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European Commission Publishes Proposal for an EU-wide Forced Labour Products Ban

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On 14 September 2022, the European Commission (“Commission”) published its [legislative proposal](#) (“Proposal”) for a Regulation prohibiting products made with forced labour on the European Union (“EU”) market. This comes precisely one year after the Commission first announced the forced labour products ban initiative and follows the publication of the Commission’s [Decent Work Communication](#).

The Proposal sets out a general prohibition on economic operators to place or make available on the EU market or export from the European Union products made, in whole or in part, with forced labour. If adopted, EU Member States will be required to directly detain, seize or order the withdrawal of any product made with forced labour at any stage of that product’s supply chain.

SCOPE OF THE FORCED LABOUR PRODUCTS BAN

The scope of the forced labour products ban is broad. While the ban does not apply to services, it applies to **all products (including components) of any type or origin** when forced labour has been used at any stage of their production, harvest, extraction or manufacture, including any work or processing done at any stage of their supply chain. The concept of forced labour is based on the definitions adopted by the International Labour Organization (“ILO”) and covers forced and compulsory labour, including forced child labour and forced labour imposed by state authorities.

The forced labour products ban applies to **all economic operators** placing or making available on the EU market or exporting from the European Union products made with forced labour. “Making a product available” refers to the supply of a product for distribution, consumption or use in the course of a commercial activity, whether in return for payment or free of charge. It also covers offering products for sale online if the offer for sale is targeted at EU users (i.e., the economic operator directs in any way its activities to an EU Member State). “Placing on the market” refers to the first making available of a product on the EU market.

Relevant ILO definitions

Forced labour means all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily. This does not cover compulsory military service, normal civic obligations of a State, work exacted from any person as a consequence of a conviction in a court of law, work exacted in cases of emergency (e.g., war or natural disasters), and minor communal services. (*Article 2 of the ILO Convention No. 29 Concerning Forced or Compulsory Labour, 1930*)

Forced labour imposed by state authorities refers to forced or compulsory labour used as (i) a means of political coercion or education or as a punishment for holding or expressing political views or views ideologically opposed to the established political, social or economic system; (ii) a method of mobilising and using labour for purposes of economic development; (iii) a means of labour discipline; (iv) a punishment for having participated in strikes; (v) a means of racial, social, national or religious discrimination. (*Article 1 of the ILO Convention No. 105 Concerning the Abolition of Forced Labour, 1957*)

INVESTIGATIONS BY COMPETENT AUTHORITIES

Competent authorities of EU Member States will be responsible for implementing the forced labour products ban. They will be in charge of monitoring the market and initiating investigations in order to identify (potential) violations of the forced labour products ban.

At the **preliminary phase of an investigation**, the competent authorities will be required to identify potential violations following a “risk-based approach”, focusing on the steps of the value chain as close as possible to where the likely risk of forced labour occurs and taking into account the size and economic resources of the economic operators, the quantity of products concerned, as well as the scale of suspected forced labour. Competent authorities will need to assess all information available to them, including:

- submissions made by third parties;
- forced labour risk indicators;
- an EU public database on forced labour risk areas or products;
- information and decisions encoded in a communication system (set up under Article 34 of [Regulation 2019/1020](#)) including past cases of compliance (or non-compliance) of an economic operator with the forced labour products ban; and
- information from other competent authorities on whether the economic operator carries out due diligence in relation to forced labour, for example, in line with EU legislation, such as the proposed Corporate Sustainability Due Diligence [Directive](#) (see our [client alert](#)).

Before starting an investigation in respect of a particular economic operator, competent authorities will need to request that operator to provide, within 15 working days of that request, information on the actions they have taken to identify, prevent, mitigate or bring to an end the risks of forced labour in their operations and value chains.

A competent authority must **initiate an investigation** if, within 30 working days following receipt of the information provided by the economic operator, there is a substantiated concern of a violation of the forced labour products ban. The competent authorities will bear the **burden of proof** of establishing that a product has been made with forced labour. To this end, competent authorities may request information from the concerned economic operator and carry out inspections, including investigations in third countries, provided they have the consent of the economic operator and the Member State/third country has been informed and raised no objections.

