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Demonstrating legal compliance of cocoa production and trade

Deforestation and forest degradation driven by agricultural expansion are growing at an alarming rate in tropical forest countries. To help tackle this problem, the European Union (EU), a major consumer of forest-risk commodities, adopted Regulation 2023/1115 on the placing on the market and export from the Union of certain commodities and products associated with deforestation and forest degradation (EUDR).¹

Once in application, it will prohibit the placing on the market or export from the European market of products that are illegal according to the laws of the producing country or have contributed to deforestation or forest degradation after 31 December 2020. The scope of the regulation covers seven commodities: coffee, cocoa, rubber, palm oil, soy, beef and timber, as well as their derived products, such as chocolate and cocoa paste.

Before placing any of these products on the EU market or exporting them from it, companies will be obliged to carry out 'due diligence' to demonstrate that their product carries no or negligible risk of deforestation and illegality.

Consequently, operators who place cocoa or cocoa products on the EU market must ensure that they have been produced in accordance with the relevant legislation of the country of production (article 3). The definition of the laws applicable in the country of production focuses on the legal status of the area of production. It is our understanding that the EUDR legality criteria does not cover the entire supply chain. At the time of writing, the Commission is expected to provide further guidance on the legality criteria.

The EUDR takes a flexible approach by listing several areas of law without specifying particular legal instruments, as these differ from country to country and may be subject to amendments. These areas are: land-use rights; environmental protection; forest-related rules; third parties' rights; labour rights; human rights protected under international law; the principle of free, prior and informed consent (FPIC); tax, anti-corruption, trade and customs. Compliance with forest-related rules is only relevant to timber and does not apply to the production of agricultural commodities.

Operators will need to identify which elements of the legal framework in each country of production are relevant for cocoa to be legally produced. Once the legal requirements have been identified, operators will also need to assess the availability of evidence required to demonstrate legality. This is essential for operators when setting up their due diligence system as required by the regulation. Providing evidence of legal compliance of smallholder activities in the cocoa sector can be particularly challenging due to their largely informal nature.

Due diligence is not a box ticking nor solely a document gathering exercise. In the cocoa sector, operators may not be able to obtain documentary evidence of compliance with all relevant legal requirements. In these cases, they will need to assess if there is a non-negligible risk of illegality.

Stakeholders can play a role in identifying which national legal requirements relevant to the EUDR will be applicable, discuss the information, documents and data required to demonstrate legality and sources of information, as well as identify potential needs for clarification of the legal framework. Efforts made in several countries to identify the relevant legal requirements and assess legality risk to facilitate the due diligence of operators as per the EU Timber Regulation (EUTR) can provide examples of how this has been carried out.²

Below are common considerations for each area of law and possible documents that operators and traders could use to demonstrate compliance for each of these requirements.³ Some of these considerations are based on EUTR Guidance.⁴

Learning from the EU Timber Regulation

The European Union Timber Regulation (EUTR) entered into application on 3 March 2013 and will be repealed by the EUDR. It required companies importing timber into the EU to conduct due diligence to ensure that the timber complies with applicable laws in the country of harvest, helping to combat illegal logging and promote legal and sustainable timber trade. The EUTR defined 'applicable legislation' as the legislation in force in the country of harvest, and unlike the EUDR, did not confine the scope of the legality assessment to the area of production. However, both instruments define this 'applicable legislation' along various broad areas that overlap in part. Because of these similarities, one can draw some useful lessons from the implementation of the EUTR to prepare for the application of the EUDR in respect of the legality requirements. In the text below, some of the boxes listing possible documentation showing compliance with the different areas of law are drawn from the European Commission Notice of 12.2.2016 containing EUTR Guidance, with some adaptation to the cocoa sector context.

