEarth referred in this regard to the Guidelines issued in November 2015, which suggests that the EPI Guidelines have remained unchanged for at least the last six years.

Therefore, **the risk-based approach outlined in the EPI Guidelines does not reflect the changes that have occurred after 2015**, including e.g. the increase in the number of operators

75 These Guidelines are not publicly available. ClientEarth was informed of their existence when the regional inspectorate of the EPI in Warsaw responded to our request for environmental information on 7th March 2021

76 From five – in Lubuskie, Opolskie, Pomorskie, Świętokrzyskie and Zachodniopomorskie voivodeships, seven – in voivodeships Dolnośląskie, Kujawsko-Pomorskie, Lubelskie, Łódzkie, Małopolskie, Podkarpackie, Podlaskie, Śląskie and Warmińsko-Mazurskie, and nine – in voivodeships Wielkopolskie and Mazowieckie. Voivodeship is the high-level administrative division – an area administered by a voivode (governor) in Poland. There are 16 voivodeships in Poland.

77 Poland has reported to the Commission having an estimated number of 8,000 importing operators in 2019. See the national report on the EUTR implementation and enforcement for the period of 2017-2019 submitted by Poland to the Commission, p. 49.

78 UNECE Committee on Forests and the Forest Industry, 78th Session (2020), Poland..., op. cit., p. 5.

79 Assuming (1) that each regional inspectorate follows the EPI-recommended minimum of conducting only one check of a domestic operator and (2) that the domestic operator on whom the check is conducted falls within the ambit of State Forests.

80 The EPI Guidelines are not publicly disclosed. We have received them upon a request for environmental information we submitted to the regional inspectorate of EPI in Warsaw.

that would be subject to checks under the EUTR. As of 2017, Poland declared having 107 domestic and importing operators placing timber on the market⁸¹, while in 2019 the number of importing operators had grown to approximately 8,000⁸². Although this discrepancy may stem from differences in reporting methodologies, it shows that the operational circumstances underpinning the original risk-based approach have significantly changed since the EPI Guidelines were issued to the regional inspectorates in 2015. Consequently, the Guidelines as they currently exist do not match the reality of the risk of illegal logging occurring and are not fit for the purpose of forming annual risk-based plans for EUTR checks by the EPI.

D. COMPLIANCE CHECKS – CONSIDERABLY LACKING IN BOTH QUANTITY AND QUALITY

The total number of checks performed since the EUTR came into force is very low. The situation is even worse when it comes to State Forests: some of the districts which operate within the structure of State Forests have never been checked against the requirements of the EUTR.

The practice follows the approach prescribed in the inadequate EPI Guidelines (as described above). The number of checks performed since the EUTR has been in force remains consistently at a very low level. With the total number of checks performed from 2015 to early 2021 not even reaching 600⁸³, and the number of operators placing timber on the market estimated to be above 8,000⁸⁴, the ratio between these two numbers shows that **each year approx. 1% of timber operators are being checked** for compliance with the EUTR.

This very low number of checks conducted is made worse by additional factors which show that the implementation of the EUTR in Poland lacks quality and consistency. For example, in the case of operators with outdated contact details or 'letter box' offices (i.e. businesses registered at physical addresses but without actual offices), the EPI considered that the scheduled checks could not be performed due to the impossibility of contacting the operators⁸⁵. As a consequence, **operators who appeared unreachable were not checked, despite reasonable concerns about their activities**. This example again highlights the need for the EPI to be able to perform unscheduled checks to investigate such cases – without an obligation to notify the operator (which of course cannot be fulfilled if the contact details are false or outdated)⁸⁶.

Once again, the situation regarding the main timber operator in Poland is worse. According to the responses received by ClientEarth to our environmental information requests, only 72 checks were performed on State Forests in the period following the entry into force of the EUTR until the first quarter of 2021. Considering that State Forests operates within 430 forests districts, this means that – as of early 2021 – **more than 80% of forest districts have never been checked regarding compliance with the EUTR**. Although the EPI Guidelines require the regional inspector-

81 The national report on the EUTR implementation and enforcement for the period of 2015-2017 submitted by Poland to the Commission, p. 5.

82 The national report on the EUTR implementation and enforcement for the period of 2017-2019 submitted by Poland to the Commission, p. 49.

83 National reports on the EUTR implementation and enforcement for the period of 2013-2020 submitted by Poland to the Commission provide similar number.

84 Together with small forest owners – who do not necessarily place the timber on the EU market – the number of operators exceeded 2 million in 2020. State Forests, however, remains the largest timber operator: it is responsible for 96% of domestic logging and provides for over 90% of timber demand in Poland. Also in 2020, Poland has reported to the Commission having an estimated number of 8,000 importing operators (the national report on the EUTR implementation and enforcement for 2020 submitted by Poland to the Commission, section II.V. points 2 and 5).

85 In response to ClientEarth's request for environmental information, we received a letter from one of the regional inspectorates of the EPI on 7th April 2021 which stated: 'A total of 12 checks were planned for 2019, but only 6 were carried out, as attempts to carry out the remaining 6 checks turned out to be impossible to succeed. The notifications about the check were returned by Polish Post. There were also cases that after the inspectors arrived at the inspection site, it turned out that the company did not exist at the address indicated, the premises were only rented, the entity resigned from renting and moved out without specifying the place of stay. There was also a case where the company selected for a check conducted business activity using a virtual address, i.e. by purchasing an address from an accounting office. The company's management board was located in Ukraine, and all attempts to establish contact were unsuccessful.'

86 As required by Article 48(2) et seq. of the Act on Entrepreneurs.

ates to perform at least one check on domestic operators annually, some of the inspectorates have never conducted any check on any of the entities of State Forests⁸⁷.

Concerns also arise regarding the quality of assessments conducted during checks. In some cases, the verification of the legality of timber has been reported to be based merely on the existence of Forest Stewardship Council – FSC certificates, which, according to the EPI, ‘guarantees compliance with all international and national requirements’⁸⁸. Such **blind reliance on third-party verification schemes by both the operator and by EPI** seriously undermines the due diligence framework established in the EUTR and the Commission’s Guidance on the EUTR has clearly stated that the mere existence of third-party certification alone does not release any competent authority (including the EPI) from its implementation and enforcement responsibilities⁸⁹.

The case studies we have conducted, as described in detail in Annex II, highlight many concerning ambiguities and shortcomings in the approach to implementation and enforcement in Poland. The accuracy and effectiveness of the checks conducted in both the Białowieża Forest and the Carpathians regions of Poland are open to serious question. Despite clear findings that raised serious doubts as to the legality of the harvesting conducted in those regions, the EPI did not find any irregularities.

E. MISSING LINKS TO CRIMINAL LAW

Placing illegal timber on the market is not considered a crime or offence under Polish criminal law, which significantly limits the enforcement measures that can be taken against operators trading in illegal timber.

Placing illegal timber on the market is an administrative offence that carries a financial penalty imposed by the EPI. The absence of a link between the EUTR and Polish criminal law has two significant consequences. Firstly, **the EPI cannot prosecute cases of illegal timber trade**, because the right of the EPI to prosecute environmental infringements in court is limited to offences penalised under criminal law⁹⁰. Secondly, **the EPI is not obliged to inform the law enforcement authorities about the suspicion of placing illegal timber on the market** discovered in the course of a check, because – again – such an obligation applies only to (environmental) crimes⁹¹. Unfortunately, the links and interactions between illegal timber trade and criminal offenses in Poland remain underestimated and undiscovered, leaving illegal logging, one of the most profitable forms of forest crime, to an administrative-oriented approach which, as demonstrated in this report, tends to be rather weak and ineffective and does not provide sufficient measures to deal with the growing threat of international environmental crime.

Aside from conducting compliance checks, the EPI does have the power to perform additional activities to counteract the commission of environmental crimes and offenses. Such activities are available under Article 10b of the Act on the EPI, which grants competent authorities **the right to undertake investigative measures in cases where there is a substantiated suspicion that a crime or offence against the environment has been committed**. These include i.a. the use of electronic surveillance (including satellite imagery and video and voice recording devices), gathering and securing evidence of the committed crime, conducting interviews and visual inspections. The aim of these measures is to counteract the deliberate destruction of evidence of suspected infringe-

87 Regional inspectorates of the EPI in Kielce and Zielona Góra.

88 We received this information from one of the regional inspectorates of the EPI on 8th April 2021 in response to ClientEarth’s request for environmental information.

89 European Commission (2016), Commission Notice of 12 February 2016 on Guidance Document for the EU Timber Regulation, p. 9. See also ClientEarth’s analysis of the role of certification schemes in the context of EUTR obligations, available at <https://www.clientearth.org/latest/latest-updates/news/eutr-news-march-2021-may-2021/>.

90 Article 2(1) of the EPI Act.

91 Article 15 of the EPI Act.

ments. The law, however, limits the types of crimes and offences that are the subject of this provision, excluding the laws that concern or could concern illegal timber trade (infringements of the EUTR included). Thus, despite the EPI being generally empowered to conduct these activities, it is not possible for the EPI to undertake them in the course of investigating suspected cases of illegal timber being placed on the EU market.

F. FAILURE TO DETECT CASES WHERE ILLEGAL TIMBER HAS BEEN PLACED ON THE MARKET

The EPI has never detected any cases of illegal timber being placed on the market, even though it reported having checked operators importing timber from Myanmar, which has been unequivocally considered by the EU as timber that cannot be proven to have been legally harvested.

Since 2013, the EPI has not detected any cases of placing illegal timber on the market. Despite having reported more than 45 incidents of operators lacking or not applying due diligence systems, such cases have not led to further enforcement actions to ensure that unverified – thus potentially illegal – timber would not enter the EU market.

