

VAN BAEL & BELLIS



**The proposed Forced Labour
Products Ban Regulation ready
for trilogue discussions**

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On 26 January 2024, the Council of the EU (“Council”) adopted its **negotiating position** on the Proposed Regulation prohibiting products made with forced labour on the European Union (“EU”) market (“the Proposed Regulation”), which paves the way for the interinstitutional discussions (the trilogue) and the final adoption of the Regulation. The Council put forward important amendments as compared to the **original proposal** tabled by the European Commission (“Commission”) in September 2022 and the **negotiating position** adopted by the European Parliament (“EP”) in November 2023.

The Proposed Regulation sets out a legal framework for preventing that products made using forced labour enter or leave the EU market. This forced labour products ban will apply to all economic operators “placing or making available” on the EU market, or exporting from the EU, products made using forced labour.

This client alert focuses on the key differences in the positions of the three EU institutions. For additional information on the Proposed Regulation, please refer to our **Client Alert** of 15 September 2022 and the **Client Alert** of 23 October 2023.

KEY AMENDMENTS PROPOSED BY THE COUNCIL AND ISSUES FOR THE TRILOGUE

The Council’s negotiating position proposes to:

- clarify the scope of the “supply chain” subject to the ban;
- clarify that the Proposed Regulation does not create new independent due diligence obligations;
- clarify the scope of the investigatory powers of the Commission (limited to situations where the products concerned are of Union interest);
- include more detailed rules on field inspections;
- centralise decision-making at the EU level;
- envisage additional consultations with economic operators prior to the adoption of a final decision affecting them;
- include more detailed rules on penalties; and
- enhance coordination and collaboration among the Member States competent authorities as well as between those authorities and the Commission.

The table below outlines the main differences between the negotiating positions of the Commission, the EP and the Council, on which a consensus will need to be found during the trilogue.

NEXT STEPS IN THE LEGISLATIVE PROCESS

The interinstitutional negotiations are expected to start imminently, with a view to agreeing on a final text of the Proposed Regulation before the European elections in June 2024. After reaching a political agreement, the compromise text will need to be formally adopted by the Council and the EP, following which the Regulation will be published in the EU Official Journal and enter into force.

THE EU FORCED LABOUR PRODUCTS BAN REGULATION: ISSUES FOR THE TRILOGUE

Topic	Commission's proposal	EP's negotiating position	Council's negotiating position
<p>Scope</p>	<ul style="list-style-type: none"> Ban on making available on the EU market products made with forced labour or forced labour imposed by State authorities = a product for which forced labour has been used in whole or in part at any stage of its extraction, harvest, production or manufacture, including working or processing related to a product at any stage of its supply chain. Making available on the market covers also products offered for sale online or through other means of distance sales (the offer for sale must be targeted at EU users). Does not cover products that have reached EU end-users. 	<ul style="list-style-type: none"> Support for the Commission's proposal. Clarification of the definitions of "forced labour" and "forced labour imposed by State authorities". Definition of "supply chain": all operators involved at all stages upstream of the product being made available on the EU market. 	<ul style="list-style-type: none"> Support for the EP's negotiating position. Clarification of the definition of "supply chain": explicit reference to "product or parts of the products to be incorporated in the final product to be made available". Online/distance sales – products are deemed to be made available on the market if their offer is targeted at EU users, i.e. if the relevant economic operator directs, by any means, its activities to one or more Member States. No new due diligence obligations beyond those envisaged in the draft Corporate Sustainability Due Diligence Directive.
<p>Investigating authority</p>	<ul style="list-style-type: none"> Member States competent authorities. 	<ul style="list-style-type: none"> Member States competent authorities + the Commission. 	<ul style="list-style-type: none"> Member States competent authorities + the Commission (if products concerned are of Union interest). Union interest: <ul style="list-style-type: none"> Assessment based on all relevant, verifiable and credible information available. Assumed if at least one of the following criteria is met: (i) significant scale and severity of suspected forced labour; (ii) the risks of suspected forced labour are located outside of the EU; (iii) the products suspected to have been made with forced labour have a significant impact on the internal market (products available in at least 3 Member States).
<p>Submissions by interested parties</p>	<ul style="list-style-type: none"> By any natural or legal person or any association not having legal personality. Competent authorities to assess submissions and to inform interested parties of the outcome of their assessment. 	<ul style="list-style-type: none"> Support for the Commission's proposal. Assessment can also be made by the Commission. The Commission to set up a dedicated centralised mechanism for the submission of information. 	<ul style="list-style-type: none"> Support for the EP's negotiating position. Submissions to be made through a single information submission point, to be set up by the Commission, on the forced labour single window. If products concerned are of Union interest → The Commission to proceed with the preliminary phase. If products concerned are not of Union interest → submission to be directed to a competent authority.

