

# Concurring Regulation in European Forest Law

## Forest Certification and the New *EU Timber Regulation*

*The recent EU Timber Regulation (EUTR) combats illegally harvested timber. Thus, it may prima facie appear to compete or overlap with the existing forest certification schemes*

*Forest Stewardship Council (FSC) and Programme for the Endorsement of Forest Certification (PEFC). In contrast to these certification schemes, EUTR is a public, not a private law scheme. Hybrid public-private regulations may re-enforce each other and, in terms of environmental norm setting, might well be superior to private or public regulations alone.*

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Currently, forest regulation comes from all levels of governance; from international and European to national and subnational and perhaps even local, but also from public to private as there is also regulatory competition among privately held forest certification organisations. In contemporary environmental law and particularly in nature conservation and forest law we are increasingly getting used to regulatory competition and concurring legislation (Heyvaert 2012) and privatisation (Reid 2011). In March 2013 the *EU Timber Regulation (EUTR)* came into force prohibiting the placing of illegally harvested timber on the EU market and requiring traders to exercise due diligence (Regulation 995/2010/EU 2010), but also some domestic forest legislation of member states and even subnational legislation might already have given such provisions. It illustrates the multi-layered and increasingly concurring legislative practice in modern forest regulation.

Besides these public law provisions there are also private law provisions. The Programme for the Endorsement of Forest Certification (PEFC) and the Forest Stewardship Council (FSC) could perhaps be seen as somewhat rival schemes (Heyvaert 2012) allegedly involved in some bitter and even paralysing trench warfare (Visseren-Hamakers and Pattberg 2013). Nevertheless, both FSC and PEFC are as private environmental regulators among the oldest standards worldwide, whereas the public law provision

of *EUTR* is a relatively new addition to the EU *acquis communautaire*<sup>1</sup> consolidating a dual approach of a hybrid public-private regulation of sustainably produced timber.

However, the question remains whether this duality, i. e., this recent regulatory competition and concurring public as well as private regulation, could be welcomed in terms of good regulation of sustainable forestry.

### EU Timber Regulation

The *EUTR* combats illegally harvested timber by three legal obligations:

1. It prohibits placing of illegally harvested timber and products derived from such timber on the European market;
2. It requests traders to exercise due diligence when they place their timber products on the EU market for the first time;
3. For traceability reasons traders have an obligation to keep record of their suppliers and customers.

Elements of this due diligence system are a risk assessment, risk mitigation and of course information as operators are obliged to have access to information describing the timber and timber products, quantity, country of harvest, details of the supplier and information on compliance with domestic forest law.

There are already some related public law schemes within the EU *acquis communautaire*: *Forest Law Enforcement Governance and Trade (FLEGT)* also combatting illegal logging by *Voluntary Part-*

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<sup>1</sup> *Acquis communautaire* is the accumulated legislation, legal acts, and court decisions which constitute the body of European Union law.

nerships Agreements (VPAs) and the well-known EU implementation of the provisions of the *Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)* by a set of regulations known as the *EU Wildlife Trade Regulations*, notably the *Basic CITES Regulation 338/97* on the protection of species of wild fauna and flora by regulating trade therein (Kistenkas 2012).

Timber and timber products covered by valid *FLEGT* license and *CITES* permit are explicitly considered to comply with these new *EUTR* requirements. Thus they have direct relevance to *EUTR*, but in contrast to these public law provisions, the privately held certification schemes of *FSC* and *PEFC* do not have such a direct relevance. *FSC* and *PEFC* certified timber does not automatically comply with *EUTR* as these are private law and non-EU law schemes and hence not the same as the EU due diligence system. Nevertheless, certificates might be taken into consideration when assessing and mitigating risks, but – unlike *FLEGT* licenses and *CITES* permits – they are not *eo ipso* in full compliance with the *EUTR* demands. Here it becomes clear that there is apparently regulatory co-existence and that we should distinguish between private regulation by self-regulatory organisations and public regulation by governments like, for instance, the EU.

However, it should also be noted that article 6 of the *EUTR* implicitly gives a certain role to private forest certification. Close reading article 6 on the *EU due diligence system (DDS)*, it becomes clear that certification or other third-party verified schemes may be taken into account in the risk assessment and risk mitigation procedures. More precisely, article 6/1 (b) in the first indent of the second paragraph verbatim states that risk assessment may include certification and according to article 6/1 (c) risk mitigation “may include requiring additional information or documents and/or third part verification”.

