ECLI:NL:RBAMS:2022:7435

Body	District Court Amsterdam
Date of sentence	12-12-2022
Date of publication	12-12-2022
Case number	81/052769-22
Jurisdictions	Criminal law
Special features	First instance – three-judge
Contents indication	
	Sentence co-perpetration of acting contrary to Article 4 paragraph 1 and Article 6 paragraph 2 of the Timber Regulation, not complying with the care requirements to prevent the import of illegally cut timber. Fine 50,000 euros suspended. Acquittal (money) laundering.
Locations	Rechtspraak.nl

Sentence

DISTRICT COURT AMSTERDAM

JUDGMENT

Public prosecutor's office number: 81/052769-22 (*Promis)*

Date of sentence: 12 December 2022

Sentence of the district court Amsterdam, three-judge economic division, regarding the criminal proceedings against

[accused],

residing at the address [business address],

1 The court hearing

This judgment in a defended action further to the court hearings on 10, 12, 13 and 17 October 2022 (substance of the case) and 12 December 2022 (conclusion).
The court has taken cognizance of the demand of the public prosecutor mr. N. Huisman and of what the representative of [accused], [co-accused 2], and the defence counsel of [accused], mr. R.E. van Zijl, have put forward.

2 Introduction

In February 2019, the Netherlands Food and Consumer Product Safety Authority (to be named hereafter: NFCPSA) got a report about the Czech company [name 1] (to be named

hereafter: [name 1]) that is managed by the Dutchman [co-accused 1] (to be named hereafter: [co-accused 1]); [name 1] is said to import high value teak from Myanmar in the Czech Republic, without complying with the care requirements of the Articles 4 paragraph 2 and Article 6 paragraph 1 of the Regulation (EU) no. 995/2010 of the European Parliament and the Board of 20 October 2010 to determine the obligations of the economic operators who market timber and wood products (to be named hereafter: Timber Regulation). The timber that is imported by [name 1] is said to be intended for the Dutch company [co-accused 3] . (to be named hereafter: [co-accused 3] that is managed by [co-accused 4] (to be named hereafter: [co-accused 4]. After investigation the NFCPSA has gotten the idea that also [accused] (to be named hereafter: [accused], plays a part in the import. [accused] is managed by [co-accused 2] (to be named hereafter: [co-accused 2]).

The investigation Havik is directed in the end against [name 1], [co-accused 3], [accused] and their [alleged] de facto directors: [co-accused 1], [co-accused 4] and [co-accused 2].
The Public Prosecution Office suspects [name 1], [co-accused 3] and [accused] of jointly having marketed teak from Myanmar on the European market, without complying with the care requirements of the Timber Regulation. They are also supposed to have laundered money and teak with reference to the aforementioned shipments. [co-accused 1], [co-accused 4] and [co-accused 2] would have had actual control of the prohibited conduct.

[accused] , [co-accused 3] , [co-accused 2] , [co-accused 4] and [co-accused 1] have been summoned for these offences and their cases have been heard by court simultaneously. [name 1] was not prosecuted, for the Public Prosecution Service did not regard this opportune.

This case is explicitly not about the question whether the imported timber was cut illegally. This is not what the accused are charged with and therefore the court does not have a judgment on this. The case is about the question whether timber was marketed on the European market in accordance with the system of care of the Timber Regulation and if not, whether the accused can be held liable for that with regard to criminal law.

3 Indictment

[accused] is – summarized – charged with, in the period from 1 January 2018 up to and including 3 December 2019:

1. having acted several times jointly with others contrary to the Articles 4 paragraph 2 and Article 6 paragraph 1 of the Timber Regulation, while marketing several shipments of teak, not enough care was said to be practised, for the care requirements, laid down in Article 6 paragraph 1 of the Timber Regulation, were said not be complied with.

2. having laundered an amount of money jointly with others of € 2,566,291.34 and/or 178,2517 cubic metre teak, and has made a habit of this laundering, alternatively simply has laundered.

The complete text of the indictment was included in appendix 1 of this judgment.

4 Formal defences

4.1 **Validity of the summons**

4.1.1 *Defence of the accused*

The defence has adopted the position that the summons regarding count 2 should be partially invalidated. The indictment namely included under 2 that [accused] , together with others, has laundered:

‘an amount of in total € 2,566,291.34, at least one or more (major) amount(s).’

The defence states that it is not clear what this part refers to and therefore this does not comply with the demands of Article 261 of the Code of Criminal Procedure (to be named hereafter: CCP).

4.1.2 *Point of view of the Public Prosecution Service*

The public prosecutor has, with reference to this defence, not adopted a position.

4.1.3 *Opinion of the court*

The court partially invalidates the summons, with reference to the words ‘an amount of in total € 2,566,291.34, at least one or more (major) amount(s).’ of count 2 of the indictment. The reason is that it is not clear, in itself and as in connection to the file and the trial in court, what this part refers to, or how the amount mentioned is composed. This part of the indictment, therefore, does not comply with the demands of Article 261 CCP.