“Are all documents showing compliance with applicable legislation made available by the supplier, and are they verifiable? If all relevant documents are readily available, it is more likely that the product’s supply chain is well established. The operator can be confident that the documents are genuine and reliable.” (EUTR Guidance)

1. Land-use rights

Land-use rights can be particularly challenging to evidence, in particular for commodities produced by smallholder farmers, such as cocoa. In all cocoa producing countries in West and Central Africa, a large proportion of the land is under customary tenure. While customary land-use rights can be recognised under the law, farmers often do not possess proof of land-use rights. For example, in Ghana, 80% of the land is under customary ownership and mostly undocumented.⁵ In Côte d'Ivoire, roughly only 4% of rural land is covered by a certificate or title.⁶

However, in many cases, smallholder agriculture is permitted without any prerequisite. Under the national laws of Ghana and Côte d'Ivoire, farmers are not required to have documented use rights (such as production or plantation permits) to produce cocoa legally outside the protected forest area. In these cases, operators would not require documentary evidence of land-use rights for cocoa to meet this aspect of the legality requirement.⁷ Nonetheless, formalisation of land-use rights (and the provision of documentation) can help farmers to have their rights to the land recognised and could help to secure their rights over the land and the trees.

Many countries regulate activities in protected areas, often prohibiting agricultural production. Access to official government legal and spatial data providing the boundaries of protected areas would be needed to ensure that cocoa is not sourced from a prohibited area. In addition, agriculture might be permitted in protected areas in certain circumstances. This is the case in Côte d'Ivoire and Ghana, where admitted agricultural areas exist within classified forests and forest reserves. When and if sourcing from these areas, operators would need to access official evidence proving that farmers are allowed to produce cocoa in these areas. Accessing spatial information about admitted agricultural areas might be a challenge as these are not often publicly available, and the accuracy of this information might be limited.⁸

Furthermore, if the cocoa comes from forestland that was converted to agricultural use before 30 December 2020, operators and traders will have to assess the legality of the conversion process.

Lessons from EUTR experience

In partner countries of the EU, the implementation of the EU Forest Law Enforcement, Governance and Trade (FLEGT) regulation provided an opportunity to engage in a multistakeholder discussion to outline the legal requirements for the production and trade of legal timber. These discussions also identified any possible lack of clarity or overlaps in land ownership and use rights. They also contributed to creating momentum to push for the legal reforms required to address them, including by formally recognising customary land-use rights.

Possible documentation showing compliance with land-use rights: documentation on ownership/rights to land use; contract, land lease or concession agreements; protected areas and admitted areas within protected areas; remote sensing images.

2. Environmental requirements

While the legal requirements related to the protection of the environment in the production of cocoa in West and Central Africa varies across countries, they will typically cover issues related to water management, waste disposal, soil management, pesticide and chemicals use, and the protection of wildlife and biodiversity. In particular, the use of pesticides and chemicals in cocoa farming can have negative environmental impacts. Regulations may govern the types and quantities of chemicals that can be used, as well as how they should be applied. In addition, water usage and water pollution from cocoa processing can be regulated under environmental laws. Cocoa producers may need to obtain permits for water use and implement pollution control measures. Farmers will likely lack proof of compliance with environmental norms, such as a certificate from an environmental inspectorate.

Furthermore, Cameroun, Côte d'Ivoire and Ghana have legal provisions subjecting activities likely to impact adversely on the environment, including agricultural activities, to an environmental assessment. However, the requirement applies to agricultural activities that involve the clearing of a land area greater than a certain threshold. Since most cocoa farming is carried out by smallholders on small areas of land, this obligation would not apply. Nonetheless, in Ghana, the obligation to carry out an environmental impact assessment applies without any surface threshold if the planned activity is in an environmentally sensitive area.

Possible documentation showing compliance with environmental legislation: official audit reports; environmental clearance certificates; codes of conduct; publicly available information showing rigorous legislative supervision and cocoa tracking and control procedures; official documents issued by competent authorities in a country of production.

3. Third parties' rights

Like any other person or company, cocoa farmers have a responsibility to prevent harm to others. This encompasses, for example, using pesticides and water carefully to avoid harmful runoffs. This also entails not encroaching upon lands held by indigenous peoples or local communities, respecting their rightful ownership and traditional use of the land and forests. Environmental regulations may also include provisions on the right to be informed about the state of the environment and participate in the procedures before making decisions likely to have harmful effects on the environment. The provisions relating to environmental impact assessments also typically include the obligation to consult affected

local communities. However, as outlined in the section on environmental regulations, the obligation to carry out an environmental impact assessment is unlikely to apply to small-scale cocoa farming.

