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The EU's Proposed Regulation Prohibiting Products Made with Forced Labor on the EU Market: Coverage and Context

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With great anticipation, on September 14 the European Union proposed [a new regulation](#) broadly prohibiting the import, export and sale of goods made wholly or in part with forced labor ("Proposed Regulation"). The Proposed Regulation also directs Member States to adopt processes that will enable them to investigate suspected forced labor import/export goods, though expressly excludes the withdrawal of products that have already reached end-users in the EU. The Proposed Regulation now must proceed through the regulatory review process, will be subject to debate and almost certainly will not become effective before 2026. As part of a larger context, the Proposed Regulation is consistent with a trend in North America and Europe, and increasingly beyond, of eliminating and addressing forced labor goods at each major phase of the value chain: creation, import, export and sale.

Contents of the Draft Regulation

Unlike other more complex initiatives, such as the Corporate Sustainable Reporting Directive or the [Corporate Sustainability Due Diligence draft directive \("CSDD"\)](#), the Proposed Regulation is substantively straightforward. Quite simply, it provides that companies cannot place and make available on the EU market, or export, products made with forced labor. In other words, it prohibits the import into the EU, export from the EU and sale of goods in the EU if they are made with forced labor. It expressly excludes withdrawing goods that already are in the hands of end-users. The Proposed Regulation is intended to apply to all companies, including small and mid-size enterprises (SMEs). However, the Commission has indicated that it "is well aware of the particular situation of SMEs and has taken this into account both in the design and enforcement of the Regulation" and that "there will be a need to support SMEs with guidelines, which could include guidance on how to carry out various steps of due diligence in relation to forced labour, and how to ensure consistency with requirements under other relevant EU legislation".¹

The bulk of the Proposed Regulation is procedural and puts the onus on EU members. Among its salient features are:

- Member States must follow a risk-based approach in assessing the likelihood that companies are violating the core prohibition. That approach is to be based on all information available to Member States, including submissions by third parties, risk indicators that the EU will identify, the decisions of other countries, and information from other authorities that may be relevant.

- The initial assessment of Member States should focus on entities as close to the risk of the suspected forced labor as possible, emphasizing in particular those parts of the value chain where the likely risk of forced labor occurs and taking into account the size of the economic operators, the quantity of products concerned, and the scale of suspected forced labor.
- Before initiating an investigation, Member States would be required to ask companies about the due diligence steps they have taken to identify, prevent, mitigate or end risks of forced labor in their operations and value chains. Companies have 15 days to respond to those requests.
- Member States would then conduct a preliminary inquiry to evaluate whether there is a “substantiated concern,” defined as “a well-founded reason, based on objective and verifiable information, for the competent authorities to suspect that products were likely made with forced labour.” That “substantiated concern”² determination must occur within 30 days of the company’s response regarding due diligence efforts, and take into account the response from the company and its steps to bring forced labor identified to an end.
- If there is a substantiated concern, the Member State would then pursue an investigation and inform the relevant companies that it has done so, the possible consequences, the reason for the investigation, and give companies the ability to submit additional information.
- Member States may ask companies for information that identifies the products under investigation, and also information about the manufacturer or producer of those products including the product suppliers. Companies have 15 working days to respond.
- The Member State investigation must conclude “within a reasonable period of time.” If a violation is found, the Member State must adopt without delay a decision containing: (a) a prohibition to import, sell or export the goods; (b) an order for the relevant companies to withdraw from the EU the relevant products already in the market; and/or (c) an order for the relevant companies to dispose of relevant products. The decision should include the Member State’s findings, a time limit for companies to comply with the order (not less than 30 days), and other details. The decisions are subject to appeal, and governments have 15 days to issue a decision on the review.
- If the Member State investigation does not identify a violation, the goods are to be released for free circulation or export. In addition, where a Member State has found a violation and issued an order prohibiting the import, sale or export of goods, it is to notify the customs authorities of other EU member countries. Those other countries then will suspend the release of goods suspected as being covered by the Member State’s order, and share with relevant authorities information to enable them to make a determination. The authorities then have four working days to make a determination, and two days if goods are perishable, or the goods will be released assuming all other requirements have been met.

The Proposed Regulation contemplates broad information sharing among EU Member States and, in order to assist with company diligence, the EU will keep a database of forced labor risks in specific geographies and make it publicly available. Administratively, each Member State should designate one or more competent authorities with responsibility to implement the Proposed Regulation, and the Commission expects cooperation among Member States in exchanging information and applying best practices. Decisions in one country will have recognition in other markets, creating a level of

complementarity. Further, the Proposed Regulation includes details related to export and import processes, substantive information that must be shared with customs officials, and the development of communications systems. It also says that the Commission will issue guidelines within 18 months from the regulation's entry into force that includes guidance on due diligence regarding forced labor, relevant risk indicators, publicly available information sources, and similar information.

