Mini-Briefing: Advantages and Disadvantages of a General Prohibition and Due-Diligence System

**QUESTION:** What are the advantages and disadvantages of having a general prohibition in addition to a due diligence system? What is the strongest argument to support having both?

**ANSWER:** As a general matter, a general prohibition is a timber-specific inquiry while the due-diligence requirement is an operator-specific inquiry; one gets at the legal status of the timber while the other gets at operators’ efforts to determine that legal status. A violation of the general prohibition is the act of trading illegal timber. A violation of the due-diligence requirement is the failure to implement an adequate due-diligence system.

The benefits of each system derive from its characteristics, which can be summed up as follows:

<table>
<thead>
<tr>
<th>General Prohibition</th>
<th>Due Diligence System</th>
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<tbody>
<tr>
<td>Focuses on legal status of timber.</td>
<td>Focuses on efforts of operators.</td>
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<tr>
<td>Violation is based on legal status of timber.</td>
<td>Violation is based on actions of operator.</td>
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<tr>
<td>Penalties may be mitigated by due diligence.</td>
<td>Penalties apply regardless.</td>
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There are strong policy justifications for having both a general prohibition and due-diligence system.

- **Policy Justifications for General Prohibition**
  - Ensures that illegal timber cannot be traded on the EU market without being in violation of the regulation, directly addressing the objective of the regulation (a due-diligence system alone does not guarantee that this will occur).
  - Provides powerful incentives for operators to source timber with adequate guarantees regarding its legality and/or create due-diligence systems that effectively keep illegal timber off the EU market.
  - Complements the FLEGT program, creating incentives for timber-producing countries to negotiate VPAs that will guarantee the legality of its timber.
  - Provides a clear basis for criminalising violations of the regulation.
  - Expands the tools available to competent authorities to enforce the regulation.

- **Policy Justifications for Due-Diligence System**
  - Requires all operators to take concrete steps to ensure the legality of their timber.
  - Induces enduring changes in the EU timber market, changing the culture of the timber industry by requiring good practices and habits.
  - Allows for simplified systems for small businesses, which may later form the basis of reducing penalties for small- and medium-sized enterprises that are found to be in violation of the regulation.

*ClientEarth (www.clientearth.org) is a non-profit organisation of lawyers and policy experts that fuse law, science, and policy to create strategic solutions to key environmental challenges. For more information, please contact Tim Grabiel at tgrabiel@clientearth.org or +33.6.32.76.77.04 (Paris).
- Facilitates implementation and enforceability.
- Provides operators flexibility in implementing systems to deliver the desired result.

• **Policy Justifications for Both a General Prohibition and Due-Diligence System**
  - Captures the benefit of both approaches identified above.
  - Creates upward compliance pressures, i.e., incentivizes operators to exercise more due diligence than the minimal required in order to satisfy the requirements of the regulation since the operators need to ensure that the timber is, indeed, legal.
  - Closes the “violation gap” in the regulation where no violation would exist in the instance that the timber is illegal but the due-diligence system passes regulatory muster.

• **Downsides to Simply Requiring Due Diligence**
  - Creates the possibility that illegal timber could be traded on the market and no violation would occur, otherwise known as the “violation gap.”
  - Incentivizes importing timber through weakest point of entry.
  - Creates downward compliance pressures, i.e., incentivizes operators to exercise the minimal amount of due diligence to meet an arbitrary regulatory threshold (low bar) rather than incentivizing operators to exercise due diligence sufficient to ensure the legality of the timber traded on the market (high bar).

I would consider the strongest argument in support of both proposals to be that it is the only way to close the “violation gap” while still ensuring enduring changes in the culture of the timber industry. As discussed in detail in the mini-briefing on complementarity, in the absence of general prohibition to accompany a due-diligence requirement, it is possible for illegal timber to be traded on the market with no violation occurring whatsoever otherwise known as the “violation gap.” The violation gap could happen for several reasons. On the one hand, a due-diligence system may be adequate to meet regulatory requirements but inadequate to expose illegal timber. This could be due to lower-than-needed regulatory standards for due diligence or loopholes in the regulation. On the other hand, competent authorities in certain Member States may apply a lenient or forgiving due-diligence standard, either purposefully or through generous review of an operator’s actions. This could be due to a variety of reasons, including differing views on what constitutes due diligence, the politics underlying an enforcement decision, conflicts of interest, or their role in curbing the illegal-timber trade. In either instance, because it is largely a subjective determination, the objective of excluding illegal timber from the market may be thwarted, compromising the internal market and leading to weakest points of entry. But these are the concerns that motivated the EC legislature and the Commission to take action in the first place. Therefore, any violation gap should be considered a profound regulatory failure since the purpose is to prevent illegal timber from being sold in the EU.

Any violation gap should be considered a profound regulatory failure since the purpose of the Illegal-Timber Regulation is to prevent illegal timber from being sold in the EU.

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