Possible documentation showing compliance with third parties' legal rights: reports of environmental impact assessments; management plans; environmental audit reports; social responsibility agreements.

4. Labour rights

Labour and social obligations vary across countries. Cocoa producing countries in West and Central Africa have different legal requirements regarding the minimum wage, maximum working hours, minimum working age, union organisation, social payments, discrimination and gender equality. Child labour is addressed in the section below on human rights.

However, most labour relations among smallholder cocoa farmers are likely to be informal. Indeed, the concept of family farming may cover several forms and may include the use of a workforce organised according to multiple arrangements for which written contracts do not always exist.

Possible documentation showing compliance with labour rights at the plot level: employment contracts, sharecropping contracts, identity card of employees, and certificates of payment of social security fees.

5. Human rights

Child labour

The International Labour Organization (ILO) defines child labour as work that robs children of their childhood, potential and dignity, posing risks to their physical and mental development. This includes work that is mentally, physically, socially, or morally dangerous and harmful, as well as anything that interferes with their education. Cameroon, Côte d'Ivoire and Ghana are all parties to international conventions on child labour and have adopted related national legislation as outlined in table 1. While children may work on cocoa farms within their families, not all instances constitute child labour. However, when such work negatively impacts a child's health, development, or education, it violates internationally agreed conventions.

For example, all three countries prohibit hazardous child labour (i.e. under 18 years old), which is defined in the respective legal frameworks. In the three countries, it includes: the

manipulation of agrochemicals; working with motorised farm machinery; carrying heavy loads beyond permissible carrying weight; night work and working long hours.

Table 1: Status of ratification of international conventions and national provisions related to child labour in Cameroon, Côte d'Ivoire and Ghana

	Cameroon	Côte d'Ivoire	Ghana
United Nations Convention on the Rights of the Child	X	X	X
ILO Convention No. 138 on Minimum Age	X	X	X
ILO Convention on worst forms of child labour	X	X	X
African Charter on the Rights and Welfare of the Child	X	X	X
Labour Act	Labour Code no 92-007 of 14 August 1992	Labour Code n° 95/15 of 12 January 1995 Act prohibiting trafficking and the worst forms of child labour n° 2010-272 of 30 September 2010	Labour Act 2003 (651) Children's Act 1998 (560)
Normal/non-hazardous work (can be employed)	Labour Code sets the minimum age at 14 years old	Labour Code prohibits the employment of people below 16 years old	15-17 years
Light work	–	13-15 years	13-14 years
Hazardous activities	> 18 years (hazardous activities can be undertaken by children aged 16-17 under the condition that i) "their health, safety, and morals are guaranteed" and ii) that they have received a specific and adequate training or vocational training in relation to the activity)		> 18 years
Definition of hazardous child labour	Order n° 17/MTLS/DEGRE (27 May 1969) on child labour	Orders n° 2017-016 and 2017/017 MEPS/CAB (2017)	Hazardous Child Labor Activity Framework for Ghana (2016)

Other human rights

All three cocoa producing countries are parties to several international human rights treaties, as illustrated in table 2 below.

Table 2: Status of ratification of a selection of international human rights instruments by Cameroon, Côte d'Ivoire and Ghana

	Cameroon	Côte d'Ivoire	Ghana
Convention on the Elimination of All Forms of Discrimination against Women	X	X	X
International Convention on the Elimination of All Forms of Racial Discrimination	X	X	X
International Covenant on Civil and Political Rights	X	X	X
International Covenant on Economic, Social and Cultural Rights	X	X	X
ILO Forced Labour Convention	X	X	X
International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families	*	X	X

*Cameroon has signed but not ratified the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families

Operators and traders will need to determine whether these international human rights instruments have been transposed into national law. Compliance with international human rights obligations is typically undocumented.

