

EU joins US in banning forced labour products: supply chain human rights due diligence

The International Labour Organization estimates that around 27.6 million people, including children, are in a forced labour situation; that is, are being coerced to work. This coercion may be through violence or intimidation, or by practices such as manipulating debt, retaining identity papers or threatening to report a person to immigration authorities. On 14 September 2022, the European Commission (the Commission) adopted a proposal for a regulation on prohibiting products made with forced labour on the union market.

The proposed regulation will have wide practical consequences for companies in the EU and beyond. It covers all products made by forced labour that are produced outside of the EU and imported into the single market, or that are produced within the EU for domestic consumption or export. It covers all industries and does not contain a value threshold.

Consistent with mandatory human rights due diligence legislation coming into force in Europe and the ban on the import of products of forced labour to the US, the Commission's activity reinforces the importance of putting in place human rights due diligence procedures that meet international standards.

The prohibition in practice

Article 3 of the proposed regulation would prohibit all economic operators from placing or making available on the EU market any product made by forced labour (the prohibition). It would also prohibit the export of these products from the EU. National authorities in the 27 EU member states would have responsibility for implementing the prohibition. This would be done through a prescribed, two-stage process.

Preliminary stage. At the preliminary stage, authorities would seek to assess whether there are well-founded reasons to suspect that a certain product had been made with forced labour. The authority would need to make this assessment on the basis of all of the relevant information that is available to it, including:

- Representations by the economic operator as to its due diligence processes (see "Human rights due diligence" below).

- Submissions made by third parties, potentially including victims, competitors, trade unions and non-governmental organisations.
- Information obtained from a new Commission database of forced labour risks.
- Information from other national authorities.

Investigative stage. Where, on the basis of the information gathered during the preliminary stage, the authority determines that there is a substantiated concern that the prohibition has been breached, it would proceed to the second, investigative stage. During this phase, the authority would be able to request from the economic operator any information relevant to the products under investigation, the manufacturer or producer of those products, and the product suppliers. It would also be empowered to carry out investigations in third countries, including the country where the economic operator is based and where the suspicion of forced labour arises. This is on the proviso that the economic operators concerned give their consent and that the third-country government has been notified and raises no objection. The absence of co-operation from companies concerned may lead to a decision based only on the available facts.

Enforcement. Following investigation, if a national authority determines that there has been a violation of the prohibition, it would adopt a decision:

- Prohibiting the product from being sold in, or exported from, the EU.
- Ordering the relevant economic operator to withdraw and dispose of the product in accordance with applicable law.

Other member states would then be required to recognise and enforce these decisions within their national jurisdictions, including by requiring their customs authorities to carry out controls at their borders on products entering or leaving the EU.

Human rights due diligence

During the preliminary stage of an investigation, businesses would have a 15-

day window in which to submit evidence of their forced labour due diligence processes. Where this demonstrates that the risk of forced labour has been addressed adequately, the relevant authority would take this into consideration before proceeding to the second, investigative stage.

International standards provide a framework for businesses when conducting human rights due diligence, such as the United Nations Guiding Principles on Business and Human Rights and the Organisation for Economic Co-operation and Development Guidelines for Multinational Enterprises. Businesses that already have in place a due diligence process that is consistent with these international standards will be in the best possible position to control the process and persuade the national authority to terminate an investigation at the preliminary stage.

The good news for potentially affected businesses is that the due diligence required to convince a national authority to terminate an investigation will substantially overlap with the due diligence required under the draft directive on sustainability due diligence (see *News brief "Corporate sustainability due diligence duty: gathering momentum"*, www.practicallaw.com/w-034-8795 and *feature article "Sustainability in supply chains: due diligence in focus"*, www.practicallaw.com/w-035-5415). Although not expressly foreseen in the proposed regulation or the accompanying explanatory materials, in substance, there is also considerable overlap with the due diligence required under the corresponding US legislation (see *box "The US approach"*).

However, it takes time to put in place these processes, particularly for large multinationals with complex international supply chains. To minimise the likelihood of being adversely affected by the proposed regulation, businesses should take steps now to stress test their existing supply chain due diligence processes and ensure that they meet the relevant international standards. This will have the corresponding benefit of helping them to:

- Comply with the legislation implementing the proposed directive on sustainability due diligence and other mandatory

human rights due diligence measures at a national level.