4.2 **Admissibility of the public prosecutor**

4.2.1 *Defence of the accused*

The defence has adopted the position that the public prosecutor is barred. Only the Czech Republic can we noted as place where the offence was committed. Based on the principle of territoriality (Article 2 Penal Code (to be named hereafter: PC) the Netherlands therefore do not have jurisdiction with reference to this offence. Since the charged offence under 1 is not punishable in the Czech Republic, the Netherlands also do not have jurisdiction based on the personality principle (Article 7 PC). Also on other grounds, no jurisdiction for the Netherlands can be assumed.

4.2.2 *Point of view of the Public Prosecution Service*

The public prosecutor has adopted the position that he is allowed to prosecute and that the defence should be rejected. The Netherlands do have jurisdiction regarding the charge, for the offences were committed both in the Netherlands and the Czech Republic.

4.2.3 *Opinion of the court*

The court rejects the defence of the accused and declares that the public prosecutor is allowed to prosecute. As will be explained below under 5.3.2.6, the court judges that both the Netherlands and the Czech Republic are considered to be the place where the proven facts were committed. Evidenced by Article 2 PC, the Netherlands have jurisdiction with respect to punishable offences committed in the Netherlands. According to fixed case law of the Supreme Court, this also applies to offences that were partially (co-)committed in another country.

5 Assessment of the evidence

5.1 *Point of view of the Public Prosecution Service*

Based on the file, count 1 can be proven. The offence was committed by the three legal persons: [name 1] , [accused] and [co-accused 3]. With regard to this, there is a matter of co-perpetration. [co-accused 2] is de facto director of [accused] . [co-accused 4] is de factor director of [co-accused 3] . [co-accused 1] is de factor director of [name 1] . [co-accused 1] plays that part in close and conscious cooperation with [co-accused 2] . Also [co-accused 2] can thus be deemed to be de factor director of [name 1] . The accused have a close and conscious cooperation regarding bringing the shipments teak from Myanmar mentioned in the indictment, on the European market. That way, they have acted jointly as economic operator within the meaning of the Timber Regulation.

In that capacity, they have not complied with the demands of Articles 4 paragraph 2 and Article 6 paragraph 1 of the Timber Regulation. They have namely not gathered the necessary information for marketing the timber. Therefore they were not able to conduct an analysis of the risk that the timber would have been cut illegally. Lastly, the accused have not taken mitigating measures with reference to these risks. The risks intended are too big because of the high amount of corruption within the government of Myanmar.

The accused have committed this offence deliberately. They namely had the intention regarding the factual conduct with reference to marketing the teak. The fact that they possibly believed that their actions were not punishable, does not affect their intent to commit this conduct. Economic criminal law applies ‘free-floating intent’ as criterion for such matters. The charged behaviour has taken place in the Netherlands and the Czech Republic and [co-accused 1] , [co-accused 2] and [co-accused 4] had actual control of this forbidden behaviour.

It cannot be proven that the accused have laundered (count 2) teak. It can namely not be determined whether concealing actions have taken place, after the punishable offence with regard to the teak was committed.

The Public Prosecutor Service opposes the (conditional) request of the defence to ask the Court of Justice of the European Union (to be named hereafter: the Court of Justice) for a preliminary ruling. The court can form an independent opinion on this. Apart from that, there is another legal remedy available, so the court is not obliged to have a preliminary ruling.

5.2 *Point of view of the defence*

[accused] has to be acquitted of the charge.

Regarding count 1 applies first of all that only [name 1] is economic operator. The Timber Regulation does not leave room to designate more persons and/or businesses jointly as economic operator. [co-accused 2] acted as advisor of [name 1], but [accused] did not play a part in the shipments mentioned in the indictment. [co-accused 3] has to be regarded as trader. Co-perpetration cannot be proved.

Apart from that, regarding the shipments the requirements of the Timber Regulation were indeed complied with. At the trial it was extensively explained how the system of care of the accused worked. The conclusions drawn regarding this in the file, cannot be taken over, for they are founded on incomplete information. With the assistance of this system of care, the documents were gathered, risks were analysed and these risks were sufficiently mitigated. The fact that the system works, was also confirmed by an additional forest investigation. All in all, it cannot be determined that the demands of the Timber Regulation were not complied with, and therefore count 1 cannot be proved.

If the court believes that count1 is proved, then it cannot be proved that this offence was intentionally committed. The public prosecutor adopts the position that it is sufficient for this that the committed behaviour was committed intentionally, but this is not correct. Since the accused assumed that the system of care was complied with, it cannot be proven that they have committed the offence (whether or not indirectly) with intent.

If the court does not acquit the accused of count 1 and does not agree with the defence regarding the explanation of the concept ‘economic operator’, then the request is made to the Court of Justice for a preliminary ruling.

With regard to count 2, based on the file it cannot be determined whether the teak mentioned in the indictment came from a crime. Therefore, it cannot be proven that [accused] has laundered this together with others.