Possible documentation showing compliance with human rights obligations: certification documents; audit reports; supplier codes of conduct; training and education records; child labour monitoring and risk assessment reports; child labour remediation plans; records of incidents, grievances, and their resolutions; and sustainability reports.

6. Free, prior and informed consent

FPIC is a right granted to Indigenous Peoples recognised in the UN Declaration on the Rights of Indigenous Peoples. It allows Indigenous Peoples to provide or withhold/withdraw consent, at any point, regarding projects impacting their territories. FPIC allows Indigenous Peoples to engage in negotiations to shape the design, implementation, monitoring and evaluation of projects. While Cameroon, Côte d'Ivoire and Ghana are signatories to the Declaration, none of them are parties to the ILO Indigenous and Tribal Peoples Convention of 1989. The application of FPIC therefore largely relies on whether the national legal framework covers the different elements of this right, including the right to information, the right to consultation and the right to withhold consent.

However, cocoa production by smallholder farmers is typically conducted on a small scale, whereas FPIC is more commonly associated with major projects that have significant impacts on communities. Furthermore, in many cocoa-producing regions, smallholder farmers have been engaging in cocoa cultivation for generations as part of their traditional

livelihoods. The need for FPIC may be less relevant when the farming activities align with long-standing practices and are not introducing entirely new or disruptive elements.

Possible documentation showing compliance with FPIC: specific reports on tenure and rights claims and conflicts; community consent agreement; community consultation records; Environmental Impact Assessments, social impact assessments and project plans provided to the community in a language and format they can understand; records of negotiations between the project proponent and the affected community; community resolutions or statements; third-party assessments of the FPIC process.

7. Taxes, fees and anti-corruption

Taxes, fees and customs duties related to cocoa production and trade in West and Central Africa can vary significantly from one country to another. Additionally, the specific regulations and rates are subject to change. These can include: export taxes and duties, licensing fees, quality control and inspection fees.

As for corruption practices, some West and Central African countries are parties to the Convention against Corruption and the African Union Convention on Preventing and Combating Corruption. These countries may have transposed the requirements of these conventions into their national legal framework. If there is no singular piece of legislation to tackle corruption, the criminal codes of some countries may criminalise various forms of corruption, such as bribery, extortion or the exploitation of public office.

Since the EUDR legality criteria applies to the area of production, it is reasonable to infer that the relevant taxes and fees would be those related to the cocoa plot only and not those related to other stages in the supply chain. Additionally, customs rules would not be applicable to smallholder cocoa farmers who typically do not directly export their products, and thus are not directly impacted by such regulations. Further guidance on this point could be useful to inform operators' due diligence efforts.

Possible documentation showing compliance with trade, customs and anti-corruption requirements: contracts, import licences, export licences, official receipts for export duties, export ban lists, export quota awards.

Way forward

To contribute to the development of an enabling environment and support compliance with the EUDR legality criteria within West and Central Africa's cocoa supply chain, the following steps could be taken by cocoa supply chain actors:

- Identify the current legal framework by conducting a review of the existing legal framework governing cocoa production and trade in the target countries. This review should focus on key areas, including land-use rights, environmental protection, third-party rights, labour rights, human rights protected by international law, the principle of free, prior, and informed consent, and trade, customs, tax, and anti-corruption regulations. This examination should identify all requirements within laws and regulations applicable to the area of production that must be adhered to for cocoa exports to the EU.
- Assess the availability of data and documentary evidence that operators can use to demonstrate their legal compliance, including evidence that could be provided by other standards such as ARS-1000 certification. This includes records related to land use, environmental impact assessments, labour practices, and community consent. Evaluating the quality and accessibility of this data is crucial, as well as identification mitigation measures when legal evidence might not be available.
- The process for identifying the applicable legal requirements and assessing the availability of documentary evidence should be transparency and inclusive, involving stakeholders from government bodies, the private sector, NGOs and local communities. It could provide an opportunity to leverage the legal work already carried out by civil society to that end, such as ClientEarth's legal analyses in Ghana and Côte d'Ivoire. Ideally, this dialogue would also engage EU Competent Authorities to build a common understanding of national legal frameworks.

