Brussels' proposed regime will press companies to ensure their supply chains are free of forced labour

BACKGROUND

On 14 September 2022, the European Commission issued a proposal for a Regulation of the European Parliament and of the Council “on prohibiting products made with forced labour on the Union market” (Forced Labour Regulation). The package represents an ambitious bid to ban products made under such conditions on the EU market and will likely have substantial compliance implications for companies active in the EU, particularly firms with supply chains exposed to high-risk jurisdictions.

The proposal will follow the ordinary legislative procedure in which the European Parliament and the Council must both agree on a legislative text before it becomes law. If adopted, it will be enforceable in a uniform way across the EU Member States and will not need to await the transposition process specific to EU directives.

The proposed Forced Labour Regulation, which constitutes a positive development towards making trade more sustainable from a human rights perspective, draws from similar initiatives taken by partner countries such as the US as well as by international inter-governmental organisations. It demonstrates the EU’s commitments to promote human rights worldwide, eradicate forced labour and implement international standards on responsible business conduct in a binding legislative act. As the European Commission indicated in its Staff Working Document, such an initiative will encourage companies established, incorporated or active in the EU to exercise more oversight of their supply chains.

It supplements and follows the philosophy of Directive 2011/36/EU on combating trafficking in human beings and protecting its victims. Directive 2011/36/EU requires EU Member States to:
• make criminally liable physical and legal persons who intentionally perpetrate or are accomplices in the commission of the offence of trafficking in human beings;

• sentence them to specific criminal sentences; and

• enable competent authorities to “seize and confiscate instrumentalities and proceeds” from such offences.

The offence of trafficking in human beings covers the situation in which an economic operator recruits a person through the threat or use of force or where that person “has no real or acceptable alternative but to submit to the abuse involved “for the purpose of exploitation. Article 2(3) of Directive 2011/36/EU includes within the definition of “exploitation” slavery, forced labour and services.

It creates bridges with the European Commission’s proposal for an EU Directive on Corporate Sustainability Due Diligence. Compliance by companies with the above due diligence requirements will affect the operation of the proposed Forced Labour Regulation.

The move also builds upon the EU’s use of unilateral and bilateral trade tools to tackle human rights concerns.

Indeed, the EU’s Scheme of Generalised Tariff Preferences conditions the maintaining of certain unilateral trade concessions to eligible developing countries and least developed countries (LDCs) upon compliance with basic human rights principles set out in listed human rights conventions (negative conditionality). The scheme also conditions the granting of enhanced unilateral trade concessions to developing countries and LDCs upon ratification of listed human rights conventions and multilateral environmental agreements (positive conditionality).

Moreover, the EU has secured the integration of human rights and labour rights provisions in new generation free trade agreements (FTAs). Such examples include the EU-Korea FTA; the EU-Ukraine Association Agreement; the EU-Japan Economic Partnership Agreement; the EU-Vietnam FTA; and the EU-Canada Comprehensive Economic and Trade Agreement. These have in common commitments to eliminate all forms of forced or compulsory labour and to effectively abolish child labour regardless of any connection to or impact upon the parties’ mutual trade. However, these commitments are typically subject to less effective dispute settlement mechanisms (such as a panel of experts delivering non-binding reports the losing party must merely consider) than core trade provisions (eg, arbitration procedure).

OVERVIEW OF THE FORCED LABOUR REGULATION
The proposed Forced Labour Regulation prohibits the placing and making available on and the export from the EU market of any product made with forced labour (main prohibition). It defines forced labour by reference to an International Labour Organization (ILO) Convention without further elaborating on its modern applications.

It calls for the establishment of a decentralised enforcement mechanism involving Member States’ competent authorities and customs authorities in which the European Commission mainly enjoys information-gathering functions. A decision finding that a product was harvested, produced or manufactured through forced labour can be issued by a competent authority only after the opening of a formal investigation. A competent authority must initiate a formal investigation if it has a reasoned suspicion that a good is likely to have been extracted, produced or manufactured with forced labour after relying on a risk-based methodology and all information available to it.

The competent authority’s decision finding a breach of the main prohibition would have to order the withdrawal of products made with forced labour from the EU market and the disposal of remaining products. Such a decision can be subject to administrative review or be directly challenged before domestic courts (if permitted by the Member State’s domestic law).

The competent authorities would enjoy a significant margin of manoeuvre in determining which economic operator(s) to assess and investigate, in evaluating the various sources of information against each other and in ascertaining whether a particular product was made with forced labour.

The effectiveness of the enforcement system is facilitated by multiple co-operative mechanisms, such as the automatic recognition of a competent authority’s decision by other competent authorities in relation to products with the same identification and from the same supply chain. It is also facilitated by the obligations placed on customs authorities to communicate with competent authorities and to enforce their decisions to oppose the free circulation of a product that was the object of a prohibition decision.