5.3 *Opinion of the court*

5.3.1 *Summary*

The court believes that count 1 is proven based on the articles of evidence included in appendix II and the considerations included in the rubric 5.3.2. The court rules that [name 1] has brought the shipments teak from Myanmar mentioned in the indictment, to the European market as economic operator. With respect to this, the care requirements that arise from Article 6 paragraph 1 under c Timber Regulation were not complied with. While marketing these shipments, insufficient measures were taken to mitigate the risks of marketing illegally cut timber. [accused] was a co-perpetrator with [name 1] of this offence, and they have committed this offence deliberately. The fact that with regard to the shipments of the indictment, the demands under Article 6 paragraph 1 under a and b were not complied with, cannot be proved. Therefore, the court acquits [accused] and [name 1] of this part of the indictment.

Based on the considerations included in rubric 5.3.3, the court rules that count 2 cannot be proven. The court is namely not able to determine whether the teak mentioned in the indictment came from a crime. Therefore, it cannot be proven that the teak was laundered and the court acquits [accused] of this count.

5.3.2 *Explanation of the court's assessment of the evidence count 1*

5.3.2.1 *Shipments*

Based on the articles of evidence, the court determines that the shipments teak from Myanmar mentioned in the indictment were ordered by [name 1]. These shipments were cleared inwards in the Czech Republic. This working method was also confirmed by [co-accused 2] and [co-accused 1].

5.3.2.2 *Economic operator*

Article 4 paragraph 2 Timber Regulation determines that the care requirements of Article 6 paragraph 1 Timber Regulation apply to the economic operator. This turns the offence into a status crime. Therefore, the court will answer the question, in this rubric, who can be deemed as economic operator in this care.

Pursuant to Article 2 under c Timber Regulation, an economic operator is a natural person or a legal person who markets timber or wood products. Article 2 under b Timber Regulation defines marketing something as:

'Supplying, in any way, regardless of the used sales techniques, timber or wood products for the first time on the internal market, in view of distribution or use within the scope of a trade activity (…)'.

This definition of marketing can be interpreted in various ways. to explain certain parts of the Timber Regulation, the European Committee has issued a document under the name ‘Guidelines for the EU timber regulation’ (12 February 2016, C (2016) 755 (to be named hereafter: the Guidelines)). Even though the Guidelines are not legally binding, they are considered to be important with regard to interpreting the provisions of the Timber Regulation. [1] The Guidelines describe that timber is considered to be marketed, when it is supplied for the first time on the internal market in view of distribution, or use within the scope of a trade activity. Supplying for the internal market also means, pursuant to the Guidelines that the timber has to be physically present in the EU. Apart from that, in order to be released for free circulation, as far as this is relevant with regard to this, the timber will have to imported in the EU and will have to cleared inwards by the customs. Products only get the status ‘goods of the European Union’ after they have entered the customs territory of the customs union.

Furthermore, the Guidelines have included that for timber cut outside the EU, the economic operator is: the entity that acts as the importer if the timber is cleared inwards by the EU customs authorities for free distribution in the EU. Since the obligations from the Timber Regulation will apply for the economic operator when he markets the timber, the court rules that this explanation is also in line with the objective of the Timber Regulation; preventing that illegally cut timber is brought into the free distribution of goods of the EU. The court, therefore, rules that the Timber Regulation has to be explained in such a way that timber can be considered to have been marketed, on the moment that it cleared inwards by the customs in the EU, in view of distribution or the use within the scope of a trade activity.

It appears from the articles of evidence that [name 1] had the shipments of teak cleared inwards in the Czech Republic. It can also be determined that [name 1] had distribution or use within the scope of a trade activity in view, founded on the file. The timber was namely imported for the benefit of sale (to [co-accused 3]). [name 1] therefore marketed the teak within the meaning of the Timber Regulation and therefore has to be deemed as economic operator. The court does not see any reason to deem [accused] and/or [c-accused 3] each separately as economic operator.

Therefore, the conclusion is that of all accused only [name 1] can be deemed as economic operator within the meaning of the Timber Regulation.

5.3.2.3 Care requirements

As economic operator [name 1] has to comply with the duties of care of Article 4 and 6 of the Timber Regulation. Therefore, she has to apply a set of proceedings and measures that are sometimes jointly referred to as ‘system of care requirements’. This system has to contain the following elements.

Firstly, the measures and proceedings will have to observed that offer access to the information referring to the origin of the timber and the question whether the logging has been in agreement with the applicable legislation (Article 6 paragraph 1 under a Timber Regulation).

Secondly, the risk assessment proceedings have to be observed that enable the economic operator to analyse and to estimate whether the risk for marketing illegally cut timber, is negligible (Article 6 paragraph 1 under c Timber Regulation).

Lastly, these measures and/or risk limiting proceedings have to observed that are adequate to minimalize these risks effectively (Article 6 paragraph 1 under c Timber Regulation).

The objective of these demands is to prevent, as much as possible that illegally cut timber is brought on the European market.

The defence argued that [name 1] (summarized) has given substance to the system of care regarding the import of shipments of teak, in the following way.