Based on data on the EUTR enforcement, as well as detailed records of the checks conducted by the EPI, it appears that the EPI conducts checks as a **simple box-ticking exercise** – focusing merely on whether a due diligence system has been applied by the operator and leaving the quality and effectiveness of such systems outside the scope of investigation. It seems that as long as operators have any due diligence system in place, the EPI does not question whether timber imported by the operator can be placed on the EU market.

This conclusion is borne out by the **continuing imports into Poland of timber from Myanmar**, which Member States have jointly agreed cannot be considered legal⁹². Despite this agreement adopted by the EU, followed by the EU sanctions against the Myanmar military coup⁹³ (which took place on 1 February 2021), imports of Myanmar tropical sawn wood have dramatically increased, marking Poland as a new entry point for a substantial part (5%) of all such imports into the EU⁹⁴.

According to UN Comtrade data⁹⁵, Polish imports of Myanmar wood that fall under the scope of the EUTR have rapidly grown in 2021. From a total of €1 million in 2017, €2 million in 2018, €1.7 million in 2019 and €2.9 in 2020, the value of timber imports from Myanmar into Poland in 2021 reached almost €7 million – more than six times the value of 2017 and **more than double** the value prior to the coup. The increase in volumes is slightly different, but the overall pattern is similar. From a total of 173,799 kilograms in 2017, 317,739 kilograms in 2018, 333,586 kilograms in 2019 and 468,430 kilograms in 2020, the volume of imports from Myanmar into Poland in 2021 reached almost 500,000 kilograms – almost **three times** the volume of 2017 and a 6% increase on 2020 volumes prior to the coup⁹⁶.

According to information disclosed by the EPI, the number of operators importing timber from Myanmar into Poland has not exceed **three entities** since the EUTR entered into force. In 2015 and 2016, there was one operator placing Myanmar wood on the EU market through Pol-

92 Annex to the summary record of the 2nd Commission Expert Group/MultiStakeholder Platform on Protecting and Restoring the World's Forests, including the EU Timber Regulation and the FLEGT Regulation in its composition limited to Member States (EG). Meeting of 9 December 2020 (2020), Conclusions of the Competent Authorities for the implementation of the European Timber Regulation (EUTR) on the application of Articles 4(2) and 6 of the EUTR to timber imports from Myanmar, available at https://ec.europa.eu/environment/forests/pdf/201209%20EUTR%20EG%20Country%20Conclusions%20Myanmar_final.pdf.

93 On 1 February 2021, the Myanmar military led a coup against the legitimately re-elected government and seized the power in the country. In response to the coup, the EU has introduced a set of sanctions to curb the funding of the junta through revenues from i.a. forestry sector. See more at <https://www.consilium.europa.eu/en/press/press-releases/2021/06/21/myanmar-burma-third-round-of-eu-sanctions-over-the-military-coup-and-subsequent-repression/>.

94 M. Norman, J. Saunders, Following the teak: Companies are using convoluted routes to bring EU Timber Regulation non-compliant timber into the European Union. A September 2020 Update (2020), available at <https://www.forest-trends.org/blog/following-the-teak-convoluted-routes-to-bring-eutr-non-compliant-timber-into-eu-september-2020-update/>.

95 Free access to detailed global trade data is available at <https://comtrade.un.org/>.

96 Values are rounded up to millions or thousands.



ish entry points. In 2017, 2018 and 2019 there were three such entities, and in 2020 and 2021 two entities. If the numbers are correct, these entities alone were responsible for Polish imports of Myanmar teak worth millions of euros. Yet, in the past decade of implementation of the EUTR, **only three checks were conducted by the EPI on these operators** and concluded with no findings of infringements in their operations. Even in more recent years, despite the EU sanctions placed on Myanmar teak and the EU-wide stance that stated that Myanmar teak could not satisfy the requirements of the EUTR, the fact that the volume and value of Myanmar teak imported into Poland has increased shows that the EPI failed to conduct the appropriate monitoring and enforcement activities to ensure that these operators complied with their due diligence obligations under the EUTR.

If effective inspections had been undertaken, it is likely that, in cases of non-compliance, operators would be running a high risk of being detected and of sanctions being imposed on them, which would at least deprive them of the economic benefit of their breaches of the EUTR⁹⁷. This is not happening in Poland (where the infamous case of illegal logging in the Białowieża Forest, described in Annex II to this report, is the starkest example).

3.2.2 SUBSTANTIATED CONCERNS

Polish law does not provide a legal basis that would regulate the submission and handling of substantiated concerns. It also fails to provide a legal path for third parties who have submit-

97 See the opinion of Advocate General Geelhoed of 29 April 2004 in *Commission v France* (C-304/02, ECLI:EU:C:2004:274), par. 39.

ted substantiated concerns to challenge decisions made by the EPI, which is able to arbitrarily decide whether a concern has been substantiated or not.

A recent example from the Netherlands⁹⁸ demonstrates that substantiated concerns can be a highly effective tool in detecting illegal timber entering the EU and a crucial mechanism supporting EUTR enforcement. Member States should, therefore, ensure, that the procedure of submitting and handling substantiated concerns is part of a legal and regulatory framework that is clear and accessible to third parties.

The information that ClientEarth has received via its requests for environmental information indicate that the EPI does not operate within a clear framework when it comes to handling substantiated concerns. Some regional inspectorates reported applying procedures enshrined in chapter VIII of the Code of Administrative Proceedings⁹⁹ ('CAP') on handling of complaints and requests. Others simply referred to internal procedures of the EPI that are not subject to disclosure. Similarly, there were some inspectorates who claimed having no particular rules on substantiated concerns, and one who referred to the EPI Guidelines (which does not, however, include any guidance concerning substantiated concerns). **None of these procedures guarantees that the authority's assessment of a substantiated concern submitted by a third party can be challenged by that third party.** It is at the competent authority's discretion to decide whether or not to take action against an operator. Therefore, there is no clear legal basis in the Polish legal order that would oblige the relevant state authorities to investigate substantiated concerns, nor any provisions which would provide legal standing to third parties to challenge the handling their substantiated concern.

The above-mentioned provisions of the EPI Act regarding unscheduled checks (as described in Section 3.2.1.D) are highly ineffective and unclear in terms of handling substantiated concerns by public authorities. Likewise, the provisions of chapter VIII of the CAP do not provide an effective and sufficient legal basis for substantiated concerns.

Provisions of the CAP included in chapter VIII concern complaints and requests submitted to public authorities by third parties. This law formalises the constitutional right of petition that provides civil society with the ability to address public authorities with issues concerning public or individual interests. Although complaints (aimed at reporting wrongdoing of public authorities, e.g. excessive length of proceedings) and requests (aimed at undertaking public action, e.g. opening new school) can address any topic, the legislature has shed light on the purpose of this mechanism by providing several examples, such as good functioning of administration, protection of property rights, strengthening rule of law, meeting the needs and protecting the interests of members of the public (Article 227 and 241 of the CAP). The proceedings are 'single-instance', which means that there are no avenues for challenging the decision on the application. On the other hand, internal procedures do not guarantee the objectivity of the process of handling substantiated concerns and, similarly to complaints and requests regulated by the CAP, do not provide for appeals.

While the CAP requires public authorities to collect and investigate all evidential material in certain administrative proceedings, Polish case law has established that checks on entrepreneurs (including timber operators) are not considered to be administrative proceedings¹⁰⁰. **Consequently, when handling substantiated concerns, the EPI is not required to follow the legal require-**

98 On 4 August 2021, the Council of State in the Netherlands confirmed that Royal Boogaerdt Timber failed to comply with the due diligence requirements of the EUTR when it imported Myanmar teak. The court upheld the penalty of €20,000 per cubic metre of Myanmar teak placed on the EU market through Dutch entry points, imposed earlier in June by the Dutch Ministry of Agriculture, Nature and Food Quality (Nederlandse Voedsel en Warenautoriteit – NVWA). According to Environmental Investigation Agency (EIA), in the hearing, the court ruled against another timber import company, whose name has not been disclosed due to confidential reasons. The case has been initiated by a substantiated concern submitted to the Dutch competent authority by Environmental Investigative Agency. See more at <https://eia-international.org/news/eia-victory-in-netherlands-highest-court-confirms-eu-rules-for-myanmar-timber-imports/>.

99 Consolidated text: Journal of Laws 2021, item 735.

100 Precisely, such a conclusion is stemming from the case law, according to which a post-inspection statement addressed to the inspected entity cannot be considered as an administrative act. Consequently, such an inspection cannot be considered as an administrative proceeding, because it does not end with an administrative act (cf. ruling of the Supreme Administrative Court of 21 June 2012, ref. no. II OSK 723/12).

ments of thorough assessment set out in the CAP, which – if breached – could be further challenged in court.

In addition, regional inspectorates of the EPI reported that **only three** substantiated concerns were received between 2013 (when the EUTR came into force) and early 2021 – a concerning low number. This may be a result of the uneven application of this mechanism in Poland and thus different reporting methodologies amongst the authorities (e.g. two substantiated concerns were submitted to the competent authorities by ClientEarth alone which have not been included in the EPI's reported statistics). However, the combination of a very low number of reported substantiated concerns since the EUTR came into force, along with the uncertainty about the procedure reported by different competent authorities, further confirms the confusion in Poland's implementation of Article 10 of the EUTR. A closer – real-life – description of the way the EPI handles substantiated concerns is included in Annex II, which presents the two cases of ClientEarth's submission of substantiated concerns regarding illegal logging in the Białowieża Forest and the Carpathians.