Topic	Commission's proposal	EP's negotiating position	Council's negotiating position
Preliminary phase of investigations	<ul style="list-style-type: none"> • Risk-based approach. • Assessment of likelihood that an economic operator violated the ban – based on all available information (submissions by interested parties, risk indicators, the database of forced labour risks areas or products, past (non)compliance, information from other competent authorities). • Before initiating an investigation, competent authorities must request information on actions taken by economic operators to identify, prevent, mitigate or end risks of forced labour: <ul style="list-style-type: none"> → response within 15 working days of the receipt of request; → preliminary phase to be concluded within 30 working days of the receipt of information. 	<ul style="list-style-type: none"> • Support for the Commission's proposal. • Information request can also be made by the Commission. • Information request must be directed at the economic operators under assessment and relevant product suppliers and may be directed at other stakeholders: <ul style="list-style-type: none"> → response within 30 working days of the receipt of request; → preliminary phase to be concluded within 30 working days of the receipt of information. • Economic operators to provide information also on how they remediated forced labour cases. • Economic operators' right to be heard at any stage of the process. 	<ul style="list-style-type: none"> • Support for the EP's negotiating position. • Information request can also be made by the Commission, if products are of Union interest. • Option of further consultations with economic operators within 60 working days from the date of information request. • Preliminary phase to be concluded within 60 working days from the date of information request.
Investigations	<ul style="list-style-type: none"> • Initiation by competent authorities (substantiated concern of a violation of the prohibition). • Economic operators to be informed within 3 working days. • Option of additional requests for information (response within 15 working days, extensions upon request). • Checks and inspections, incl. investigations in third countries possible (subject to consent of economic operators concerned and notification (and no objection) by the government of the country concerned). 	<ul style="list-style-type: none"> • Similar to the Commission's proposal. • Initiation by Member States competent authorities + the Commission. • Economic operators to be informed within 2 working days. • Additional requests for information addressed to economic operators and relevant product suppliers are possible (response within 30 working days, extensions upon request). 	<ul style="list-style-type: none"> • Similar to the EP's negotiating position. • Initiation by Member States competent authorities + the Commission (products of Union interest). • Economic operators to be informed within 5 working days. • More detailed rules on field inspections.
Burden of proof	<ul style="list-style-type: none"> • Competent authorities to demonstrate a substantiated concern of a violation of the prohibition. 	<ul style="list-style-type: none"> • Reversed burden of proof: the economic operators to demonstrate that no violation occurred for products coming from geographic areas and economic sectors with an identified high risk of forced labour imposed by State authorities (to be defined in delegated acts). 	<ul style="list-style-type: none"> • Competent authorities or the Commission (if products are of Union interest) to demonstrate a substantiated concern of a violation of the prohibition.
Deadlines for concluding investigations	<ul style="list-style-type: none"> • Within a reasonable period of time from the date of initiation of the investigation. 	<ul style="list-style-type: none"> • Within 90 working days from the date of initiation of the investigation (extension possible). 	<ul style="list-style-type: none"> • No specific deadline.

Topic	Commission's proposal	EP's negotiating position	Council's negotiating position
Final decision	<ul style="list-style-type: none"> By competent authorities. Possible restrictive measures: (i) prohibition to place, make available on the EU market or export from the EU products; (ii) withdrawal of products; and (iii) disposal of products. Compliance period: min. 30 working days – max. time necessary to withdraw products. 	<ul style="list-style-type: none"> By competent authorities or the Commission. Additional restrictive measures: (i) prohibition and withdrawal of products and product components; (ii) donation (for perishable products); (iii) recycling (for non-perishable products); (iv) disposal as a last option. 	<ul style="list-style-type: none"> By the Commission (an implementing act). Commission to share preliminary findings with the economic operators + relevant competent authorities. Economic operators must have opportunity to comment (time limit to be set by the Commission: min. 30 working days; for perishable goods, animals and plants, min. 5 working days). No explicit reference to product components. Additional restrictive measures: content removal from an online interface referring to the products concerned.
Review of decisions	<ul style="list-style-type: none"> Administrative review: economic operators may request a review within 15 days (5 days – for perishable goods) from the receipt of the decision + new information: <ul style="list-style-type: none"> → delay the enforcement & review of a decision; → possible withdrawal of a decision (within 15 days (5 days – for perishable products)). Judicial review (procedural and substantive legality). 	<ul style="list-style-type: none"> Support for the Commission's proposal. 	<ul style="list-style-type: none"> Administrative review: by the Commission (on its own initiative or upon economic operators' request) + new information → reconsideration, amendment or repeal of a decision (substantial change in facts / the decision was based on incomplete, incorrect or misleading information). Judicial review.
Enforcement	<ul style="list-style-type: none"> By competent authorities and customs authorities. Decisions to be recognised in other Member States, in so far as they relate to products with the same identification and from the same supply chain for which forced labour has been found. 	<ul style="list-style-type: none"> Support for the Commission's proposal. 	<ul style="list-style-type: none"> Largely support for the Commission's proposal (but no mention of recognition).
Penalties	<ul style="list-style-type: none"> Member States to lay down the rules on penalties. 	<ul style="list-style-type: none"> Similar to the Commission's proposal. Penalties: pecuniary fines (delegated acts on calculation method, applicable thresholds, mitigating and aggravating circumstances). 	<ul style="list-style-type: none"> Competent authorities or the Commission (if products are of Union interest) to demonstrate a substantiated concern of a violation of the prohibition.

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