The system of care used by [name 1]

It starts at purchasing the trunks at a sawmill. The sawmill accordingly purchases the trunks at the export auction of MONREC (National Forest Service of Myanmar). After accepting the offer by the Myanmar Timber Enterprise (to be named hereafter: MTE), the organization that is responsible for the actual cutting, the purchase is enforced by a delivery order. The official proof for the logging location of the trunks is the certified letter that is issued by the MTE. The defence says that a huge amount of documents form the foundation of this certified letter, for the MTE has to go through an extensive procedure, to be able to confirm where the trunks come from. The certified letter also contains information about the person responsible for uprooting the timber. This document also mentions whether the required proceedings for the uprooting are complied with and whether taxes have been paid. Before the shipment is loaded in the container to go to the harbour, this is checked by the Forest Department. After this check, MONREC issues a legality letter. This document is also checked by the Ministry of Forestry.

Apart from that, a so-called Green book is drawn up. In this book documents are gathered with reference to the timber. This concerns an export license, a customs declaration, a shipment document of goods, a phytosanitary certificate, a certificate of origin and a fumigation certificate. These documents offer, according to the defence, the information that needs to be acquired according to Article 6 paragraph 1 under a Timber Regulation.

Accordingly, a risk analysis is conducted within the meaning of Article 6 paragraph 1 under b Timber Regulation. By means of this analysis, an estimation is made of what the risk is that the timber concerned was cut illegally. This risk analysis will be conducted by Double Helix. Based on these analysis, it was concluded that the risk for illegal timber was not negligible.

Therefore, according to the defence, measures were taken to mitigate this risk, such as is required in Article 6 paragraph 1 under c Timber Regulation. The documents described above are verified by Double Helix. This means that Double Helix checks the available documentation for completeness and consistency. The delivery order, the certified letter and the legality letter are the most important documents for this purpose. That documentation will also have to be authorized by the right people and the right organizations. When everything has been approved, Double Helix issues a so-called traceability docket. With reference to all shipments mentioned in the indictment, these working method was observed. The defence states that the system of care this way complies with the demands of Article 6 paragraph 1 Timber Regulation.

Double Helix furthermore checked its verification system by means of an additional inquiry with reference to one specific shipment, namely: shipment 1837. Shipment 1837 was not charged, but can be regarded as a reference file, according to the defence. Double Helix gathered additional information for this shipment about the phase of the logging. The additional documents that Double Helix has requested, regarding this shipments, were issued by the government of Myanmar. These documents were not issued for every shipment, but without these documents, according to the defence, the delivery order, the legality letter and the certified letter will not be drawn up. Since these three documents are available for every shipment in the indictment, the defence says that it has to be the case that the documents that are the foundation of the shipments, have to exist for these shipments as well.

Another part of the additional inquiry of Double Helix with reference to shipment 1837 is a forest investigation. The report of this investigation was included in the file under appendix 2020. Regarding this forest investigation it was checked, among other things, whether documentation that existed, was also present in the local offices in the forest.
Apart from that, according to the defence, during this forest investigation it was determined that the trunks of shipment 1837 came from the places mentioned on the certified letter, and that the logging had taken place in accordance with the local legislation and regulations. The specific trunks were matched with the accompanying stumps in the forest, according to the defence. The defence has argued that it is not attainable to have this forest investigation conducted before every shipment, but because of the inquiry into this shipment, it was determined that this verification process of Double Helix works.

In short: the defence states that by using this system of care, the demands of Article 6 paragraph 1 Timber Regulation were complied with.

The assessment of the court of the system used by [name 1]

With regard to Article 6 paragraph 1 under a Timber Regulation – access to information

In this current case it was included in the indictment that: no, at least insufficient measures and/or proceedings were used that offer access to the correct information with reference to the country were the timber was cut, the subnational area where the timber was cut, the logging concession, the name and address of the person who supplied the timber to the economic operator and documents or other information from which it appears that the timber or timber products are in accordance with the applicable legislation. Therefore Article 6 paragraph 1 under a Timber Regulation was said not to be complied with. According to the public prosecutor, this follows from what was written about this by the NFCPSA in the file. However, the defence did adopt the position that this information was indeed available. This information namely follows from the delivery order, the certified letter and the legality letter that is available for every shipment. The court concludes that indeed there is information in the file and the documents submitted by the defence, about these topics. With regard to information referring to the logging concession, the logging concession itself may not be available, but the certified letter does contain a confirmation that all applicable regulations and legislation have been complied with. Therefore, this certified letter also confirms that the logging process was conducted in accordance with the logging concession. The fact that the information arising from the aforementioned documents may not be reliable because of corruption, is with regard to this part of the indictment not relevant. Article 6 paragraph 1 under a Timber Regulation only obliges the economic operator to clarify information with respect to the batch of timber and to make this information accessible. It cannot be determined whether no access is ordered with regard to information referring to the topics mentioned in the indictment. Therefore, it is not proven that [accused] and [name 1] have not complied with the demands from Article 6 paragraph 1 under a Timber Regulation. Therefore, the court acquits [accused] for this part.