Risk assessment and risk mitigation are part of the *DDS*, and in both the private certification schemes are allowed to play an important supportive role. So through article 6 there is interrelation between *EUTR* and privately held forest certification. In fact it gives us an opportunity to link public with private forest law.

## A Dual Approach

The sustainability impact of certification standards has indeed not been fully evaluated yet, and legality of logging and sustainability have not automatically always been the same or necessarily been linked to each other as critical literature reminds us quite rightly (WWF 2005, Van Kuijk et al. 2009, Gomez-Zamalloa et al. 2011, Visseren-Hamakers and Pattberg 2013). Moreover, we cannot turn a blind eye to the possible economic effects of the fight against illegal logging including potential winners and losers of a stricter regulation, with the winners mostly being forest sectors of Europe and North-America and the losers being many develop-

ing countries (Li et al. 2008). Nevertheless, illegal logging could be seen as a global problem with significant negative economic, environmental and social impact. In economic terms illegal logging results in lost revenues, in terms of environment it is associated with deforestation, biodiversity loss and climate change, and in social terms it could be linked to land and resource conflicts. As it affects the balance of economic welfare, environmental welfare and social welfare it clearly is a matter of sustainability (Kistenkas 2013).

In the EU legal framework sustainability is also defined as a general principle of law in article 3/3 *Treaty on the European Union (TEU)*, and the principle of sustainable development is mentioned and anchored in article 37 of the *Charter of Fundamental Rights* of the EU. Basically it aims at a triple P (planet, profit, people) balancing (Kistenkas 2012). The *EUTR* aims at sustainably produced timber by combatting trade in illegally harvested timber. Such a sustainable forestry is essentially the same in the *FSC* and *PEFC* schemes. All are aiming at sustainable forest management and triple P balancing, promoting environmentally appropriate (planet), socially beneficial (people) and economically viable (profit) management of forests.

As both *EUTR* and the two privately held certification schemes aim at sustainably produced timber, the regulatory competition is *de iure* about identical goals. Their competitiveness lies merely in the origin of the regulations: it is public law from the EU and private law given by forest certification organisations. The purpose and content of the regulations are not adversely. They might be called concurring, but they are not necessarily contradictory. They might indeed support each other.

## A Modern Policy Mix

In times of alleged failure of conservation law and austerity in finances any extra alternative approach may have a lot to offer (Reid 2011). Adopting dual or hybrid approaches relying both on con-

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Forest law is increasingly featured by regulatory competition. The picture shows a forest nearby Utrecht, The Netherlands.



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ventional “command-and-control”, and private regulation could perhaps lead easier to the accomplishment of sustainability goals. Problem solving could be pursued at all levels of the political spectrum – from local to global – but also beyond, by private environmental regulators (Visseren-Hamakers and Pattberg 2013).

The currently advocated failure of conservation regulation (Reid 2011) urges that we need all the regulatory help we can get to meet up with sustainability and especially sustainable forest management goals. A dual approach of a hybrid public-private regulation of sustainably produced timber might turn out to be a better environmental norm setting than conventional regulation.

Mutually supportive regulation consists of economy, education and information but also of self-regulation and voluntarism as well as of course classic command and control regulation (Gunningham et al. 1998, Howlett and Rayner 2004, Schout and Jordan 2005, Van Gossum et al. 2008, Van Gossum et al. 2012, Reh binder 2012). A successful policy mix uses a variety of regulatory instruments: from coercive public law to less coercive instruments like self-regulation and voluntarism. Regulation nowadays is not only classic command-and-control public law but also less coercive private law. So it might be argued the EUTR and the private schemes do play their concurring but useful part in symbiotic regulation and a modern policy mix.

