



**COUNCIL OF  
THE EUROPEAN UNION**

**Brussels, 1 March 2010**

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**Interinstitutional File:  
2008/0198 (COD)**

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**5885/4/10  
REV 4 ADD 1**

**AGRI 31  
ENV 50  
FORETS 17  
CODEC 75  
DEVGEN 40  
RELEX 102  
JUR 52  
UD 30  
WTO 30  
PROBA 13**

**STATEMENT OF THE COUNCIL'S REASONS**

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Subject : Position at first reading adopted by the Council on **1 March 2010** with a view to the adoption of a Regulation of the European Parliament and of the Council laying down the obligations of operators who place timber and timber products on the market

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**STATEMENT OF THE COUNCIL'S REASONS**

## **I. INTRODUCTION**

1. On 17 October 2008, the Commission submitted a proposal for a Regulation of the European Parliament and of the Council laying down the obligations of operators who place timber and timber products on the market. The proposal is based on Article 192 (1) of the Treaty on the Functioning of the European Union (TFEU).

2. The European Parliament adopted its position at first reading on 22 April 2009<sup>1</sup>. The Economic and Social Committee delivered its opinion on 1 October 2009 and the Committee of the Regions indicated that it did not intend to deliver an opinion.

3. On 1 March 2010, the Council adopted its position at first reading in accordance with Article 294 TFEU.

## **II. OBJECTIVES**

The purpose of the Regulation is to minimize the risk of placing illegally logged timber on the internal market. It 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 a proactive behaviour on the part of the operator.

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<sup>1</sup> 8881/09

### **III. ANALYSIS OF THE COUNCIL'S POSITION AT FIRST READING**

#### **1. General observations**

In its first reading on 22 April 2009, the European Parliament (EP) adopted 75 amendments.

The Council's position at first reading incorporates a number of the European Parliament's amendments, in part or in spirit. Notable among them is that particular attention should be made to the impact of the Regulation on small and medium-sized enterprises (AM 22, 29, 47, 72), that the scope of the Regulation should not exclude timber and timber products which are subject to mandatory sustainability criteria (AM 21, 32) and that the Commission should recognise monitoring organisations which intend to carry out its activities in more than one Member State (AM 51-56).

However, other amendments were not reflected in the Council's position at first reading because the Council considered that they were rendered unnecessary in the light of the way in which the text had evolved. The Council 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. As the EP position at first reading was delivered approximately seven months before the entry into force of the Lisbon Treaty the amendments related to comitology were not taken into account as they were no longer relevant.

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 following sections describe the substantive changes. In addition, there are drafting changes to clarify the text or to ensure that the Regulation is generally consistent.

## 2. Specific comments

### 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 (AM 21, 32);
- 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"(AM 34);
- the Council specified the meaning of "the placing on the market" by adding that it included all selling techniques, it also added that supply by means of distance communication was 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 respective Article.

## **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. The Council has broadened the definition put forward in the Commission proposal to include forest-related legislation, including directly 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 the EP when it mentions "property tenure and rights of indigenous people" (AM 38). However, the Council considered the EP'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. In its AM 37 the EP also saw the need to clearly set out the two elements of risk identification and the risk minimisation.

For the risk assessment procedures the Council set out four risk assessment criteria that can be supplemented pursuant to Article 290 of the TFEU.

In its Article 5 (1) (b) and (c) the Council endeavoured to distinguish between the risk assessment and the 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 (AM 47).

Unlike the EP, 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 (AM 15, 17, 19, 20, 31, 33, 35, 41, 42, 43, 50). 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 the EP, the Council also deleted the proposed exemption for timber subject to mandatory sustainability criteria in the Commission proposal (AM 21, 32).

### **Annex**

The Council rearranged the timber products in the Annex according to the numbering of the CN codes and added some product categories. It considered that at this stage the burden on operators would be too heavy if other categories are added (AM 74, 75).

## **Monitoring organisations**

The Council shared the view of the EP that it was important to have harmonised standards across the EU and suggested that the Commission should also recognise monitoring organisations. The Council distinguished between monitoring organisations which intend to carry out activities in one Member State or in several Member States. It agreed that the Commission should recognise those organisations carrying out their activities in several Member States (AM 51, 53, 54, 55, 56) cf. (Article 7(3)). 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 the EP, the Council considered it important that the monitoring organisation should carry out its functions in a manner to avoid any conflict of interest (AM 51) (cf. Article 7(2)(c)). It was not deemed necessary to distinguish between the monitoring organisation being a public or a private entity (AM 51, 52).

## **Penalties**

The Council considered adding a list of penalties (AM 69) but after extensive discussion 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 the view of the EP that a prohibition should be introduced to ensure legality (AM 17, 19, 31, 42 (as regards Article 3(1)), 43, 50, 71). Such an extension of the scope was not considered to be in line with the spirit of the proposal and is therefore unacceptable.

## **Application**

The Council considered that it would be unrealistic, to make the Regulation applicable only a year after its entry into force, no matter how desirable (AM 73). Therefore, and in order to give the operators time to adjust to the new situation and for the implementing measures to be adopted it was suggested that the Regulation should begin to apply 30 months after its entry into force.

## **Situation of small and medium-sized enterprises/operators**

Like the EP, the Council has taken into account the special situation of small and medium-sized enterprises and operators (AM 22, 29, 47, 72). It has for example introduced the notion of *negligible risk* in Article 5(1)(c). It is set out in Article 12 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 Article 18 on reporting, the Council added that the review should in particular take into account the administrative consequences for small and medium-sized enterprises.



## **Recitals and references to environmental issues (sustainable forest management)**

The EP has added a considerable number of recitals to take account of the forest environment, biodiversity, forest ecosystems and sustainable forest management (AM 2-8, 10, 11, 14). The Council considers that since the due diligence system and the behaviour of the operators to minimise the risk of placing illegally logged timber and timber products on the market 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 operational provisions to which such recitals could be linked.

## **Review**

The Council concurred with the EP that it is necessary that the Commission carries out a review of the Regulation and that this review should in particular address the administrative consequences for small and medium-sized enterprises (AM 72).

### **3. 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 in Article 11. The Council also specified that the types of penalties imposed should be covered by the exchange of information.

## **Subject matter**

In order to clarify the purpose of the obligations laid down in the Regulation the Council has added that the aim 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 in Articles 5(3) and 7(7) and 12 as well as a new recital. Similarly, the Council adapted the provisions for the adoption of implementing measures pursuant to Article 291 TFEU.

## **IV. CONCLUSION**

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

The Council looks forward to constructive discussion with the European Parliament with a view to achieving a workable agreement on this Regulation.

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