- Rebut any presumption of forced labour under the US trade legislation.
- Meet the expectations of stakeholders (including clients and investors) concerned about environmental, social and governance issues (see feature article “Managing ESG compliance: challenges for UK listed companies”, www.practicallaw.com/w-025-9225).

Next steps

The European Parliament and the Council of the EU will now consider the proposed regulation, with a view to agreeing a final version of the text. The proposed regulation would apply 24 months after its entry into force, which is likely to be in late 2025 at the earliest or, perhaps more likely, during the course of 2026.

The proposed regulation is a significant development in tackling human rights abuses and will give member states the power to examine any forced labour concerns. It remains to be seen whether this proposed functioning will run efficiently in practice across the member states. The proposed database of forced labour risks areas or products is likely to be a useful tool.

Aside from the reporting obligation under the Modern Slavery Act 2015, there is no equivalent legislation in the UK and no signs that the government plans to introduce further legislation in this area (see feature article “Modern Slavery Act 2015: the impact on multinational businesses”, www.practicallaw.com/2-623-9985). Nevertheless, an EU forced labour ban would have significant knock-on effects for UK companies and, indeed, other companies based outside of the EU. Not only would any subsidiaries or branches of the non-EU business importing goods into the EU be caught by the proposed regulation, non-EU businesses exporting to the EU would also be affected.

Where the authorities of a member state open an investigation into an imported product, in order to persuade the authorities to close that investigation, the EU importer will likely seek to demonstrate that it has carried out due diligence on its supply chain. In turn,

The US approach

The US prohibits the importation of products that have been produced or manufactured in foreign countries using forced labour (*section 307, Tariff Act of 1930, as amended*). After investigating any products of concern, US Customs and Border Protection (CBP) can issue a withhold release order (WRO) or a finding.

A WRO is subject to a lesser burden of proof and may be issued by CBP if information “reasonably but not conclusively” indicates that forced labour goods are being, or are likely to be, imported into the US. Products that are subject to a WRO will be held at the relevant port. Conversely, to issue a finding, CBP must find “probable cause” that certain imported goods are produced with forced labour. Products covered by a finding are subject to seizure and forfeiture. CBP also may assess civil penalties and make referrals to the US Department of Justice for criminal prosecution. As with the proposed EU regulation on forced labour, importers may challenge CBP’s enforcement action by providing evidence that the goods were not made, either wholly or in part, with forced labour.

More recently, the Uyghur Forced Labor Prevention Act of 2021 (UFLPA), which entered into force on 21 June 2022, creates a rebuttable presumption that any imports that trace back to the Xinjiang Uyghur Autonomous Region of the People’s Republic of China or otherwise involve certain designated entities in China are presumed to be made with forced labour and are prohibited from entry into the US. In order successfully to rebut the presumption, importers must establish “by clear and convincing evidence” that the imports were not made, either wholly or in part, with forced labour. The importer’s submission must include detailed information on the company’s due diligence, supply chain tracing and supply chain management measures. This process is governed by tight deadlines and significant aspects of UFLPA practice and procedure will continue to develop in the months ahead, including how the “clear and convincing evidence” standard will be applied.

Importers and other stakeholders that participate in CBP’s Customs-Trade Partnership Against Terrorism program, which is the US counterpart to the EU’s authorised economic operator programme, must also take steps to address forced labour in their supply chains as part of updated CBP requirements. Affected companies should be able to develop common approaches to forced labour that mitigate the risk of enforcement actions in the EU and in the US.

this would require non-EU companies in the importer’s supply chain to demonstrate the steps that they have taken to identify and address the risk of forced labour. Indeed, in anticipation of a forced labour ban coming into force, as well as related mandatory human rights due diligence legislation, EU-based importers are likely to place increasingly stringent demands on their suppliers to carry out human rights due diligence, irrespective of where they are domiciled.

The proposed regulation is part of the Commission’s general move to ensure that the products produced or consumed domestically comply with public moral

concerns. In addition to the draft directive on sustainability due diligence, this is also in line with the EU’s November 2021 proposal for a Deforestation-free Products Regulation to limit the consumption in the EU of products contributing to deforestation or forest degradation.

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The proposed regulation is available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52022PC0453>.