Concurring regulation might be well considered as complementary regulation as long as it is not colliding regulation. Law collision should be avoided of course, but such a collision is not very likely here, as focus and aims of EUTR, FSC and PEFC are, as stated above, not contradictory. Governmental regulators like the EU as well as non-governmental “surrogate” regulators like FSC and PEFC could both be welcomed then, as it currently does not appear being a counterproductive instrument mix. Moreover, privately held self-regulation schemes could become even more successful in the shadow of public law (Sinclair 1997, Van Gossum et al. 2012). The new existence of a public law stick might well enhance the performance of less interventionist instruments like privately held voluntary schemes (Ayres and Braithwaite 1992). Anyway, this duality could be part of designing a more optimal policy mix on sustainable forestry (Van Gossum et al. 2008).

## Conclusion

The new EUTR is basically saying that illegally harvested forest products must not be brought on the European market, while certification merely targets on voluntary standards for sustainable forest management, but both are interrelated by article 6 of the EUTR and could be mutually supportive. Both regulatory frameworks do not appear as colliding or counterproductive instruments and could be welcomed as tools of designing a symbiotic policy mix combatting illegal logging.

Conventional command and control regulation, especially of EU origin, can never be ruled out as a classic instrument on top of the instrumental pyramid of coerciveness, but private regulation is also needed as this transnational regulation might be even

more successful as it takes place in the shadow of public law (Van Gossum et al. 2012). This law could well be provided now by the EUTR from Brussels.

## References

- Ayres, I., J. Braithwaite. 1992. *Responsive regulation. Transcending the deregulation debate*. Oxford, UK: Oxford University Press.
- Gomez-Zamalloa, M. G., A. Caparros, A. S. Ayanz. 2011. 15 years of forest certification in the European union. Are we doing things right? *Forest Systems* 20/1: 81–94.
- Gunningham, N., P. Grabowsky, D. Sinclair. 1998. *Smart regulation. Designing environmental policy*. Oxford, UK: Clarendon.
- Heyvaert, V. 2012. Regulatory competition. Accounting for the transnational dimension of environmental regulation. *Journal of Environmental Law* 25/1: 1–31.
- Howlett, M., J. Rayner. 2004. (Not so) “smart regulation”. *Marine Policy* 28/2: 171–184.
- Kistenkas, F. H. 2012. *Recht voor de groenblauwe ruimte*. Wageningen: Wageningen Academic.
- Kistenkas, F. H. 2013. Rethinking European nature conservation legislation: Towards sustainable development. *Journal for European Environmental & Planning Law* 10/1: 72–84.
- Li, R., J. Buongiorno, J. A. Turner, S. Zhu, J. Prestemon. 2008. Long-term effects of eliminating illegal logging on the world forest industries, trade, and inventory. *Forest Policy and Economics* 10/4: 480–490.
- Regulation 995/2010/EU. 2010. *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*. Official Journal of the European Union L 295: 23–34.
- Reh binder, E. 2012. Sustainable resource management. New legal approaches needed? *Journal for European Environmental & Planning Law* 9/1: 34–62.
- Reid, C. 2011. The privatisation of biodiversity? Possible new approaches to nature conservation in the UK. *Journal of Environmental Law* 23/2: 203–231.
- Schout, A., A. Jordan. 2005. Coordinated European governance: Self-organising or centrally steered? *Public Administration* 83/1: 201–220.
- Sinclair, D. 1997. Self-regulation versus command and control? Beyond false dichotomies. *Law & Policy* 19/4: 529–559.
- Van Gossum, P., B. Arts, K. Verheyen. 2012. “Smart regulation”: Can policy instrument design solve forest policy aims of expansion and sustainability in Flanders and the Netherlands? *Forest Policy and Economics* 16/1: 23–34.
- Van Gossum, P., L. Ledene, B. Arts, R. de Vreese, G. van Langenhove, K. Verheyen. 2008. New environmental policy instruments to realize forest expansion in Flanders (northern Belgium): A base for smart regulation? *Land Use Policy* 26/4: 935–946.
- Van Kuijk, M., F. E. Putz, R. Zagt. 2009. *Effects of forest certification on biodiversity*. Wageningen: Tropenbos International.
- Visseren-Hamakers, I. J., P. Pattberg. 2013. We can't see the forest for the trees. The environmental impact of global forest certification is unknown. *GAIA* 22/1: 25–28.
- WWF (World Wide Fund For Nature). 2005. *The effects of FSC certification in Estonia, Germany, Latvia, Russia, Sweden and the UK. An analysis of corrective action requests*. Gland, CH: WWF European Forest Programme.

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