Regarding Article 6 paragraph 1 under b Timber Regulation – risk analysis

The public prosecutor states that no appropriate analysis of the risk to illegally cut timber has been conducted, for article 6 paragraph 1 under a Timber Regulation has not been complied with. Considering the acquittal of accused with reference to the violating Article 6 paragraph 1 under a Timber Regulation, this reasoning does not apply. The defence also put forward that a risk analysis was indeed conducted, after which the conclusion was made that the risk for illegally cut timber without the application of mitigating measures is not negligible. It cannot be determined whether insufficient risk assessment proceedings were observed. Therefore, it was not proved that [accused] and [name 1] have not complied with the demand of Article 6 paragraph 1 under b Timber Regulation. The court, therefore, will acquit [accused] of this part.

The risk

It is a fact that at the moment of marketing the teak from Myanmar, the risk for marketing illegally cut timber was not negligible. This was never up for discussion in this case. What the risk entails is described in the file as follows.

In 2017, a group of experts with regard to the Timber Regulation that is directed by the European Committee (Commission Expert Group/Multi-Stakeholder Platform on Protecting and Restoring the World's Forests, including the EU Timber Regulation and the FLEGT Regulation, to be named hereafter: the Expert group) concluded that currently in a practical manner it is not possible to comply with the demands of the Timber Regulation while marketing teak from Myanmar. The general reason for this is described as the corruption index of the government of Myanmar being high. More specifically, it is a fact that at the order of the MTE, for years (up to and including 2016) more timber was cut than was planned. The excessive cut timber therefore had to be qualified as illegally cut timber. This timber was accordingly brought into the chain and mixed with legally cut timber. It is basically impossible to determine, in hindsight, which part was cut legally and which part was cut illegally. The import of teak from Myanmar could, despite this conclusion of the expert group, not be excluded categorically. If the economic operator uses a system of care with which assistance marketing teak from Myanmar does comply with the demands of the Timber Regulation, then she is not guilty of an offence.

With regard to Article 6 paragraph 1 under c Timber Regulation – mitigating measures
Since it was determined that the risk for importing illegally cut timber is not negligible, risk mitigating measures have to be taken, pursuant to Article 6 paragraph 1 under c Timber Regulation. An inspector of the NFCPSA describes in the file that it appears from analysis of the documentation referring to the shipments mentioned in the indictment that no measures were taken to clarify the missing information in the chain from the logging process up to the import, and thus to verify the correctness of the information. As was stated before, the defence adopts the position that by making use of the conducted system of care, no information is missing and that the risks indeed have been mitigated sufficiently. The court, however, rules that the system of care used by [name 1] is both in itself as in cohesion with the additional investigation of Double Helix, insufficient to effectively mitigate the risk for marketing illegally cut timber. For that, the following is causal.

For each of the shipment mentioned in the indictment, a delivery order, a certified letter and a legality letter are available. Double Helix has, as considered, checked these documents for its contents, among which for its consistency. Other investigation than the document inquiry does not take place in the verification system of Double Helix. The defence did put forward, broadly speaking that it can be deducted from which stump in the forest the supplied trunk (and after sawing even the plank) comes from. This could be done based on brand signs and/or hammer marks. That this has actually happened for the shipments of teak mentioned in the indictment, does not appear from the file and was also not put forward by the defence, let alone made plausible.

Regarding the shipment 1837, an additional forest investigation gathered the documents that are the foundation of the delivery order, the certified letter and the legality letter. These underlying documents were said to contain other information with reference to the phase of the logging process and the transport of the logging

location towards the auction. Apart from that, the defence stated that with regard to this shipment physical trunk investigation has taken place in the forest. Also [name 2] of Double Helix states this in the hearing at the examining magistrate. According to the judgment of the court, from the report regarding the additional forest investigation nothing more than document inquiry appears. After all, this report does not mention that physical investigation into stumps in the forest was conducted, how this investigation would have been conducted and/or what the results of this inquiry are. [name 2] refers in his hearing to the photos that were made of a stump in the forest. However, these photos cannot be related to a specific shipment or actually supplied trunks or planks.

The court therefore concludes that by means of both the regular verification system of Double Helix, and by the additional forest investigation, it can solely be inquired whether the drawn up documentation is complete and consistent. The court judges that this is not sufficient to mitigate the risk for illegally cut timber.

That is, given the circumstances that by order of the MTE for years, more timber was cut than planned, and that the illegally cut timber was brought into the chain as a mixture, according to the judgment of the court however, not sufficient to mitigate the risk for illegally cut timber. It is important that the documentation can be linked to the stump concerned and the stump to the actually supplied timber (trunk or plank). This is not possible based on just the submitted documents. The (visual) registration of brand signs or hammer marks on both the stump in the forest and the supplied trunks and planks is missing. Results of other physical investigations into the timber are also missing. Since the documentation cannot be linked to the stump nor to the supplied trunks or plans, the court rules that the chain of custody is not complete. The risk that the supplied timber was cut illegally is therefore not effectively mitigated by means of the system of care used by [name 1].