**LEGAL BASIS**

The proposed Forced Labour Regulation derives it legal basis from Articles 114 and 207 of the Treaty on the Functioning of the European Union (TFEU). Article 114 empowers the EU legislator to harmonise Member States’ national laws and regulations that have as their object the establishment and the functioning of the internal market. Article 207 empowers the EU legislator to adopt EU regulations that define a framework intended to implement EU’s common commercial policy, including in the area of export control.

The proposed Forced Labour Regulation impacts EU’s external trade policy insofar as it would result in the prohibition of the import and export of forced labour goods into and from the EU’s customs territory. The proposed Forced Labour Regulation also impacts EU’s internal market, as it is intended to remove the risk of distortion of competition and of obstacles to free movement of goods that would be caused by the divergence in Member States’ laws on the matter.
SCOPE OF THE MAIN PROHIBITION

The proposed Forced Labour Regulation prohibits the “placing” and “making available” on and the export from the EU market of any product where “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”. It would not matter whether it is the final product or one of its components that benefited from forced labour. The origin of the product and the sector in which it was produced would also be irrelevant to the applicability of the main prohibition.

The expression “forced labour” would be defined by reference to Article 2 of the 1930 ILO Convention No. 29 on Forced Labour as “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 definition is fairly open-ended and merely requires the absence of genuine consent to the provision of work or service by reason of the threat of penalty. On its face, it does not cover child labour unless it can be presumed that below a certain age there is no genuine consent to performing work. The ILO definition does not clarify the status of children’s work, and thus it is only on a case-by-case basis that it can be determined whether child labour amounts to forced labour.

Under the ILO Convention No. 29 on Forced Labour, matters which do not fall within the scope of forced labour include: (i) military work called for by military service; (ii) work required of convicts provided that it is conducted under the supervision of public authorities and that the convict is not hired for the benefit of or made available to private persons, companies or organisations; (iii) work resulting from normal civic obligations; (iv) work or service called for by an emergency threatening the existence or well-being of a country’s population; and (v) minor communal services provided that representatives of the local community were consulted.

In light of the above carve outs, the proposed Forced Labour Regulation does not apply to imports into or exports from or trade in the EU of goods produced with the assistance of imprisoned criminal convicts for the benefit of the penitentiary or another state authority. However, the proposed Forced Labour Regulation may apply to goods that are the result of coerced work from prisoners who have not been criminally convicted (e.g., political prisoners sent to re-education or internment camps without having been subject to a criminal trial). It is notable that the ILO definition of forced labour does not take account of whether the prisoner underwent an unfair trial. Provided a prisoner was criminally convicted, their mandatory work would not qualify as forced labour and therefore would fall outside the scope of the proposed Forced Labour Regulation.
The proposed Forced Labour Regulation covers the following steps in a product’s value chain: (i) the import into the EU of products made with forced labour; (ii) the supply of products made with forced labour on the EU market with a view to their distribution, consumption or use in the EU in the context of a commercial activity that may but need not imply payment; (iii) the online offering for sale of products made with forced labour when targeting EU users; and (iv) the export from the EU of products made with forced labour. It would thus apply on the EU’s internal market and to import and export operations between third countries and the EU. Contrary to the proposed EU Directive on Corporate Sustainability Due Diligence, the proposed Forced Labour Regulation would apply to small and medium-sized enterprises.

PRELIMINARY INVESTIGATION

To open a formal investigation, a Member State’s competent authority must first determine whether there is a “substantiated concern”. The authority must base its determination on a risk-based methodology, taking into account the following sources of information:

- the EU database of forced labour risks
- submissions by natural and legal persons and associations
- future European Commission’s guidance on risk indicators
- information requested of other competent authorities
- decisions and information communicated to the European Commission and other Member States as part of the market surveillance information and communication system established under Article 34 of Regulation (EU) 2019/1020
- information requested of those economic operators under assessment about their compliance with corporate due diligence standards recommended or mandated by the EU or relevant international institutions.

FORMAL INVESTIGATION

If, based on preliminary investigation, it determined there is a “substantiated concern”, the competent authority would be required to launch a formal investigation. In which case, the economic operator investigated must be informed of the investigation’s launch, of the reasons for the initiation, of the possible consequences of such investigation, of the products concerned, and of the right to submit additional information. The competent authority must then review all information made available to it during the preliminary phase of the process as well as information requested of the economic operator. The investigation must be completed within a reasonable period of time starting from the date of its launch.
DECISION BY THE COMPETENT AUTHORITY

The outcome of a formal investigation must be concluded in a decision issued by the competent authority. The investigated economic operator would have to be notified of any decision to close the investigation. If it established a breach of the main prohibition, the authority would have to issue a decision that: (i) prohibits the placing on, the making available on or the export from the EU market of the products found to be made with forced labour; (ii) orders the operator to withdraw from the EU market those products found to be made with forced labour; and (iii) orders the operator to dispose of the remaining products made with forced labour.