3.2.3 PENALTY SCHEME

INACCURATE PENALTIES

The penalties adopted for EUTR infringements are ineffective and rarely imposed. The EPI can only impose administrative sanctions within the timeframe of three years from the date of the infringement and is obliged to refrain from imposing a penalty if it has concluded that the infringement could not have been prevented. No immediate interim measures against non-compliant operators are available in the EPI's legal arsenal.

Article 19 of the EUTR states that Member States must lay down penalties for infringements of the EUTR and these penalties are set and enforced at national level according to the specificities of each Member State's legal system. While the choice of penalties remains within their discretion, the principle of sincere cooperation enshrined in the Article 4(3) of the Treaty on European Union obliges Member States to ensure that EU law is applied and enforced effectively¹⁰¹. Member States can apply and enforce EU law according to their national procedural rules, but the requirements and standards of EU law applicable to penalties must nevertheless be complied with and upheld. This means that both the legal design of national penalty schemes and enforcement policies and practices must meet the required legal standard of being 'effective, proportionate and dissuasive' as set out in Article 19(2) of the EUTR¹⁰².

The case law of the CJEU has continuously indicated that an effective penalty for an EU law breach must be ensured by penalising infringements of EU law under conditions, both procedural and substantive, which are **comparable in nature and importance** to those applicable to infringements of national law¹⁰³. In the case of the EUTR, the Commission has expressly acknowledged the potential of national legislation to address illegal logging by means of laws concerning theft and trafficking of stolen goods, money laundering or smuggling¹⁰⁴. Therefore, in order to assess the accuracy of the penalty scheme for EUTR infringements adopted by Poland, it is necessary to briefly describe relevant Polish law that could serve as a model for designing such penalties, precisely – that could be comparable in nature and importance.

101 See e.g. judgments of 8 September 2005, Yonemoto (C-40/04, EU:C:2005:519), par. 59, and of 8 June 1994, Commission v United Kingdom (C-382/92, EU:C:1994:233), par. 55.

102 The concept of an 'effective, proportionate and dissuasive penalty' has been elaborately defined in the case law of the CJEU. See more e.g. ClientEarth (2018), National EUTR penalties: are they sufficiently effective, proportionate and dissuasive?, available at <https://www.clientearth.org/latest/documents/national-eutr-penalties-are-they-sufficiently-effective-proportionate-and-dissuasive/>.

103 Judgement of 27 March 14, LCL Le Crédit Lyonnais SA v Fesih Kalhan (C-565/12, ECLI:EU:C:2014:190), par. 44.

104 European Commission (2007), Commission staff working document accompanying document to the proposal for a regulation of the European Parliament and of the Council determining the obligations of operators who make timber and timber products available on the Market – Impact Assessment, available at https://ec.europa.eu/environment/forests/pdf/impact_assessment.pdf, p. 15-16.

Poland introduced provisions potentially against commercialisation of illegal timber in the Penal Code of 6 June 1997¹⁰⁵, aiming to tackle trafficking in illegally acquired property (Articles 291 and 292 of the Penal Code) and money laundering (Article 299 of the Penal Code). Customs law enshrines similar provisions (Article 91 of the Penal and Fiscal Code¹⁰⁶). On the basis of these provisions, acquiring and placing on the market timber or timber products obtained as a result of a criminal offence or providing assistance to such activities (either consciously or through acting without due diligence) is punishable under Polish criminal law, with penalties of up to 10 years of imprisonment.

Another group of provisions that could serve as a comparative indicator for an appropriate penalty scheme within the EUTR are those that apply to domestic illegal logging (Articles 290 of the Penal Code and 120 of the Code of the Petty Offences¹⁰⁷) and nature protection violations (Articles 181 and 187 of the Penal Code). These infringements, subject to laws against theft and damages to the environment, carry penalties of up to 5 years of imprisonment.

While therefore a set of criminal law penalties is set out in Polish law against illegally acquired property and illegal logging of trees in state forests, **the applicable penalties for breaches of the EUTR are limited to administrative sanctions of relatively low significance**, ranging from PLN5,000 to PLN500,000 (approx. €1,030 – €103,000). An obvious discrepancy occurs in comparing these different enforcement approaches, which consequently begs the conclusion that the penalties established for EUTR violations are not comparable in nature and importance to penalties applicable to infringements of national law.

OBLIGATION TO WAIVE A PENALTY

In addition to inaccurate levels of penalties for EUTR breaches, Polish law expressly allows for waiver of a penalty under a vague condition of inevitability. This grants the EPI a wide discretion whether to impose a penalty or not, even in cases where the infringement is of a serious nature.

According to Article 66f(3) of the Act on Forests, a penalty cannot be imposed if the circumstances of the case and the evidence show that the infringement is a result of events or circumstances which could not have been prevented. The condition of inevitability enshrined in this article seems to go further than the rule of *force majeure* usually applicable to administrative proceedings¹⁰⁸. This vague wording of Article 66f(3) of the Act on Forests (*events or circumstances which could not have been prevented*) poses a significant threat to the effectiveness of the penalties for EUTR infringements as the EPI has the mandate to decide whether certain circumstances can justify non-compliance with the EUTR¹⁰⁹.

SHORTER PRESCRIPTIVE PERIOD FOR IMPOSING A PENALTY

The penalties for EUTR infringements can be imposed only within a timeframe of three years from the date of the infringement. This significantly limits the capacity of the EPI to prosecute non-compliant operators.

105 Consolidated text: Journal of Laws 2020, item 1444.

106 Consolidated text: Journal of Laws 2021, item 408.

107 Consolidated text: Journal of Laws 2021, item 281.

108 The concept of force majeure is defined as an unavoidable and uncontrollable event of an accidental or natural (spontaneous) nature; the unavoidability of an event means an exceptionally low probability of its occurrence (cf. the Supreme Administrative Court, the ruling of 4 June 2013, ref. no. II GSK 1887/11). The definition limits the impacts of force majeure to events that could not have been both foreseen and counteracted, such as natural disasters, sovereign acts of government and social upheaval (war, civil unrest) (cf. ruling of the Regional Administrative Court in Lublin of 3 March 2016, ref. no. III SA/Lu 769/15).

109 Although exceptions to general legal principles must be interpreted strictly, this wording could be read to extend well beyond the well-established definition of force majeure. Theoretically speaking, factors like complexity of supply chains, limited information on suppliers, or lack of reliable documentation proving legality of the timber, could serve as circumstances for an operator to claim that the risk of placing illegal timber on the market could not have been prevented. The law does not enshrine an exhaustive list of events that would justify refraining from applying a penalty. Such a list could ensure this possibility does not undermine the obligation of having well-established due diligence systems in place.

The penalty scheme for the EUTR in Poland specifies a prescriptive period (or limitation period) within which administrative proceedings must be initiated that is shorter in duration than the general national rule. While the general limitation period for launching administrative proceedings is five years after the infringement has occurred¹¹⁰, the provisions implementing the EUTR specify a **period of three years**¹¹¹. Given the scale and seriousness of the problem of illegal timber and insufficient capacity of the EPI to conduct checks, we consider that the reduction in the Polish penalty scheme of the prescriptive period from five years to three years is unjustified and provides further evidence of Poland's failure to apply an appropriate penalty scheme under Article 19(1) of the EUTR. Furthermore, Poland is one of the few Member States which **does not empower its competent authority to apply immediate interim measures to address breaches of the Regulation**, such as the temporary seizure of timber¹¹².

PENALTIES IMPOSED DO NOT COMPLY WITH THE MEMBER STATES' OBLIGATIONS

The penalties actually imposed by the EPI do not fulfil the requirements of being 'effective, proportionate and dissuasive' as laid down in Article 19(1) and (2) of the EUTR and often do not meet the minimum levels for penalties set out in Polish law.

The applicable penalties for EUTR infringements in Poland are relatively low and, when considered together with additional provisions – such as those relating to the potential waiver and the shortened prescriptive period described above – do not provide a suitable deterrent for operators seeking to avoid their EUTR obligations. Additionally, the imposition of penalties, which are solely based on administrative law, lies at the discretion of the EPI, including in both deciding whether an infringement has actually been committed and also in deciding on the justifiability and amount of the penalty to be applied. This has resulted in highly concerning practice applied by the EPI in imposing penalties. **Out of a total of 37 penalties imposed for infringements of the EUTR between 2013 and early 2021, the monetary amount of the fine imposed by the EPI in at least 24 of those cases was lower than the minimum penalty levels required by Polish law**¹¹³. Additionally, all of the penalties imposed by the EPI concerned a lack or misapplication of due diligence systems, but none involved an identified case of placing illegal timber on the market.

3.2.4 PERSONNEL AND FINANCIAL CAPACITY

The EPI struggles with the issues of underfinancing and understaffing. The tasks stemming from the EUTR were carried out by 8.1 full-time equivalent staff of the EPI, with an annual budget of less than PLN29,000 (€6,000) in 2020.

For years, critical observations have been made in Poland pointing out systemic weaknesses of the EPI in general, concerning i.a. ineffective structure and financing¹¹⁴. Indeed, the number of staff employed by the EPI has remained almost the same since Poland joined the EU even though its tasks have more than doubled due to obligations stemming from the application of EU environmental law (from an estimated number of tasks of 120 in 2003 to 300 in 2018)¹¹⁵. At the same time, its funding from the State Treasury has decreased¹¹⁶. In 2013, the EPI employed approximately 2500 people (720 inspectors, 300 employees dedicated to environment monitoring, 840 laboratory staff, and 610 management and administration staff)¹¹⁷. High fluctuation of staff over

110 Article 189g of the CAP.

111 Article 66f(4) of the Act on Forests.

112 European Commission (2021), Commission Staff Working Document - Fitness Check..., op. cit., p. 14.

113 These calculations are based on the information disclosed by the regional environmental protection inspectorates upon ClientEarth's request for environmental information submitted in February 2021.