The defence has also put forward that the system of reporting the documents is detailed and complicated. The determined consistency between the documents therefore makes that the chance that information would be corrupted is small. For that to occur, a far-reaching or comprehensive corruption would be required and this is practically nearly impossible. This way, the defence however fails to notice that if the first document in the chain of custody contains corrupt information that this would extend to the documents, without the knowledge of the successive persons or bodies, who issued these documents. It is then very well possible that the documents are consistent and complete, as Double Helix investigated, but that this information is, nevertheless, not in agreement with reality. MTE of whom it has already been determined that they (partially) have cut illegally, is precisely the party that issues the first documents (delivery order and certified letter).

Since MTE has brought mixed legally and illegally cut timber into the chain, it is therefore important that it is checked whether the supplied timber – of which in the documentation a claim is made that it was cut legally – can indeed be linked to a

legally cut stump. Since the system of care used by [name 1] does not provide for means to check this, making use of this system cannot be regarded as an effectively mitigating measure.

The defence, furthermore, has put forward that all measures were taken that could be reasonably expected in view of the Timber Regulation. Apart from that, the risks of marketing illegally cut timber should only have to be minimalized as much as is feasible.

The court judges that the Timber Regulation cannot be thus explained that timber can be brought into the market when reasonable measures have been taken, even when the risk for illegally cut timber is not effectively mitigated because of this. Instead of this, in that case, the timber concerned should not be brought into the market. Since the measures taken have not have an effectively mitigating effect on the risk of marketing illegally cut timber, this defence does not succeed. The consideration of the Administrative Jurisdiction Division that '*an economic operator who applies the required system scrupulously (...) [is] not an offender* (omission by the defence), does not alter this. This consideration cannot be thus explained that the economic operator who applies a poor system of care scrupulously, is not an offender. Even when he would assume, wrongly that this system of care suffices.

Regarding this case it is of no importance that the competent authority in Sweden allegedly ruled that the Timber Regulation was complied with, with reference to marketing a specific shipment of teak from Myanmar, as the defence has put forward. Leaving aside the fact that the court does not know of the mitigating measures taken in that case, it holds that the court has an opinion on the shipments in this case, and of that it was determined that this did not comply with Article 6 paragraph 1 under c Timber Regulation.

It was proven that [name 1], when marketing the mentioned shipments teak, has not complied with Article 6 paragraph 1 under c Timber Regulation.

5.3.2.4 Co-perpetration

The fact that only Fariwind can be deemed as economic operator, does not mean that the offence deemed to be proved can be co-perpetrated. It appears from settled case law that for co-perpetrating a status crime, it is not required for all co-perpetrators to possess that status. The persons concerned who do not possess the status economic operator, can indeed be held liable as operators.

The court considers it proved that [accused] and [name 1] have co-perpetrated count 1. The following is causal for this.

[co-accused 2] has stated that he has approached [co-accused 1], for [accused] – because of problems with the NFCPSA – could no longer comply with the obligations with reference to the current orders for clients. Further to this, [co-accused 1] has

incorporated the company [name 1] and the current orders were transferred from [accused] to [name 1]. According to [co-accused 2], [accused] was not reimbursed for this. [name 1] has used the system of care regarding the import of the timber, which was originally created by [accused]. Evidenced by the money flow, [accused] was also involved with payments of a large part of the shipments mentioned in the indictment. With reference to one of the shipments with regard to which no involvement of [accused] from the money flow follows, a purchase order was found though, with written on it '[accused] order]'.

These findings show a close and conscious cooperation between [accused] and [name 1] regarding the import of teak from Myanmar. The defence of the accused regarding this point is rejected.

The fact that [co-accused 3] has co-perpetrated the offence, cannot be proven, because the behaviour that [co-accused 3] has performed with regard to count 1, could also be explained from the role of trader within the meaning of the Timber Regulation. Therefore, it cannot be proved that [co-accused 3] has cooperated with the economic operator that close and conscious that she would have to be deemed as co-perpetrator with the economic operator. This opinion was further explained in the judgments regarding [co-accused 3] (with public prosecutor's office number 81/052755-22) that was pronounced simultaneously with this judgment.

5.3.2.5 Intent

The court considers it proved that the offence was deliberately committed. Different from what the public prosecutor has argued, the case law gives cause to assume that also with regard to economic criminal law, something more (at least something) is needed than just the single finding that the behaviour itself was performed deliberately. [2] This applies even more, since the accused were charged with having deliberately acted contrary to the Timber Regulation. Therefore, the court has to judge whether the accused already (whether or not indirectly) had the intent to act contrary to the Timber Regulation.

The defence argues that there is not a case of (indirect) intent regarding the offence. [co-accused 2] has stated that he had full confidence that the system of care was in accordance with the demands of the Timber Regulation. Even though the NFCPSA imposed an order subject to a penalty for non-compliance and the court in preliminary relief proceedings upheld this, but [co-accused 2] did not agree to this and furthermore, after this, an additional forest investigation was added to the system of care. The NFCPSA did not assess the added system of care anymore, but [co-accused 2] was convinced, despite all this that the system of care was sufficient now.

