Obligations of operators who place timber and timber products on the market

2008/0198(COD) - 01/03/2010 - Council position

The Council adopted its position, with the Netherlands delegation voting against and the United Kingdom delegation abstaining. The proposal is based on the principle of due diligence and focuses on the first time that timber and timber products are placed on the internal market. The Council has maintained the spirit of the Commission's systemic approach. It has therefore focused on elaborating the legal requirements for proactive behaviour on the part of the operator.

In its first reading, the European Parliament adopted 75 amendments. The Council's position at first reading incorporates a number of Parliament's amendments, in part or in spirit. Notable among them are the following:

- particular attention should be made to the impact of the Regulation on small and medium-sized enterprises (SMEs);
- the scope of the Regulation should not exclude timber and timber products which are subject to mandatory sustainability criteria;
- the Commission should recognise monitoring organisations which intend to carry out its activities in more than one Member State.

However, other amendments were not reflected in the Council's position because the Council considered that they were rendered unnecessary in the light of the way in which the text had evolved. It introduced a number of changes resulting from the entry into force of the Lisbon Treaty on 1 December 2009, in particular the legal framework that will be constructed to replace the comitology system. The Council's position at first reading also includes a number of changes other than those envisaged in the European Parliament's position at first reading. The main ones are as follows:

Definitions: the following changes were made to the original proposal:

- the definition of “timber and timber products” was modified to indicate that recycled timber products - that is timber products or components of such products manufactured from timber and timber products that have completed their lifecycle and would otherwise be disposed of as waste- will not be covered by that definition as it was considered that it would be disproportionate to require operators to ascertain information concerning the original source of timber present in recycled products;
- the proposed exception for timber and timber products which are subject to mandatory sustainability criteria was deleted;
- it was clarified that the timber products derived from timber or from timber products which have already been placed on the market should not be covered by the definition of "timber and timber products";
- the Council clarified the meaning of "the placing on the market" by adding that it included all selling techniques. Supply by means of distance communication is also covered;
- the notion of sub-national region of harvest was added to cover cases in which there are regional differences within a country;
- the definition of 'country of harvest" was extended to include not only countries but also territories;
- the definitions of “risk management” and "monitoring organisation" were deleted because it was considered that these concepts were more comprehensively described in the operative clauses.

Applicable legislation: the definition of applicable legislation is one of the core issues of the draft regulation since the operator would be obliged to have access to information about the compliance of timber and timber products with the applicable legislation. The Council has endeavoured to strike the right balance between an extended list of areas of legislation and a list that enumerated the relevant areas of legislation in general terms. It has broadened the definition put forward in the Commission proposal to include forest-related legislation, including environmental legislation as well as trade and customs legislation, as far as the forest sector is concerned. The Council has added "third parties' legal rights concerning use and tenure" which can be seen as approaching the line taken by Parliament when it mentions "property tenure and rights of indigenous people". However, the Council considered Parliament's amendments concerning the inclusion of labour and community welfare legislation to be problematic from a legal and practical point of view.

Due diligence systems: the Council considered it important that the main elements in the draft Regulation were clarified. Therefore it has elaborated three elements of the due diligence system: access to certain information, the risk assessment procedure and the risk mitigation procedure. Parliament also saw the need to set out clearly the two elements of risk identification and risk minimisation.

For the risk assessment procedures the Council set out four risk assessment criteria. It has endeavoured to distinguish between the risk assessment and risk mitigation procedures, according to different factors such as the complexity of the product and its origin, without explicitly indicating situations which require special attention, in the form of either stricter or lighter requirements. Unlike Parliament, the Council did not extend the obligation of due diligence to operators other than those who place timber and timber products on the internal market for the first time. Such an extension was considered to be unduly burdensome.

The Council introduced the possibility for the operator to choose between three different due diligence systems, their own, a due diligence system provided by a monitoring organisation or a system provided by a third party.

Scope: like Parliament, the Council also deleted the proposed exemption for timber subject to mandatory sustainability criteria in the Commission proposal.

Annex: the timber products in the Annex are re-numbered according to the numbering of the CN codes. Some product categories are added. It considered that at this stage the burden on operators would be too heavy if other categories are added.

Monitoring organisations: the Council shared Parliament's view that it was important to have harmonised standards across the EU and suggested that the Commission should also recognise monitoring organisations. It distinguished between monitoring organisations which intend to carry out activities in one Member State and in several Member States. It agreed that the Commission should recognise those organisations carrying out their activities in several Member States. However it was considered more practical for a Member State's competent authority to be responsible for recognising monitoring organisations carrying out their activities only in that Member State. Like Parliament, the Council considered it important that the monitoring organisation should carry out its functions in a manner that avoids any conflict of interest. It was not deemed necessary to distinguish between the private or public monitoring organisations.

Penalties: the Council considered adding a list of penalties but after extensive discussion, it decided to retain the language of the Commission's proposal which is agreed language for EU legislation. Many Member States were of the opinion that the level and content of penalties were within the sphere of Member States' competence. Furthermore the setting out of a list of penalties raised some practical issues such as the exhaustiveness of the list and difficulties in identifying at this stage all possible infractions.

Prohibition: the Council has kept the spirit of the Commission proposal for a systemic approach. Operators should use a due diligence system to minimise the risk of placing illegally harvested timber or timber products on the market. The Council does not concur with Parliament's view that a prohibition should be introduced. Such an extension of the scope was not considered to be in line with the spirit of the proposal and is therefore unacceptable.

Application: since it was felt to be unrealistic to make the Regulation applicable only one year after its entry into force, it is provided that the Regulation will apply 30 months after entry into force, to give operators time to adjust to the new situation and for the implementing measures to be adopted.

Situation of SMEs: like Parliament, the Council has taken into account the special situation of SME's and introduced the notion of negligible risk. The Regulation also provides that the delegated acts which will amend and supplement the list of timber and timber products set out in the Annex should not create a disproportionate burden on operators. In the article on reporting, the Council added that the review should in particular take into account the administrative consequences for SMEs.

Recitals and references to environmental issues (sustainable forest management): Parliament in its first reading added a considerable number of recitals to take account of the forest environment, biodiversity, forest ecosystems and sustainable forest management. The Council considers that, since the due diligence system and the behaviour of operators is at the heart of the Regulation, such references are superfluous, however desirable the objectives. In addition, recitals serve to justify the provisions of the Regulation, while here there are no operative provisions to which such recitals could be linked.

Other changes made by the Council

Status of timber products covered by FLEGT and CITES: the provision on timber and timber products covered by FLEGT and CITES was set out in a separate Article because the Regulation considers FLEGT licenses and CITES certificates to be sufficient evidence of legal harvesting.

Cooperation between competent authorities: the Council was of the opinion that only serious shortcomings needed to be subject to an exchange of information. It also specified that the types of penalties imposed should be covered by the exchange of information.

Subject matter: the Council has added that the aim of the legislation is to minimise the risk of placing illegally timber or timber products derived from such timber on the market.

Lisbon Treaty changes: since the Council considers that powers should be delegated to the Commission pursuant to Article 290 of the Treaty on the Functioning of the European Union, it added three new Articles necessary for such delegated acts and has adapted the provisions for the adoption of implementing measures pursuant to Article 291 TFEU.

The Council believes that its position at first reading is in line with the fundamental objectives of the Commission's proposal, representing a balanced package of measures that would contribute to the pursuit of the objectives of combating illegal logging.