114 M. Rudnicki (2011), *Koncepcja reformy służb ochrony środowiska* [in:] M. Rudnicki (ed.), *Organizacja ochrony środowiska*, s. 138.

115 Reasoning of the Amendment to the Act on EPI of 2018, p. 3-4, available at <https://www.sejm.gov.pl/Sejm8.nsf/druk.xsp?nr=2662>.

116 Interview with the former General Inspector of EPI Marek Haliniak, available at <https://www.teraz-srodowisko.pl/aktualnosci/rola-gios-musi-sie-zmienic-3252.html>.

117 IEEP, Bio Intelligence Service and Ecologic Institute (2013), *Information collection and impact assessment...*, op. cit., p. 233.

the intervening years resulted in an increase in salary levels and the overall number of full-time employees in 2018 (including 600 new inspectors)¹¹⁸, but the overall personnel capacity remains very low. We need look no further than the EUTR for an example of this issue: **as of 2021, the tasks stemming from this Regulation were carried out by 8.1 full-time equivalent staff**¹¹⁹. Considering that there are 16 regional inspectorates operating within the EPI, this means that there is just over one EPI staff member for every two regional inspectorates.

Similarly, the annual budget dedicated to EUTR enforcement was approx. **PLN27,972 (€5,943.1) in 2020**¹²⁰. In the previous years, the budget amounted approx. PLN47,919 (€9,884.48) in 2019¹²¹, and a total of PLN75,581 (€15,587) in the period of 2017-2019¹²². The EPI itself has acknowledged that the financing of the EUTR application is not adequate¹²³.

Low capacity manifests in many aspects of the enforcement of the EUTR. Low number of checks and ineffective enforcement measures are the main indicators, but there are also issues with supranational cooperation. According to Article 12 of the EUTR, competent authorities shall cooperate with each other, with the administrative authorities of third countries and with the Commission in order to ensure compliance with this Regulation. The rationale behind this obligation is that cooperation between competent authorities is key in tackling international illegal timber flows: joint efforts of national authorities would have much more potential to decode sophisticated business structures operating within different Member States and third countries. The performance of the EPI in this regard is, however, limited to participation in the FLEGT/EUTR Expert Group meetings in Brussels¹²⁴. But apparently, even this activity does not result in any substantial improvement in EUTR enforcement on-the-ground: the continuing imports of Myanmar teak (which have been expressly prohibited in the EU by the Member State Expert Group as explained above) into Poland are just the most striking example of poor supranational cooperation.

3.3 CONCLUSIONS REGARDING THE IMPLEMENTATION AND ENFORCEMENT OF THE EUTR IN POLAND

Poland has not established a legal framework that ensures an appropriate level of institutional control over its timber market. Although the EUTR has been formally implemented into Poland's main legislation that regulates forest governance, the Act on Forests, the relevant provisions do not serve the purpose of effective EUTR in two ways: they are too weak and are not properly enforced. This issue is further compounded by a wider problem of the EPI being systematically ineffective: it operates within an unclear legal framework and struggles with problems of underfinancing and understaffing.

THE TIMBER MARKET IN POLAND AND THE POSITION OF STATE FORESTS

State Forests is a state-owned logging and timber organisation that manages 76.9% of Polish forests and provides for more than 90% of timber demand in Poland. It holds a dominant position in the Polish timber market while also being tasked with the responsibility of protecting public forests. The stark example of the massive logging of the Białowieża – Poland's most precious old forest, as well as other examples of harvesting within protected areas in Poland (such as in the Carpathians region) show that

118 See at <https://bip.brpo.gov.pl/pl/content/rpo-policja-srodowiskowa-bez-pieniedzy-nie-pomoze-ludziom>.

119 Information obtained from the General Inspectorate of EPI.

120 The national report on the EUTR implementation and enforcement for 2020 submitted by Poland to the Commission, section II.II. point 7.

121 The national report on the EUTR implementation and enforcement for 2019 submitted by Poland to the Commission, section II.II. point 7.

122 The national report on the EUTR implementation and enforcement for the period of 2017-2019 submitted by Poland to the Commission, p. 73.

123 Ibidem.

124 The national report on the EUTR implementation and enforcement for 2020 submitted by Poland to the Commission, section I.II. point 8.

the balance between the conservation of natural resources and the economic use of them is difficult for State Forests to achieve in practice. Even though this clash between forestry and wildlife protection has been – for years now – widely criticized in the public debate, **the current legal order in Poland does not provide effective means of institutional control over Polish forests and State Forests itself.** Considering the dominant position of State Forests in the Polish timber market, the failure of authorities to provide appropriate supervision of the organisation's activities is further proof of the lack of proper implementation and enforcement of the EUTR in Poland.

COMPLIANCE CHECKS

Given the existence of millions of timber companies operating in the EU, the complexity of timber supply chains accessing the EU and the limited resources available to the public administrations responsible for enforcement, competent authorities should operate within a clear and effective legal and regulatory framework that enhances their chances to tackle illegal timber flows. However this is not the situation in Poland.

- **The current legal framework is unclear on the exact scope of activity the EPI is allowed to carry out:** it does not unequivocally determine if the EPI is able to carry out unscheduled checks on timber operators. In light of this uncertainty, the EPI either cannot or does not inspect timber companies without giving prior notification and, therefore, is not able to prevent non-compliant operators from potentially hiding or destroying evidence of their wrongdoing. The limited arsenal of measures at the disposal of the EPI partially stems from the fact that **Polish law does not expressly consider the placing of illegal timber on the market as a crime** under its criminal law.
- **In addition to this lack of legal clarity, the operation of the EPI falls short of being effectively planned.** The EPI Guidelines that were issued to the 16 regional inspectorates in November 2015 are outdated and do not consider the actual numbers of operators placing timber on the EU market through Poland. The EPI Guidelines require that only one check of a domestic operator is conducted per regional inspectorate per year, which means that if the regional inspectorates follow this guideline, only a maximum of 16 (out of 430) of State Forests 'operators' would be checked for EUTR compliance per year.
- **The actual performance of the EPI in the field of compliance checks is even worse.** The total number of checks performed in the period since the EUTR came into force in 2013 to early 2021 reaches 572 while the estimated number of operators placing timber on the market is above 8000. The situation worsens when it comes to State Forests: **in early 2021, more than 80% of forest districts within the structure of State Forests had never been checked against the requirements of the EUTR.**
- The quality of the checks is also at question. The starkest examples are the compliance checks performed in the **Białowieża Forest and the Polish Carpathians**, which – despite clear findings against the legality of the harvesting conducted in those regions – found no irregularities (the cases are further described in Annex II to this report). Additionally, some of the regional inspectorates of the EPI seem satisfied to blindly rely on third-party verification schemes as proof of compliance instead of conducting their own investigations as required by the EUTR.
- **The EPI has never detected any cases of placing illegal timber on the market** despite identifying more than 45 incidents of operators lacking or not applying due diligence systems and **having checked operators known to be importing timber from Myanmar**, which has been unequivocally considered by the EU as timber that cannot be shown to meet the requirements of the EUTR.

SUBSTANTIATED CONCERNS

Substantiated concerns are an effective tool to help the authorities in identifying illegal timber, while involving the public in law enforcement. In Poland, the legal and regulatory framework concerning the submission and handling of substantiated concerns is unclear and does not provide the public with any means to challenge the potential inaction of the competent authority.

- Polish law **does not provide a legal basis** that would oblige the competent authority to handle substantiated concerns and **does not enshrine any provisions** which would clearly provide legal standing for third parties to submit such concerns.
- The EPI's assessment of substantiated concerns **cannot be challenged** by any third party.
- The total number of **only three substantiated concerns** received by the EPI between 2013 and early 2021 confirms the confusion in Poland's implementation of the EUTR in regards to substantiated concerns.