African Regional Standards for Sustainable Cocoa (ARS 1000) and other certification schemes

The African Regional Standards for Sustainable Cocoa (ARS 1000) was developed by the African Organization for Standardization (ARSO) to promote and harmonise sustainable cocoa production. Ghana and Côte d'Ivoire, as members of ARSO, have been leading the ARS 1000 development and have endorsed the standard nationally. The ARS 1000 and its national implementation guidelines provide a framework for farmers' organisation, cocoa traceability and quality and certification. The EUDR mentions the role that certification standards, voluntary or mandatory, could play in supporting the due diligence process of operators by providing complementary information for risk assessment. Once operational, ARS 1000 certification could provide valuable information for operators carrying out their EUDR due diligence, in particular when it comes to cocoa legality, if the ARS 1000 is aligned with its requirements.

The EUDR is also clear that certification does not replace the due diligence process. The liability in case of a breach of the regulation remains with the operator, and there is no green lane access for products certified under any voluntary or mandatory schemes.

In conclusion, ensuring compliance with the EUDR in the cocoa supply chain of West and Central Africa is a complex and collaborative effort. It requires a deep understanding of the legal framework, extensive data assessment, and the development of practical actions to meet legal requirements. Cocoa producing countries can play a key role in providing clarity on the relevant legal framework, ensuring access to information, and engaging actors to identify relevant legal evidence, which can eventually facilitate cocoa operators' due diligence process and access to market. Efforts are ongoing in Côte d'Ivoire, Ghana and Cameroon to provide guidance to cocoa supply chain actors for navigating compliance with the EUDR legal criteria.

¹ The EUDR was published in the EU Official Journal on 9 June 2023 and came into force on 29 June 2023. Its main obligations will apply to medium and large companies from 30 December 2024 and to micro-and small enterprises from 30 June 2025.

² Satyal, P. (2017) Assessing Civil Society Participation in REDD+ and FLEGT: Case Study Analysis of Cameroon, Ghana, Liberia and the Republic of Congo, DEV Reports and Policy Paper Series, The School of International Development, University of East Anglia, UK, https://ueaeprints.uea.ac.uk/id/eprint/68399/1/FPE_CivilSocietyParticipation_revised_final_110918.pdf

³ The relevant documentation needed to prove legality may vary by producer country. The list presented below is indicative of possible documents but not a definitive list of documentation that operators will need to provide.

⁴ Commission Notice of 12.2.2016, Guidance Document for the EU Timber Regulation, <https://circabc.europa.eu/ui/group/34861680-e799-4d7c-bbad-da83c45da458/library/288d9b51-c58c-4563-bbce-e3f9374ed44d/details?download=true>

⁵ John Tiah Bugri and Eric Yeboah, "A brief overview of land tenure arrangements in Ghana" in Understanding changing land access and use by the rural poor in Ghana, International Institute for Environment and Development (2017), available at: <http://www.jstor.com/stable/resrep02694.9>

⁶ <https://afor.ci/>

⁷ See, EUDR Frequently Asked Questions, page 7, <https://circabc.europa.eu/ui/group/34861680-e799-4d7c-bbad-da83c45da458/library/e126f816-844b-41a9-89ef-cb2a33b6aa56/details>

⁸ See EFI's Cocoa Insight, "The use of spatial data for EUDR due diligence" available at: <https://efi.int/sites/default/files/files/flegtred/Sustainable-cocoa-programme/Cocoa%20insights/EFI%20Cocoa%20Insight%201%20EN%20v2.pdf>

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The European Forest Institute is one of the implementing partners of the EU Sustainable Cocoa Programme in Côte d'Ivoire, Ghana and Cameroon. We are supporting producer countries in developing robust standards and tools to achieve traceable and deforestation-free cocoa.

Information and publication of EFI's Sustainable Cocoa Programme can be found here:

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