In addition, that decision must include the findings of the investigation, the information on which these findings were based and a time limit by which the operator is to comply with these orders. If the operator did not comply with the orders, the authority must take all necessary steps to ensure the main prohibition is put into effect, that the products are withdrawn from the EU market and that the products still within the operator’s possession are disposed of at its expense. If the operator showed it complied with the orders contained in the decision and that forced labour was excluded from its operations or supply chain in relation to the products concerned, the authority would be obliged to withdraw its prohibition decision.

RIGHT OF REVIEW

An economic operator affected by a prohibition decision could seek administrative review of the finding within 15 working days from the date of its receipt of the decision. The request for review would need to contain novel information (ie, information not submitted during the initial investigation). The competent authority would have to decide on the request within 15 working days from the date of its receipt. If the review of the decision led it to conclude there was no breach of the main prohibition, the authority would be obliged to withdraw its original decision. The power of review would not prevent economic operators from directly challenging the validity of the authority’s original decision on substantive or procedural grounds before Member States’ domestic courts. This is unless the applicable national law required exhaustion of all domestic administrative remedies before courts could step in.

PENALTIES

The proposed Forced Labour Regulation would require Member States to impose penalties on economic operators that did not comply with the competent authority’s prohibition decision. Member States would enjoy discretion in regulating these national penalties subject to the need for them to be dissuasive, effective and proportionate.

ENFORCEMENT MECHANISM

A decision to initiate a formal investigation, find a breach of the main prohibition or close an investigation in the absence of established violation must be communicated to the European Commission and the Member States without delay.
Any prohibition decision by a competent authority must be recognised and enforced by other competent authorities with respect to “products with the same identification and from the same supply chain for which forced labour has been found”.

In respect of goods made with forced labour that are either imported into or exported from the EU market, the proposed Forced Labour Regulation contains provisions requiring cooperation in enforcement actions and the exchange of information between the competent authorities and the customs authorities of Member States. Specifically, a competent authority would be required without delay to communicate its prohibition decision and its decision pronouncing on a request for review to all Member States’ customs authorities. Following that communication, customs authorities must identify any product that may be in breach of the main prohibition. If they identified such a product, they must suspend its release for free circulation or export and immediately notify the competent authorities. Such a suspension would cease if the conditions attached to the import/export of the product were satisfied and the competent authorities failed to request the customs authorities to maintain the suspension within four working days from the date of the suspension or notified them of their approval of the product’s free circulation or export. If concluding that the product notified by a customs authority is made with forced labour according to its prior prohibition decision, a competent authority would have to request the notifying customs authority not to release the product for free circulation or export.

COMPATIBILITY WITH WTO LAW AND THE TFEU

The proposed Forced Labour Regulation allows customs authorities and competent authorities to prohibit the import into and export from the EU market of products made with forced labour as well as intra-EU trade in such products. Although decisions by these authorities will breach Article XI:1 of the GATT 1994 as well as Articles 34 and 35 of the TFEU, they will most likely be covered by Article XX(a) of the General Agreement on Tariffs and Trade 1994 (GATT 1994), and Article 36 of the TFEU. Both of these justify import and export bans and restrictions in the name of public morals objectives subject to certain proportionality requirements.

Generally, Article XX(e) of the GATT 1994, which justifies measures contravening WTO laws relating to the products of prison labour, will not be relevant to decisions by competent authorities and actions by customs authorities. This is because ILO Convention No. 29 on Forced Labour already excludes from the scope of forced labour goods that result from work or services required of imprisoned persons convicted of a criminal offence unless the prisoners are hired to serve the interests of private companies. Article XX(e) may potentially have a role if goods are imported into or exported from the EU after being harvested, produced or manufactured by prisoners either not criminally convicted or convicted but placed at the disposal of private companies. In such a case, the goods could be subject to an import/export prohibition by customs and competent authorities under the proposed Forced Labour Regulation, a GATT violation that may then be open to justification under a GATT general exception. However, it is unclear whether Article XX(e) would cover such a situation, and ultimately the success of such a defence would hinge on how future WTO adjudicators would interpret the notion of prison labour.
CONCLUSION

The European Commission’s proposal for a Forced Labour Regulation is currently being discussed within the Council. It will need to be jointly endorsed by the European Parliament and the Council before it can be formally adopted. The European Commission will be required to issue a document to assist Member States in implementing the Regulation’s rules (eg, guidance on risk indicators of forced labour; guidance on due diligence requirements in respect of forced labour) 18 months after its entry into force. That guidance may not prove crucial to the operation of the Regulation, as most Member States already regulate forced labour and human trafficking in one way or another.
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