PENALTY SCHEME

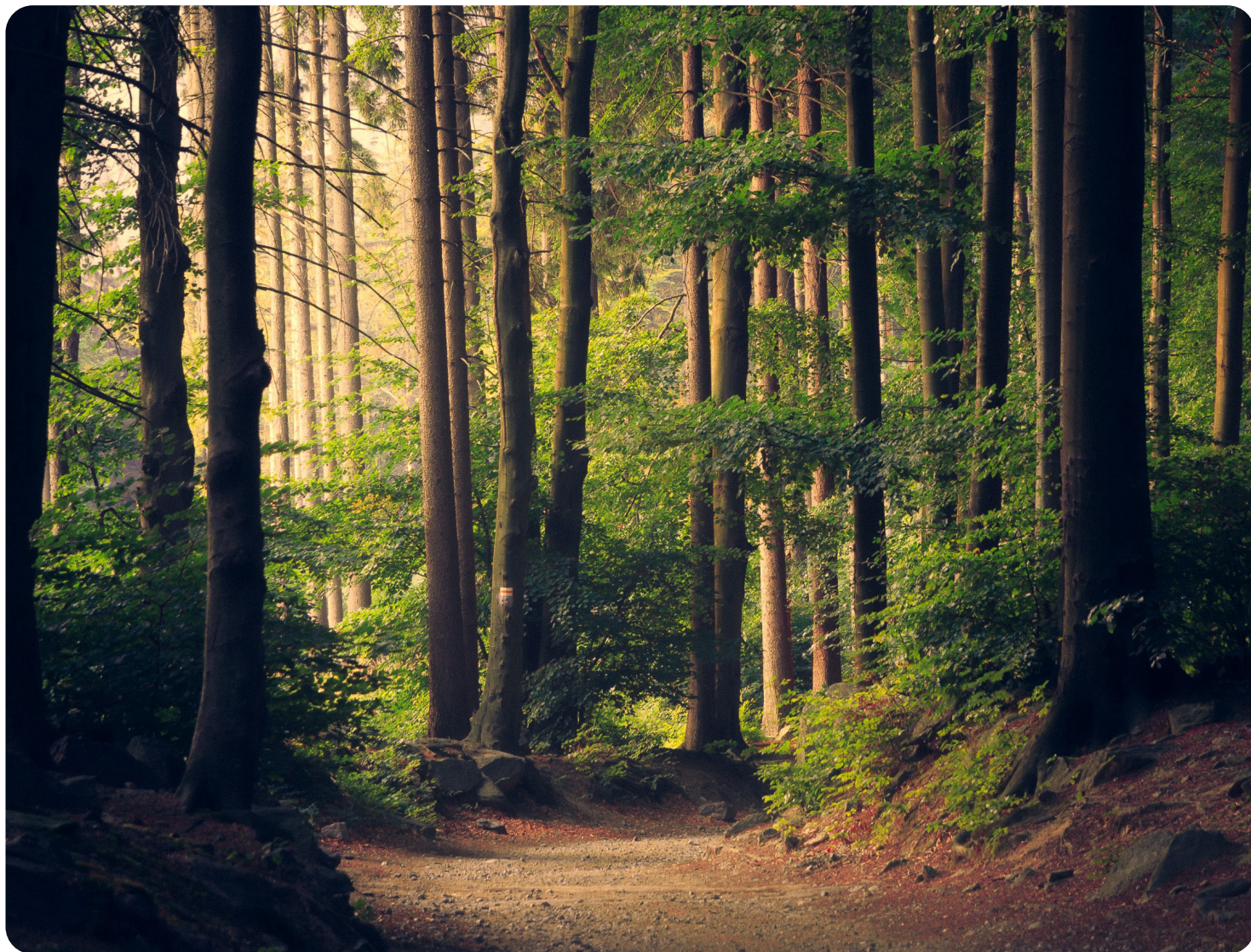
The overall efficiency of the punitive system within the EUTR depends on both the law on paper, which determine the types and severity of penalties, and the actual enforcement measures executed by the relevant authorities which guarantee that the actual objective of preventing illegal timber from being placed on the market is achieved. The penalty scheme for the EUTR breaches in Poland is ineffective in both ways and cannot meet the required legal standard of being 'effective, proportionate and dissuasive' as set out in the Article 19(2) of the EUTR.

- **The penalties for EUTR infringements set out in the Act on Forests are low** (do not exceed PLN500,000, approx. €103,000) **and are rarely imposed**. Furthermore, the penalties actually imposed in practice are often lower than the minimum level of fines required by the law (between 2013 and February 2021, it was the case of at least 24 penalties out of 37 penalties imposed in that period).
- The punitive arsenal of the EPI is **limited to administrative sanctions**, which **cannot be imposed after three years** from the date of the infringement. Additionally, the EPI is **obliged to refrain from imposing the penalty** if it has concluded that the infringement could not have been prevented.
- Polish law **does not empower the EPI to take immediate interim measures**, such as the temporary seizure of timber, which means that financial administrative sanctions are the only tool of the EPI against illegal timber.
- This penalty scheme **does not correspond to other penalty schemes** in Polish law that are applicable to infringements comparable in nature and importance, such as theft and trafficking of stolen goods, money laundering or smuggling.

PERSONNEL AND FINANCIAL CAPACITY

Checks including cross-institutional and supranational cooperation, on-site visits and scientific methods could lead to results with real impact. Simple box-ticking exercises purely consisting of a documentation review have little chances to effectively detect illegal timber.

- The tasks stemming from the EUTR were carried out by **8.1 full-time equivalent staff of the EPI**, with an annual budget of **less than PLN29,000 (€6,000)** in 2020.
- Cooperation of the EPI with other national and supranational authorities in the field of EUTR enforcement is **limited** to participation in the FLEGT/EUTR Expert Group meetings in Brussels.



4 RECOMMENDATIONS

4.1 POLAND

Environmental inspections performed by the EPI are generally reported to be systematically weak: they do not fulfil their function of prevention (the risk of a check being conducted on the activities of an operator is low), deterrence (the penalties are too low and are therefore not dissuasive) or protection (the effects of the checks do not contribute to higher environmental protection)¹²⁵. Sadly, the analysis conducted in regards to the EUTR confirms this conclusion.

The EPI itself does not bear all the responsibility for this situation. The inspectors of the EPI have to work under challenging circumstances where very limited resources are dedicated to the enforcement of the EUTR. A systemic change is required to improve the operation of the EPI and its ability to effectively act against illegal timber in Poland. Hence, we have prepared a set of recommendations that should be implemented by Polish decision-makers to address the crucial shortcomings identified in this report.

¹²⁵ In regards to water protection the report of the Supreme Audit Office (Najwyższa Izba Kontroli) of 30 October 2017, available at <https://www.nik.gov.pl/kontrole/P/17/050/>.

1. CRIMINALISATION OF PLACING AND TRADING OF ILLEGAL TIMBER ON THE MARKET.

The placing on the market of illegal timber should be expressly considered a crime in Polish law. Criminalisation of this activity could partly address the deficit in personnel and budgetary resources of the EPI: it would **engage other enforcing authorities** (police in the main) and **give the problem proper institutional attention**. Infringers of the EUTR would potentially face criminal prosecution with all the consequences it entails. Finally, criminalisation of the illegal timber trade opens the door to a variety of **legal and operational measures** at the disposal of the EPI. If criminalised, the EPI would not only be obliged to report cases concerning illegal timber to the police¹²⁶, but would also be assigned the role of prosecutor, i.e. allowed to launch a criminal investigation and further press charges against the infringer in court¹²⁷.

2. STRUCTURAL REINFORCEMENT OF THE EPI.

Currently, the burden of detecting illegal timber flows in Poland is put on 8.1 full-time equivalent staff with PLN27,972 (€5,943.1) of funds dedicated to this activity per year¹²⁸. With only a handful of employees of the EPI and an enormous number of environmental acts to monitor and enforce (the EUTR being only one of them), effective protection of the environment comes as a real challenge. The EPI should be granted a stable financial stream from the State Treasury that would allow it to significantly **increase the number of qualified environmental inspectors**, and **secure the quality of their operation**. Funds could also be dedicated to **introducing scientific methods** to the regular course of checks by the EPI, including purchase of advanced equipment and training.

3. STRENGTHENING THE OPERATIONAL GUIDANCE OF THE EPI.

The EPI Guidelines must be updated (or even rewritten), to include a **minimum number of checks** to be conducted each year on timber operators, adequately linked to the overall number of operators and the volume of timber they place on the market and equally applied to both domestic and importing operators. The General Environmental Protection Inspector, in cooperation with other relevant authorities (e.g. customs), should prepare an **operational guidance on checks** and interactively distribute it amongst regional inspectorates. Such guidance should include i.a. the requirements that each check on a timber operator or trader must meet, and subsequent enforcement measures that must be undertaken in certain cases (e.g. the suspension of an operator's authorisation to place timber on the market in case of the absence of an appropriate due diligence system). Additionally, checks should be carried out without the need to give prior notice to the operator to enhance their effectiveness.

4. AMENDMENT OF THE ADMINISTRATIVE PENALTY SCHEME.

Out of 37 penalties imposed for the infringements of the EUTR in Poland between 2013 and early 2021, at least 24 were lower than the minimum level of fines required by the law¹²⁹. This concerning pattern has developed despite the fact that the minimum level of the administrative penalties for EUTR infringements set out in Articles 66b-66i of the Act on Forests are very low in any event (they range between PLN5,000-500,000, approx. €1,030-103,000). The legislature should adopt higher minimum levels of penalties, and introduce additional interim measures for breaching the

126 Article 15 of the EPI Act.

127 Article 10(b) of the EPI Act.

128 The national report on the EUTR implementation and enforcement for 2020 submitted by Poland to the Commission, section II.II. point 7.

129 These calculations are based on the information disclosed by the regional environmental protection inspectorates upon ClientEarth's request for environmental information submitted in February 2021.

EUTR, such as the obligatory seizure of timber at risk. Additionally, the Act on Forests **should not include the possibility of a waiver of a penalty** (Article 66f(3) of the Act on Forests, according to which a penalty cannot be imposed under a vague condition of inevitability), and should **extend the prescriptive period** (or limitation period) within which administrative proceedings for infringement of the EUTR must be initiated to the normal length in Poland of five years.

5. ENSURING ACCESS TO JUSTICE TO THIRD PARTIES WHO SUBMIT SUBSTANTIATED CONCERNS.

Substantiated concerns have neither a legal definition nor form in Poland. This results in inconsistent procedures for handling them amongst the different entities within the structure of the EPI. As of now, third parties cannot effectively challenge the decision made by the EPI regarding a substantiated concern. It is, therefore, up to the authority whether to investigate a specific shipment, operator or trader, even if there is strong evidence of the occurrence of illegal logging. The legislature must introduce provisions that would **enhance the submission and handling of substantiated concerns** by members of the public, with access to court (or at least administrative review) guaranteed. At the very least, the General Environmental Protection Inspectorate should adopt **guidance on substantiated concerns** with harmonised rules to be applied across the country.