[co-accused1] stated that [co-accused 2] accordingly convinced him that the system of care complied with the demands of the Timber Regulation. He also knew, however that the NFCPSA had previously rejected the system of care. [co-accused 1] namely stated that he incorporated [name 1], because the trade of [accused] was no longer possible in the Netherlands, because of the difference of opinion with the NFCPSA.

The court rules that it is proven that [accused] and [name 1] have had indirect intent regarding the offence. They namely knew that the system of care of [accused] was rejected by the NFCPSA. The court therefore judges that there was a reasonable chance that the system of care would still not comply with the demands of Article 6 paragraph 1 under c Timber Regulation, even after adding the additional investigation. This is all the more cogent given that the additional investigation only regarding one shipment. [co-accused 2] and [co-accused 1] have had to be aware of this remarkable chance. This appears from the fact that they no longer proceeded the import of timber via the Netherlands, but via the Czech Republic, so they could avoid the NFCPSA. By acting the way they did, they have also consciously accepted that remarkable chance. Therefore the court considers it proved that [accused] and [name 1] have committed count 1 intentionally.

5.3.2.6 Place where the offence was committed

The court firstly judges that the Czech Republic holds as the place where the offence was committed, for the teak was brought into the European market when it was cleared inwards by [name 1] in the Czech Republic.
The court also deems the Netherlands as a place where the offence was committed. The defence has adopted the position that this is not possible because there is a matter of an offence of omission. What was neglected, namely complying with the care requirements, should have been performed in the Czech Republic. Therefore, it does not matter where the perpetrator(s), as a matter of coincidence, were at that moment. By this, the defence has failed to notice that regarding this offence, there is also a matter of a commission component. Not only neglecting to comply with the demands of the Timber Regulation is part of the indictment, but also marketing teak, regardless. [accused] is established in the Netherlands and has operated from the Netherlands. Therefore, [accused] has co-perpetrated the offence from the Netherlands. Since there is a matter of co-perpetration, all charged conducts can be attributed to both [accused] and [name 1]. Therefore, both places where the offence was committed apply to [accused] and [name 1].

5.3.2.7 (Conditional) request for a preliminary ruling

The defence has conditionally requested the Court of Justice for a preliminary ruling regarding the explanation of the concept of ‘economic operator’. The court does not get around to these requests, for the court explains the concept of economic operator in the same way as the defence. The court namely judges that [name 1] has to be regarded as economic operator and that she has become economic operator on the moment of clearing the shipments of teak inwards. With reference to the question what the obligations of the economic operator are, the court also follows the point of view of the defence. The obligations for the economic operator came into being in the Czech Republic, where the timber was cleared inwards. The fact that the court, apart from that, based lawfully participation provisions, reaches the conclusion that there is

a matter of co-perpetration, and that therefore the Netherlands are also deemed as a place where the offence was committed, does not change this. This is a matter of explanation of Dutch law that is not based on EU regulations and the Court of Justice is not called upon to explain that.

5.3.3 *Stating the reasons of acquittal for count 2*

Under 2 it is charged that [accused] jointly with other has laundered 178.2517 cubic metre of teak. This regards teak of the shipments from Myanmar, as was included in the indictment under 1. The sole conclusion that a crime with regard to an object was committed, it not sufficient to determine that this object also came from the crime, as appears from case law of the Supreme Court. [3] The fact that the timber was not marketed with due observance of the correct care requirements, does not make the timber itself an object coming from a crime. Since in this case no judgment is given regarding the question whether the timber of the charged shipments was cut illegally, it is not possible to determine, based on the file that the timber came from a crime. Therefore the court does not consider it proved that the teak was laundered and the court therefore acquits [accused] from count 2.

6 Judicial finding of fact

The court considers it proven that [accused]

Regarding count 1:
In the period from 1 January 2018 up to and including 3 December 2019 in the Netherlands and in the Czech Republic,

jointly and conjunction with others, several times,
intentionally,

has acted contrary with an – by ministerial regulation, to wit the Regulation Nature Conservation – indicated regulation of a EU Regulation, to wit Article 4 of the Regulation (EU) no. 995/2010 of the European Parliament and the Council of the European Union of 20 October 2010 to adopt the obligations of the economic operators who market timber and wood products (OJEU 2019, L 295),

by, as an economic operator, not exercising care with respect to marketing timber, to wit:

by acting contrary to the system of care requirements of Article 6, paragraph 1, of this regulation, because they, accused, and their co-perpetrators, at:

- shipment 1801 and 1802, a party of 37,4533 cubic metre teak;
- shipment 1903, a party of 23,8238 cubic metre of teak;
- shipment 1904, a party of 23,6784 cubic metre of teak;
- shipment 1905, a party of 23,9151 cubic metre of teak;
- shipment 1906, a party of 23,0473 cubic metre of teak;

- shipment 1907, a party of 23,839 cubic metre of teak and
- shipment 1908, a party of 23,4948 cubic metre of teak;

insufficiently,

c, have observed a whole of measures and/or risk limiting proceedings that are in proportion to that risk and are sufficient to effectively minimize these risks.