A **determination** on a violation of the forced labour products ban will need to be made within “a reasonable period of time”. This determination may be based on facts available where it is not possible to gather evidence from the concerned economic operator or through inspections.

CONSEQUENCES OF A POSITIVE DETERMINATION

The Proposal stipulates that where a competent authority has established a violation of the forced labour products ban, it must adopt a **decision** that:

- **prohibits** placing or making the products concerned available on the EU market and exporting them from the European Union;
- orders the economic operator to **withdraw** the products concerned that have already been made available on the EU market (this does not, however, extend to recalling products once they have reached end-users);
- orders the economic operators to **dispose** of the products concerned;
- provides a reasonable time limit for the economic operator to **comply** with the decision (no less than 30 working days); and
- supplies **all relevant information** concerning the investigation's findings and the identification of the product, manufacturer/producer, suppliers and, where relevant, customs information.

Economic operators will be responsible for withdrawing and disposing of the products in accordance with the decision and will need to bear the related costs. A failure to do so may result in **penalties**.

The Proposal prevents “window-shopping” by providing that **a decision taken by a competent authority in one EU Member State must be recognised and enforced by the competent authorities in all other Member States** in respect of products with the same identification and from the same supply chain for which forced labour has been found. In this regard, an economic operator cannot be the subject of several investigations in respect of the same product by different competent authorities.

CUSTOMS CONTROLS

Products entering or leaving the EU market are subject to specific procedures. **Customs authorities** will be required to carry out controls and identify products that do not comply with the forced labour products ban. Competent authorities will need to notify customs authorities of their decisions without delay. The Commission may also adopt delegated acts specifying banned products or product groups and their manufacturers and/or suppliers. It may also adopt implementing acts that further specify details of products that should not be cleared through customs.

Where customs authorities identify a product that might violate the forced labour products ban, they will need to **suspend** that product's release for free circulation or export. That suspension may be lifted if the competent authorities do not request it to be maintained within 4 working days (2 days, for perishable goods, animals and plants) or otherwise permit the release of the products. If the suspension is not lifted, customs authorities will be responsible for disposing of the products.

REVIEW OF A DECISION

According to the Proposal, the economic operators affected by a decision will have a possibility to request a **review** of the decision within 15 working days (5 days, for perishable goods, animals and plants) from the date of receipt of the decision. This request will need to demonstrate that the products comply with the forced labour products ban and may only contain new information that was not shared with the competent authority during the investigation. A review request will delay the execution of the decision until the competent authority adjudicates the request, which must be done within 15 working days (5 days, for perishable goods, animals and plants) from the receipt of the request.

In addition, the Proposal lays down the right for affected economic operators to seek (judicial) review of the competent authorities' decision. This is without prejudice to any provision of national law which requires that administrative review procedures be exhausted prior to recourse to judicial proceedings.

NEXT STEPS AND ASSESSMENT

The European Parliament and the Council of the European Union will now scrutinise the Proposal with a view to agreeing on a final version of the text. If the current text is adopted, the Proposal envisages a two-year implementation period.

The Commission has designed the Proposal in a manner that seeks to minimise the possible challenges under WTO law, by relying on ILO standards, not limiting the measure to an import ban and stating that the measure is necessary for the protection of public morals. Whether the measures introduced in the Proposal, if adopted, will be challenged by other WTO Members might depend on how they will be applied in practice.

Although the Proposal envisages that the Member States' competent authorities have the initial burden of proof, the use of reporting on particular areas or sectors of manufacturing might mean that, in practice, a presumption of a violation of the forced labour products ban is easily established. In other words, regardless of that initial burden of proof, businesses will need to adjust their supply chains and develop and implement due diligence strategies.

Customs authorities will play a key role in the enforcement at the border of decisions adopted by competent authorities. Disruptions at the border can be expected in some cases as customs authorities might decide on their own initiative to examine products entering or leaving the EU market, which may entail requests for additional information about the products and their suppliers.

Businesses are advised to assess their operations and supply chains with a view to identifying and addressing potential risks of forced labour, as well as to actively participate in the EU legislative decision-making process over the next months.

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