



20 June 2022

“FOR AN INITIATIVE EFFECTIVELY BANNING PRODUCTS PRODUCED, EXTRACTED OR HARVESTED WITH FORCED LABOUR”

EUROPEAN COMMISSION CALL FOR EVIDENCE

As per the Call of Evidence, we understand that the following five (5) components will be included in the upcoming proposal of the European Commission:

- an effective prohibition of the placing on the EU market of products made by forced labour (marketing prohibition)
- covers both domestic (EU) and imported products
- combined with a robust, risk-based enforcement framework
- built on international standards
- complements existing horizontal and sectoral EU initiatives, in particular the due diligence and transparency obligations

We would like to take this opportunity to provide initial input, ideas and concerns, before our fully developed position that is envisaged to be published later in autumn, following the European Commission's proposal.

General remarks

The European business community fully condemns, and rejects forced labour. This is a serious human rights violation and is, as such, part of the broader discussion on human rights due diligence and needs to be reflected in the different initiatives undertaken by the EU, including the Corporate Sustainable Due Diligence Directive.

This is not a new issue of concern, and we recognise the efforts that have been taken so far by the European Commission, the EU Member States, International Organisations and the broader civil society, including business, to address these challenges. It is our core belief that the best way to effectively address forced labour, a multistakeholder, multidisciplinary approach is required. From the part of the business, companies are increasing their efforts to address issues in their supply chains, both at company level, as well as through sectoral schemes. In this regard, public private partnerships are for example an excellent illustration. It is important that these efforts are recognised and supported. Moreover, a one-size-fits-all approach is often not the solution. Taking initiatives at a sectoral level is often a more effective approach which is clearly targeted, tailored to the needs in the field, workable in practice, can build upon know-how of that specific sector and takes into account the specificities and concerns of a particular sector.



When it comes to the process of developing this legislative proposal, despite our understanding that it will be accompanied by a Staff Working Document, we would like to call for the need to complete a thorough impact assessment. Legislative proposals that are far-reaching in terms of their impacts on supply chains, traceability challenges and the market surveillance of products should be based on robust evidence to guarantee enforceability. At the same time, this will guarantee a more comprehensive analysis of the different legislative and non-legislative measures at the European Commission's disposal and a full assessment of the economic, social and environmental impacts of the different scenarios, before deciding the best way forward. Finally, notwithstanding our appreciation for a number of opportunities to exchange views with the European Commission in the context of the Call for Evidence, an impact assessment would also enable the conduct of a public consultation over a longer period of time.

On the marketing prohibition

According to the information available to date, a blank prohibition to place products on the market might fundamentally change the architecture of product regulation in Europe, as the very change to the notion of "placing a product on the market" may disrupt the New Legislative Framework for products (the NLF package of 2008) that has been working well for decades and allowed to make the Single Market a trading area of the safest products on the Globe. BusinessEurope strongly favours the NLF principles and they should not be affected.

Enforceability is another big issue of concern, as the future provisions may stipulate the obligations on economic operators that they cannot meet for objective reasons, such as a lack of evidence gathering tools. Often, it is very hard for companies to have access to information about situations in the field. Such a challenge would immediately lead to uncertainties around liability and a question regarding how public authorities would enforce the legislation. At the same time, in no way can a market surveillance function be "transferred" onto private operators. This would fundamentally confuse the public interest defense tools which are a prerogative of governments. This way, the EU would "exit" a legally certain investment and trade framework.

On the scope

We understand that the European Commission's proposal will cover goods produced domestically, as well as goods imported to the EU. When it comes to goods produced in the EU, it is normally the role of the Member States to ensure the protection against forced labour and effectively implement the law (criminal liability). How would legislation at EU level complement or improve implementation? What would the obligations of domestic producers and of importers be? This is important to clarify in order to achieve a level playing field. Ultimately, if there are breaches and we enter a criminal liability area due to lack of enforcement in Member States, then it is the Commission's role to initiate infringements instead of drafting yet another set of rules which are very likely not to be enforced.



Robust, risk-based enforcement framework / Building on international standards

We agree with the European Commission's approach to follow a risk-based approach when it comes to enforcement. Risk is normally assessed and mitigated in the context of due diligence process. However, the European Commission argues that the nature of this regulation is related to products, in the form of a marketing prohibition. How would the regulation bridge the two?

Designing the right enforcement framework also needs to take into account the different types of forced labour. For instance, addressing regimes sponsored by third governments is challenging. This is not a responsibility that should be left at the hands of the private sector. The role that the EU, together with like-minded partners, as well as the concerted efforts at international fora and organisations, such as the ILO, the UN more broadly, and the OECD, can play is critical.

It is also important to note that mitigating forced labour risks is an issue of the level-playing field and of competitiveness, which is the basis of our economic leverage. Therefore, we have to be careful not to lose this leverage that allows us to make a difference on the ground, for instance through robust company and sector-led initiatives.

Our key message is that the balance between the States' duty to protect human rights, including against forced labour of course, and the business obligations to respect human rights needs to be maintained by the EU legislation.

Moreover, the particular situation of SMEs, that often do not have enough resources, needs to be taken into account. Additional guidance, including on implementing the international standards, is key. The Guidance provided by the European Commission already in 2021 is a good step. However, more targeted assistance is necessary.

Complementing existing initiatives

Even if the objective and the scope of this legislative initiative are focused on products, via the implementation of a marketing prohibition, there are important and inevitable linkages with the implementation of due diligence processes. In this regard, it is essential that the legislation is well aligned with existing initiatives and coordinated with upcoming ones, the Sustainable Corporate Due Diligence Directive (SCDDD) in particular. SMEs struggle a lot with taking a wide variety of regulations already into account and the upcoming SCDDD places all responsibility on companies. Additional obligations and red tape should therefore be avoided. Sectoral regulations, such as the Timber Regulation and the Conflict Minerals Regulation, need to be taken into account too. How will all these regulations relate to each other and how will they co-exist without creating additional burdens for companies? Accordingly, it is key to avoid duplications, that lead to uncertainties and additional costs both for economic operators as well as for the authorities.

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