6. THE COOPERATION BETWEEN STATE AUTHORITIES AND SUPRANATIONAL BODIES.

The lack of sufficient engagement of Polish institutions that have broader mandates and are not primarily focused on environmental issues significantly weakens the overall effectiveness of the EUTR. Instead of each operating in a vacuum, authorities such as **tax, customs, competition and police**, should come to understand the importance of preventing illegal timber from being placed on the market. As the illegal timber trade does not respect boundaries, **cooperation and information exchange at the international level** is equally crucial. The EPI has been reported to cooperate with relevant authorities of the Czech Republic, Germany, Slovakia, Ukraine and Lithuania¹³⁰. This shows that the international communication channels are in place – the only thing is to use them consistently and effectively.

4.2 EU

The current legislative process regarding the Commission's proposal for a regulation on deforestation-free products¹³¹ (the 'Deforestation Proposal') is an immense opportunity to strengthen the legal framework against illegal logging. To ensure that the new law, which will also cover timber, will achieve its objective, it is essential that the EU decision-makers responsible for the final text of the regulation safeguard important provisions proposed by the Commission that learn from the experience of EUTR implementation in practice and address documented weaknesses in the EUTR framework.

1. 'NEGLECTIBLE RISK' DEFINED.

Under the EUTR, 'negligible risk' is a central term of the due diligence process. If the risk assessment conducted by an operator reveals that the risk of illegally harvested timber entering the EU market is non-negligible, the operator needs to take appropriate risk mitigation measures to re-

130 IEEP, Bio Intelligence Service and Ecologic Institute (2013), Information collection and impact assessment..., op. cit., p. 224.

131 European Commission (2021), Proposal for a regulation of the European Parliament and the Council on the making available on the Union market as well as export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010, available at https://ec.europa.eu/environment/publications/proposal-regulation-deforestation-free-products_en.

duce the risk to a negligible level. If an operator fails to do so, they breach Article 4(2) of the EUTR. Thus, 'negligible risk' is also a central term for the competent authorities when conducting a check on an operator's risk assessment and due diligence system. The current absence of a definition of negligible risk severely impacts their work: it is hard to establish a case of non-compliance without clear indicators of what exactly constitutes a failure of due diligence. The Deforestation Proposal introduces a **definition of negligible risk**¹³² that will help the authorities to effectively prosecute operators placing non-compliant products on the EU market. The proposal makes it explicit that operators may only place products on the EU market or export products from the EU market if no or only a negligible risk was found¹³³. The definition of negligible risk is therefore a defining feature for the results-based due diligence that operators will need to conduct under the Deforestation Regulation. It provides operators and competent authorities with a clear benchmark as to what level of risk is acceptable for products to be placed on or exported from the EU market. The definition adopted in the final legislative text should provide this missing clarity – for operators, traders and competent authorities.

2. STRENGTHENED COMPLIANCE CHECKS.

The Deforestation Proposal specifies minimum requirements for compliance checks performed by competent authorities on operators and traders¹³⁴. These would include i.a. the **minimum level of checks** to be performed annually (linked to both the overall number of operators and large traders operating in each Member State and also the quantity of the relevant commodities and products placed on each Member State's market)¹³⁵, criteria to be taken into account when **planning checks** (i.a. risk of illegal harvesting)¹³⁶, strengthened obligations on competent authorities to **initiate investigations** based on evidence of potential non-compliance (such as substantiated concerns submitted by third parties)¹³⁷, the **right to perform checks** without giving prior notice to the operator¹³⁸, and an obligation on competent authorities to require the relevant operator or trader to take **appropriate and proportionate corrective action** to bring the non-compliance to an end and to ensure that the commodity or product at risk does not reach (or is not exported from) the EU market¹³⁹.

These provisions are critical for effective and harmonised implementation and enforcement of the new law across the Member States. Quantified control objectives in particular will ensure consistent implementation of the requirements of the regulation across the EU and provide clear standards for competent authorities' enforcement actions, putting them at an equal footing across the single market and thereby avoiding 'forum shopping' by operators who seek to avoid detection and enforcement (a known weakness of the EUTR framework).

3. STRENGTHENED PENALTY SCHEMES.

The Deforestation Proposal introduces **stronger requirements** which national penalty schemes have to fulfil. The objective criteria provided for the schemes aim at ensuring a penalty is adequate and fulfils its deterrent purpose (by being proportionate to the environmental damage and the value of the illegal commodities or products). The Proposal also provides important **measures** that would hinder the circulation of non-compliant products on the EU market and deprive the respon-

132 The Deforestation Proposal attempts to address this gap by defining 'negligible risk' as 'a full assessment of both the product-specific and the general information on compliance (...) showing no cause for concern' (Article 2(16) of the Deforestation Proposal).

133 Articles 4(2), (5) and 10 (1) of the Deforestation Proposal.

134 Article 14 of the Deforestation Proposal.

135 Article 14(9) of the Deforestation Proposal.

136 Article 14(13) of the Deforestation Proposal.

137 Article 14(11) of the Deforestation Proposal.

138 Article 14(12) of the Deforestation Proposal.

139 Article 22 of the Deforestation Proposal.

sible company of the (future) profits gained from non-compliant products (e.g. obligatory confiscation of relevant commodities or products and revenues and temporary exclusion from public procurement processes)¹⁴⁰.

4. STRENGTHENED SUBSTANTIATED CONCERNS.

The Deforestation Proposal sets out an explicit requirement for Member States to adopt a legal framework that **facilitates the use of substantiated concerns** by both natural and legal persons without restriction¹⁴¹. It also ensures that every applicant is informed about the results of a substantiated concern and the reasons behind the authority's decision to pursue or refuse further proceedings. Moreover, the Proposal provides third parties with a right to apply to a court or another impartial body established by law to review the acts or omissions of a competent authority, including – but not limited to – its handling of a substantiated concern¹⁴².

This 'access to justice' provision is an important improvement compared to the EUTR framework as it provides for the review of the actions and decisions of competent authorities in all Member States, irrespective of their legal status or the capacity to challenge them under national administrative law. As such, the provision provides for stronger public enforcement and aligns with existing EU access to justice principles.

5. ENHANCED ROLE FOR CUSTOMS AUTHORITIES.

The Deforestation Proposal **grants customs authorities a structural role** in regards to commodities and products entering and leaving the EU (including timber)¹⁴³. It requires customs authorities to verify the receipt of a due diligence statement for imports and exports and, if necessary, to suspend the release for free circulation or export of high-risk products¹⁴⁴. The Commission, competent authorities and customs authorities are required to '*cooperate closely and exchange information*'¹⁴⁵, which will be done i.a. through electronic means.

140 Article 23 of the Deforestation Proposal.

141 Article 29 of the Deforestation Proposal.

142 Article 30 of the Deforestation Proposal.

143 Articles 24-26 of the Deforestation Proposal.

144 Article 24(5) and 24(6) of the Deforestation Proposal.

145 Article 25(1) of the Deforestation Proposal.

ANNEX I LEGAL FRAMEWORK IMPLEMENTING THE EUTR IN POLAND

1. THE SCOPE OF IMPLEMENTATION

The EUTR has been implemented in Polish legal system through the amendments of March 2015¹⁴⁶ to the Act on the Environmental Protection Inspectorate of 20 July 1991¹⁴⁷ and to the Act on Forests of 28 September 1991¹⁴⁸. The legislature assigned the central environmental inspection authority in Poland – **the EPI**¹⁴⁹ as the competent authority within the meaning of Article 7 of the EUTR, and adopted a set of penalties for infringements of the Regulation. Both these segments – the role of the EPI as the competent authority for the EUTR enforcement and the penalty scheme – are further explained in the Annex I to this report.

2. ENVIRONMENTAL INSPECTIONS

Environmental inspections are the main tool of the EPI to check whether companies comply with the obligations stemming from environmental legislation, including the EUTR. They can be scheduled – performed according to a set plan which is notified to a inspected entity, or unscheduled – performed on an ad hoc basis, without notifying the company in advance. Unfortunately, the current rules in Poland are not clear whether the EPI can performed unscheduled checks on the basis of the EUTR, which significantly limits the overall effectiveness of the enforcement of the Regulation.

The EPI performs environmental inspections on public authorities, individuals who exploit the environment, and – most often – entrepreneurs¹⁵⁰. Environmental inspections on entrepreneurs are regulated by the EPI Act and the Act on Entrepreneurs. Whereas the EPI Act provides for general rules on the inspections performed by the EPI, the Act on Entrepreneurs sets out the rights and obligations of those subject to inspections (entrepreneurs) and those conducting the inspections (the EPI). Both Acts have fundamental importance in explaining the checks performed by the EPI as part of their responsibility for the application of the EUTR in Poland.

Environmental inspections on entrepreneurs can be either scheduled or unscheduled¹⁵¹. **Scheduled inspections** are carried out in accordance with yearly inspection plans of regional environmental protection inspectorates, developed and exercised after having conducted a risk analysis of potential incompliance with the law¹⁵². Such plans – based on a systematic assessment of threats to human life, health and the environment, in particular threats resulting from economic activities impacting the environment¹⁵³ – set out the annual goals of the EPI in each voivodeship and lists entities selected for inspection in the following quarters¹⁵⁴. Annual work plans are not, in principle, subject to revision during the year.

146 Journal of Laws 2015, item 671.

147 Consolidated text: Journal of Laws 2020, item 995.

148 Consolidated text: Journal of Laws 2020, item 1463.

149 The two statutory obligations of the EPI are exercising control over compliance with the environmental law, and measurement and assessment of the environment. It operates within a two-tier structure of the General Environmental Protection Inspector and 16 regional environmental protection inspectors. While the General Environmental Protection Inspector holds mainly organisational and planning functions, regional environmental protection inspectors are assigned with the majority of the actual inspections.