As far as there are language mistakes and/or writing errors in the indictment, they have been corrected. The accused is not prejudiced regarding his defence because of this.

7 The liability to punishment of the offence

The offence considered to be proved is punishable according to the law. The existence of a justification defence has not become plausible.

8 The liability to punishment of the accused

No circumstance has become plausible that excludes the liability to punishment of the accused. Therefore, the accused is punishable.

9 Stating the reason of the punishment

9.1 *The demand of the public prosecutor*

> The public prosecutor has demanded that [accused] will be sentenced, for the offence to be considered proven by him, for a fine of € 100,000.00 of which € 50,000.00 suspended with an operational period of 3 years.

9.2 *Point of view of the defence*

> The defence did not put up a defence against the sentence demanded by the prosecution.

9.3 *The opinion of the court*

> The sentencing that now follows is in accordance with the gravity of the offence deemed to be proven and the circumstances under which they were committed.
>
> [accused] together with [name 1] is guilty of co-perpetrating as economic operator of importing teak from Myanmar, without – with regard to this – complying with the demands of the Timber Regulation. The Timber Regulation came into being in order to combat the illegal logging and the trade connected to it. Illegal logging is a serious social problem of major international importance. This contributes to deforestation and that way threatens the biodiversity. This also undermines sustainable forestry and

sustainable forest development. It can contribute to desertification and erosion and can deteriorate extreme weather conditions and floods. By not complying with the care requirements that arise from the Timber Regulation, and by marketing timber, [accused] has run the risk that this timber would have been cut illegally. [accused] was warned, but has made her own commercial interest of more importance than social interest and continued via [name 1] to import teak from Myanmar.

The court has taken notice of the Extract Judicial documentation of the accused of 20 May 2022, from which it appears that [accused] has not been sentenced for a criminal offence before.

The court considers that the offences were committed in 2018 and 2019. The first apparent prosecution act has occurred on 3 December 2019, when searches took place. The sentence takes place three years later on 12 December 2022, while the reasonable term in criminal proceedings is usually two years. In this case the court judges however that a longer term is reasonable, because it is a complicated case with international aspects. Therefore, the court determines an exceeding of the reasonable term by six months. The court will take this into account in the advance of [accused], while determining the punishment.

Lastly, the court takes into account the punishment imposed on [co-accused 2] for having actual control of the conduct that was proven in the current judgment, namely 240 hours of community punishment. The court feels that it is important, with regard to the gravity of the offence that [accused] is imposed with a separate punishment. The court, therefore, considers a suspended fine of € 50,000.00 is suitable. This punishment also functions as a deterrent, to prevent that [accused] will again commit (similar) criminal offences.

The public prosecutor has demanded that an operational period of 3 years is determined at the suspended punishment. The court does not feel there is reason, because of the time period between the offence and the sentence, to determine an operational period exceeding 2 years. The court, therefore, determines the operational period for 2 years.

10 Applicable legal provisions

The, to be imposed punishment is founded on the following Articles

- 14a, 14b, 14c, 23 (old), 47, 51 and 57 of the Penal Code;
- 4 of the Regulation (EU) no. 995/2010 of the European Parliament and the Board of 20 October 2010 to determine the obligations of economic operators who market timber and wood products;
- 4.1 of the Regulation Nature Conservation;
- 4.8 Nature Conservation Act and
- 1a, 2 and 6 of the Economic Offences Act,

11 Decision

The court reaches the following decision, based on the above.

Partially invalidates the summons with regard to the charges under 2, as was mentioned above in rubric 4.1.3.

States that the charges under 2 are not proved on the ground of insufficient evidence and acquits the accused for that.

States that it is proved that accused has committed the offence that he is charged with under 1, as was mentioned above in rubric 6.

States that what the accused is charged with other than what is proved above, is not proved on the ground of insufficient evidence and acquits the accused for that.

The proven facts constitute:

Co-perpetrating a minor offence of a regulation, stated pursuant to Article 4.8 of the Nature Conservation Act, committed deliberately by a legal person, committed several times

States the proven fact punishable.

States accused, **[accused],** punishable for that.

Sentences accused for a **fine** of **€ 50,000.00** (fifty thousand euros).

Demands that this fine is not executed, unless ordered differently.

Determines with regard to this, an operational period of 2 (two) years.

The execution can be ordered, if the convicted person is guilty of a criminal offence before the end of the operational period.

This judgment was delivered by

mr. A.C.J. Klaver, chairman,
Mrs G.H. Marcus and M. Smit, judges,
In the presence of mr. J.C. Roodenburg, clerk of the court,
And pronounced in open court of this court on 12 December 2022.

[1] See Administrative Jurisdiction Division 28 October 2020, ECLI:NL:RVS:2020:2571, r.o.7.1.4
[2] Compare The Supreme Court 07 January 2014, ECLI:NL;HR:2014:24, (conclusion A- G Harteveld, 0.6.8), Dutch Law Reports 2014/65
[3] The Supreme Court 13 March 2018, ECLI:NL:HR:2018:327, m.nt. H.D. Wolswijk, r.o. 3.4.2