150 Entrepreneurs are defined as natural persons, legal persons or organisational units without legal personality, which were statutorily granted a legal capacity, performing an economic activity (Article 4(1) of the Act on Entrepreneurs).

151 Article 9(1) of the EPI Act.

152 47(1) of the Act on Entrepreneurs.

153 9 (1a) of the EPI Act.

154 B. Meina, J. Surawska (2017), Działalność kontrolna Inspekcji Ochrony Środowiska w zakresie przestrzegania przepisów dotyczących ochrony środowiska [in] W. Pływaczewski, A. Nowak, M. Porwisz (eds.), Przeciwdziałanie międzynarodowej przestępczości przeciwko środowisku naturalnemu z perspektywy organów ścigania, p. 243.

Unscheduled inspections include inspections carried out at the request of a public authority (if the law entitles it to do so)¹⁵⁵, and interventional inspections¹⁵⁶. Interventional inspections are performed upon complaints and requests for intervention of third parties regarding environmental pollution or the risk of such pollution, serious accidents, in order to prevent the commission of a crime or offense and in regards to issuance, revision or violations of an integrated permit¹⁵⁷. Additionally, the Act on Entrepreneurs allows the EPI to perform an inspection without prior risk analysis and plan when the authority gains a reasonable suspicion of any of three premises having taken place (existence of a threat to human life or health, commission of a crime or offense, or other breach of legal prohibition or obligation)¹⁵⁸.

Scheduled inspections must be notified to the entity subject to the inspection at least 7 days ahead, while unscheduled inspections can be conducted without having informed the entity in advance¹⁵⁹. The law allows, however, a waiver of the notification in several cases (i.a. in regards to inspections performed on the basis of directly effective provisions of EU law, in order to counteract commission of a crime or offense, or in the case of a direct threat to human life, health or environment). The Act on Entrepreneurs further establishes a set of guarantees for the inspected entity (i.a. the obligation to conduct an on-site check only in the presence of the entity's representative¹⁶⁰ and the obligation to conduct only one inspection at the same time¹⁶¹), but some of them are lifted in cases of unscheduled inspections.

According to Article 2(1)(12a) of the EPI Act, the EPI is obliged to fulfil the obligations stemming from the EUTR. This means that, first and foremost, it shall carry out checks to verify if timber operators comply with the requirements set out in Articles 4 and 6 of this regulation. The Polish law does not, however, provide further clarifications in this matter, leaving it to the regulatory competencies of the EPI to decide how such checks should be conducted.

Scheduled inspections performed on the basis of the EUTR are planned according to the guidelines on a risk-based approach issued by the General Environmental Protection Inspectorate¹⁶² (the EPI Guidelines) and quarterly customs data on timber companies. The EPI Guidelines provide a set of general rules on how the checks should be planned and performed, according to which:

- each of the 16 regional environmental protection inspectorates has to perform at least five, seven or nine checks on all operators annually (a specific number is assigned to each voivodeship¹⁶³);
- within the assigned number, each of the 16 regional inspectorates has to perform at least one check on domestic timber operators annually.

Unscheduled inspections performed on the basis of the EUTR are not mentioned in the EPI Guidelines.

3. PENALTY SCHEME

The EPI has a right to impose penalties on companies who are not complying with their obligations stemming from applicable environmental legislation, including the EUTR. The set of

155 The literature points out that the wording of this provision is unclear in regards to inspections carried out at the requests of third parties, they say this would be public authorities. See A. Haładyj (2018), *Uprawnienia kontrolne Inspekcji Ochrony Środowiska*, op. cit., p. 271-272.

156 Article 9(1b) of the EPI Act.

157 Article 9(1c) and 5a(7) of the EPI Act.

158 Article 47(2)(1) of the Act on Entrepreneurs.

159 Article 48(2) of the Act on Entrepreneurs.

160 Article 50 of the Act on Entrepreneurs.

161 Article 54 of the Act on Entrepreneurs.

162 Dated 25 November 2015.

163 According to point 6 of the EPI Guidelines, i) voivodeships Lubuskie, Opolskie, Pomorskie, Świętokrzyskie and Zachodniopomorskie have to perform at least five checks per year; ii) voivodeships Dolnośląskie, Kujawsko-Pomorskie, Lubelskie, Łódzkie, Małopolskie, Podkarpackie, Podlaskie, Śląskie and Warmińsko-Mazurskie have to perform at least seven checks per year; voivodeships Wielkopolskie and Mazowieckie have to perform at least nine checks per year (p. 4 of the EPI Guidelines).

measures at the disposal of the EPI is, however, limited by the law: The current rules on the penalties for the EUTR infringements are weak and grant the EPI a wide margin of discretion in whether to impose a penalty or not.

Penalties can be imposed by the EPI over any infringements of environmental law that have been detected during the inspection. Enforcement measures at the disposal of the EPI include financial penalties (both of administrative and criminal nature), and suspension of authority to conduct certain activities (e.g. to use an industrial installation), as well as notices of remedial action.

Individuals and legal entities that breach the obligations of the EUTR are subject to **administrative financial penalties**, regardless of whether they do so intentionally or negligently. The EPI may fine an individual or legal entity that:

- places illegally harvested timber on the market with a penalty of between PLN20,000 and PLN500,000 (approx. €4,123 – €103,000),
- does not exercise due diligence with a penalty of between PLN5000 and PLN500,000 PLN (approx. €1,030 – €103,000),
- does not maintain or regularly evaluate their due diligence system with a penalty of between PLN5,000 and PLN500,000 PLN (approx. €1,030 – €103,000),
- does not keep records of timber operators and traders for at least five years with a penalty of between PLN5,000 and PLN20,000 (approx. €1,030 – €4,123),
- does not provide relevant information to the EPI at their request with a penalty of between PLN5,000 and PLN20,000 (approx. €1,030 – €4,123 €)¹⁶⁴.

The penalties can be imposed within **three years** from the date of the infringement¹⁶⁵.

The penalty level depends on the type and scale of the infringement, including its impact on the environment, the value of timber or timber products, current conduct of the entity that committed the infringement and the consequences of the infringement¹⁶⁶. However, if the circumstances of the case and the evidence established by the EPI show that **the infringement is a result of events or circumstances which could not have been prevented**, the law states that the EPI **shall** refrain from imposing the penalty and discontinue the proceedings¹⁶⁷.

164 The penalties are set out in Articles 66b-66e of the Act on Forests.

165 Article 66f(4) of the Act of Forests.

166 Article 66f(2) of the Act on Forests.

167 Article 66f(3) of the Act of Forests.

ANNEX II CASE STUDIES

I. ILLEGAL LOGGING IN THE BIAŁOWIEŻA FOREST

I. BACKGROUND

Białowieża, located across Poland and Belarus, is one of the last remaining natural forests in the EU, and a UNESCO World Heritage Site. Giving shelter to some of the Europe's most fragile species and habitats, it is protected by the EU Habitats Directive¹⁶⁸, and is part of the Natura 2000 network.

In 2016, Polish government amended Forest Management Plan (FMP) for Białowieża, which stipulated three-time increase in the current volumes of logging, and put this precious forest under a critical threat. The increase had been officially justified by a bark beetle outbreak – but the majority of scientists could not find evidence of increased harvesting being a reasonable tool to preserve the forest.

ClientEarth, as a part of a coalition of NGOs dedicated to safeguarding Białowieża, decided to act. Our legal intervention resulted in the Commission's legal intervention and subsequent orders of the Court of Justice EU (CJEU) of 27 July 2017 and 20 November 2017¹⁶⁹, which – in legal terms – halted commercial harvesting in the Białowieża Forest.

II. SUBSTANTIATED CONCERN

Despite the prohibition stemming from the CJEU's orders, ClientEarth and partner non-governmental organisations in Poland gathered evidence demonstrating that State Forests continued the logging in the Białowieża Forest and placed the timber harvested therein on EU market. Based on that evidence, in November 2017, ClientEarth submitted a substantiated concern to the competent authority in Białystok (Podlaskie Regional Environmental Protection Inspector in Białystok, Poland – REPI), in which it requested the authority to launch a compliance check on State Forests in order to verify whether the timber illegally harvested in the Białowieża Forest had been indeed placed on the market. The REPI denied the request to launch proceedings in this regard¹⁷⁰.

Surprisingly, a few months later, in August 2018, the REPI informed ClientEarth that the requested check had been ultimately conducted on State Forests and that no infringements of law in regards to logging in Białowieża had been found.

III. BOX-TICKING CHECK – REASONS FOR CONCERN

EXCESSIVE PROCEEDINGS

In November 2020, as a result of a request for environmental information submitted on the basis of Article 11(2) of the EUTR, ClientEarth received the records of the check carried out on the Białowieża Forest in August 2018 ('Records').

The information included therein showed that the check had been included in the annual work plan of the EPI, and could not be considered an unscheduled (interventional) check performed

168 Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ L 206, 22/07/1992, p. 7-50).

169 Accordingly, the orders of 27 July 2017, *Commission v Poland* (C-441/17 R, not published, EU:C:2017:622), and of 20 November 2017, *Commission v Poland* (C-441/17 R, ECLI:EU:C:2017:877).

170 The substantiated concern was based on Article 10(2) of the EUTR and Article 31 of CAP, which grants civil society organisations the right to launch or join administrative proceedings where they represent a common interest. REPI denied the request, explaining that the checks performed by competent authorities are not considered administrative proceedings, thus Article 31 of the CAP could not apply. ClientEarth did not appeal from that decision due to weak legal chances of success.

on the basis of the substantiated concern submitted in November 2017. The evidence enclosed therein could have influenced the preparation of the annual work plan for 2018, but the check – **performed roughly nine months after the submission of the substantiated concern** – was not a direct result of the submission. In consequence, the check that aimed at verifying substantiated (as expressly admitted by the EPI¹⁷¹) suspicion of placing illegal timber on the market, **could not have fulfilled its preventive role** against breaching the EUTR by State Forests.

FOREST MANAGEMENT PLANS EXHAUSTING THE DEFINITION OF 'APPLICABLE LEGISLATION'

The Records show that the EPI based its assessment of compliance with applicable legislation only on the annex to FMP and the decision of the Director-General of State Forests, **both of which the CJEU found were non-compliant** with the Habitats and Birds¹⁷² Directives in its judgement of 17 April 2018. The documents were, therefore, issued unlawfully and could not have served for justifying the increased logging.

PUBLIC SAFETY FELLING – AN EXCUSE FOR COMMERCIAL LOGGING

The EPI found that after the first prohibiting order of 27 July 2017 had been issued, logging activities in Białowieża were not pursued for commercial reasons, but **did not explain** how this finding could have been conciliated with the opposite evidence presented in the substantiated concern.

Having in mind the very narrow scope of logging activities allowed in the order of 27 July 2017 (limited to strictly necessary cuts aimed at public safety), the focus of the check in Białowieża should have been put on **the threat of circumvention of the law** – using safety felling as an excuse for continuation of commercial logging. This could be possible e.g. by establishing the level of timber harvested after the order had been issued and comparing this number to standardized level of sanitary cuts conducted in previous years. It would be, therefore, possible to assess the actual nature (commercial or non-commercial) of harvesting conducted after 27 July 2017.

According to the Records, the REPI did not undertake **any further steps** to ensure that the timber from Białowieża had been harvested legally. The information provided by State Forests has been accepted without questions, although it clearly said that the timber harvested allegedly for safety reasons had been placed on the market¹⁷³.

INCREASE IN HARVESTING FOR SAFETY PURPOSES

We analysed the data on forest cuts across the years received through environmental information requests to State Forests and came to the conclusion that the commercial logging in the Białowieża Forest after the first prohibiting order of 27 July 2017 had continued: the timber harvested after 27 July 2017 (so the timber that could have been harvested only for public safety purposes) until early 2021 reached the number of 23,917.03 m³, whereas the timber harvested for the com-

171 In the letter of 18 January 2018, which we received in response to ClientEarth's request for environmental information, the EPI stated that the evidence included in the substantiated concern was 'a reasonable incentive' to carry out a check.

172 Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds (OJ L 20, 26.1.2010, p. 7-25).

173 In fact, in the letter of 18 January 2018, which we received in response to ClientEarth's request for environmental information, the REPI clearly admitted that the timber harvested after 27 July 2017 as a result of sanitary felling had been placed on the market: 'After the CJEU issued the above mentioned order, the Białowieża Forest District limited its activities to ensuring public safety, as a result of which timber harvesting could take place within the framework of the annual allowable cut included in the FMP for 2012-2021.'. Similar information is included in the Records: 'The overriding objective was to ensure public safety, including fire safety, and not commercial trading (...) Harvested as a result was mainly coniferous timber, large and medium-size. From 20 November 2017 – the date on which the second order of the Court of Justice of the European Union in Luxembourg was issued – the Białowieża Forest District refrained from work that could result in timber harvesting, and this state of affairs has been maintained to this day.'

mercial purposes in the period between March 2016 and 27 July 2017 (before the first prohibiting order of the CJEU) reached only 17,679.34 m³.

In terms of timber sales, State Forests confirmed that **all** of the timber harvested in the course of ensuring public safety had been placed on the market. At the same time, the REPI stated that since the ruling of the CJEU of 20 November 2017 had been issued, State Forest did not commercialize any of the timber harvested for safety reasons¹⁷⁴.

This means that either the total number of 23,917.03 m³ of timber was harvested within these few months between July and November 2017 (which clearly proves the **commercial purpose** of this logging, falsely justified by activities aimed at ensuring public safety), or the REPI has been given **false information** about the activities performed in Białowieża at that time.

OVERRIDING EVIDENCE AGAINST THE TIMBER FROM THE BIAŁOWIEŻA FOREST

In 2017, the increased logging in the Białowieża Forest was one of the most publicly discussed events in Poland. The decision of the Ministry for Environment to triple the level of harvesting, followed by the decision of State Forests allowing unlimited sanitary cuts in the Białowieża Forest, resulted in a strong international, academic and civic opposition.

The regulatory bodies reacted as well. After the first prohibiting order of the CJEU had been issued, in August 2017, Forest Stewardship Council (FSC) issued recommendations not to sell material originating from Białowieża as controlled or sold with a FSC controlled wood claim¹⁷⁵. At that time, the risk of continuing logging and subsequently placing timber on the market was also acknowledged by Preferred by Nature (formerly NEPCo)¹⁷⁶. Thus, any timber harvested in the Białowieża Forest and placed on the market after the first prohibiting order had been issued **could not be considered legal without thorough investigation over its potentially illegal origin**.

II. ILLEGAL LOGGING IN THE CARPATHIANS

I. BACKGROUND

Puszcza Karpacka is a vast forest complex in the area of southern Poland, at the junction of the Eastern and Western Carpathians, with an area of approximately 315,000 hectares. Being called the most precious mountain forest in Poland, Puszcza Karpacka represents a variety of rare and protected species and habitats comparable to the biodiversity of Białowieża. At the same time, Puszcza Karpacka is subject to extensive commercial logging conducted by State Forests, which manages this area through several forest districts, i.a. Bircza, Stuposiany and Lutowska. Activists and scientists predict that if State Forests continues exploitation for timber and hunting purposes, characteristics of Puszcza Karpacka as a natural forest ecosystem will vanish by 2026.

174 The Records read: 'From 20 November 2017 – the date on which the second ruling of the Court of Justice of the European Union in Luxembourg was issued – the Białowieża Forest District refrained from work that could result in timber harvesting, and this state of affairs has been maintained to this day'.

175 See more at <https://forestcocertification.com/bialowieza-forest-dispute-between-eu-and-polish-authorities/amp/>.

176 The information put up on their official website reads: 'Because there is no evidence to date that the logging ban is being, or will be, respected by the relevant forestry authorities, a precautionary approach must be applied. (...) Considering the current ban on logging placed on the three districts, there is currently no credible means to confirm that the legal requirements at the Forest Management Unit level are met or the risk is effectively mitigated'. See more at <https://preferredbynature.org/sourcinghub/timber/timber-poland>.

II. SUBSTANTIATED CONCERN

On 26 August 2021, we submitted to the Podkarpackie Regional Environmental Protection Inspector in Rzeszów, Poland – REPI an official request for an environmental inspection (substantiated concern) in regards to the activities performed by State Forests in Bircza Forest District, in which Natura 2000 sites constitute approx. 95% of its cover. It raised two allegations of breaches of the EUTR conducted by State Forests –

- placing possibly illegal timber on EU market (Article 4(1) of the EUTR) – as the harvesting in Bircza Forest District breached relevant provisions of EU Habitats and Birds Directives;
- not exercising due diligence when placing timber on the market (Article 4(2) of the EUTR) – as the due diligence system adopted by State Forests does not fulfil the requirements set out in Article 6(1) of the EUTR and Article 5(2) of the EC Implementing Regulation and therefore does not guarantee the effectiveness of the due diligence process.

The substantiated concern was supported by evidence indicating the fact that the timber logged in Bircza Forest District had been placed on the market, including photos and a video received from activists being present in the field. In September 2021, the EPI informed us that the concern had been partially handed over to the Regional Directorate for Environmental Protection (RDEP). It further stated that the concern had included information about potential violations of nature protection laws and should be assessed by the RDEP, which supervises Natura 2000 sites and nature protection planning. The records of the check we requested in November 2021 (which consisted of i.a. document exchange between the REPI and the RDEP), indicated that the RDEP had considered itself as incompetent and refused to handle the request.

The information received in November 2021 from the REPI about the check performed after the submission of our request stated that no alleged infringements had been found.

III. BOX-TICKING CHECK – REASONS FOR CONCERN

Lack of supervision over nature protection

In December 2021, on our request for environmental information, we received records of the check ('Records'), which revealed i.a. that the RDEP had found itself incompetent to assess the potential violations of nature protection laws and refused to handle the motion. This consequently means that the allegations we had raised in this matter **have not been verified – either by the REPI or the RDEP**. The RDEP stated that the supervision over Natura2000 sites located in the area managed by State Forests is executed independently by the head of the forest district. Apparently, the actual protection of nature in the Carpathians (as well as in other state-owned forests) is left to State Forests alone – the same entity which heavily pursues a production-oriented policy towards forests. **There is, therefore, no institution that finds itself competent to check whether nature protective measures are properly executed within the forest management of State Forests.**

As the Records left us with many ambiguities regarding the enforcement of the EUTR, in April 2022, we submitted another request for environmental information. We asked the REPI to elaborate on how it understands certain concepts of the EUTR and other nature protection laws, and how it applies them to State Forests. For example, the result of the inspection (no breaches found) was based on the description of the procedures and lists of internal regulations rather than on concrete evidence that was either very scarce or not provided at all. If it was provided, it seems that the forest district could choose the evidence presented, what worked in its favour. Further information received in response to this request confirmed our assumption that the role of the EPI is limited to simply checking if certain documents have been adopted by State Forests, without analysing their relevance or verifying if they are in actual use.

ClientEarth Prawniczy dla Ziemi Foundation

ClientEarth is a registered charity that uses the power of the law to protect people and the planet.

ClientEarth is funded by the generous support of philanthropic foundations, institutional donors and engaged individuals.