The Proposed Regulation further references international cooperation by the Commission with civil society, business organizations, and others. The current draft indicates that, if adopted, the Regulation would be effective 24 months from its entry into force. As a "Regulation," it would be immediately applicable to all Member States and overrule inconsistent national laws (as opposed to a "Directive," which is a legislative act setting goals that EU Member States must reach and transpose into national legislation). No doubt, the Proposed Regulation will be subject to substantial debate and discussion before it is finally adopted, including how it may complement the CSDD.

How it is Different from, and the Same as, North America Laws

While the spirit of the draft regulation is similar to [existing forced labor import bans that exist in North America](#), it has clear differences. In the United States, Section 307 of the Tariff Act of 1930, and Canada's Custom Tariff Act, both preclude importing goods where there is a reasonable belief they have been created with forced labor. Mexico has a similar law, resulting from the USMCA. Although the procedures for evaluating and investigating forced labor goods in the U.S., Canada and Mexico differ from the Proposed Regulation, and the relevant burden of proof may not be the same, conceptually they are all alike: goods created wholly or in part with forced labor will be denied entry into these markets, effectively demanding due diligence of relevant supply chains. The EU includes the added component of prohibiting the sale or export of forced labor goods that already are within the EU, which goes beyond the North American laws. It also increases pressure on supply chain due diligence, and may touch on issues prohibited by the U.S. Trafficking Victims Protection Reauthorization Act, which [creates liability](#) if a corporation knows or should have known that it benefitted (financially or otherwise) "from participation in a venture which has engaged in the providing or obtaining of" trafficked or forced labor.

Notably, the EU Proposed Regulation differs substantially from the recently enacted U.S. Uyghur Forced Labor Prevention Act, [which creates a legal presumption](#) – which only can be overcome with clear and convincing evidence – that goods created in the Xinjiang Uyghur Autonomous Region of China, or in connection with certain Chinese entities or government employment programs, are made with forced labor. The Proposed Regulation is intentionally generic in nature, makes no reference to any specific geography or country, creates no forced labor presumptions, and does not include a heightened burden of proof, among other things.

The Bigger Picture

While the draft regulation will be subject to substantial debate and scrutiny, it is worth considering within the larger business and human rights context. Banning the import, sale and export of goods tainted by forced labor correlates to a variety of global regulations targeting each of these phases of commercial activity.

Host Country Production and Export. At the pre-import phase, before the EU's Proposed Regulation formally kicks in, there have been well-publicized steps by governments to incentivize host governments to institute stronger labor rights enforcement through [free trade agreements](#) that eliminate tariffs where certain criteria are met. They seek to enhance human rights protections at the raw material and production phases, preventing the creation of forced labor goods that may be earmarked for import.

Indeed, the U.S. Trade Representative is currently [contemplating a strategy](#) to use trade policies and tools to combat forced labor, and sought [public comment](#) in relation to it over the summer.

Also at the pre-import phase, there are rapidly growing supply chain due diligence laws, which have been adopted in France, Germany, Norway and Switzerland, and are starting to be [considered](#) in a range of other jurisdictions – from Spain to the Netherlands to Brazil to Canada to New Zealand to the EU itself. Under these laws, companies must take affirmative steps to identify potential human rights violations within their supply chains. Where risks or impacts are identified, they must institute measures to prevent or mitigate them, evaluate the effectiveness of those measures and report publicly on their efforts. A lighter variation relies on transparency in seeking to drive change. These include modern slavery acts, in force in the U.K. and Australia and near adoption in Canada, as well as other disclosure laws that require companies to disclose the steps they are taking to address modern slavery in their operations and supply chains.

Purchasing and Sale. At the purchasing and sale phase, akin to the Proposed Regulation’s ban on marketing forced labor goods, governments around the world are increasingly [banning the public procurement](#) of goods infected with human rights violations generally and/or forced labor specifically. Much like import bans, these laws rely on market forces to drive supply chain due diligence, under the theory that the vast array of companies that sell goods and services to governments will take steps to ensure their supply chains are free from abuses. This includes: the United States Federal Acquisition Regulations, which have included trafficking provisions for several years; Canada’s Code of Conduct for Procurement, which includes provisions setting forth the government’s expectations for suppliers related to modern slavery and other human rights issues; the U.K.’s contemplated ban on the National Health System from purchasing goods where there is a “serious risk of [genocide](#) in the sourcing region” or that may be tainted by [modern slavery](#); and the U.K.’s draft procurement bill that seeks to eradicate forced labor and modern slavery more generally. In fact, in some instances, the U.S. TVPRA may create liability where a company knows of or should have known that it benefitted from the purchasing of forced labor goods, and the [U.K. Criminal Finances Act](#) allows for a civil recovery against companies that profit from gross human rights abuses or violations.

Export. Finally, in line with the EU Proposed Regulation’s ban on exporting goods made with forced labor, an increasing number of laws and proposals focus on [downstream](#) activities. These [include](#) Norway’s Transparency Act and the draft EU CSDD, which contemplate that companies will conduct due diligence and seek to mitigate potential risks and impacts of their products and services by customers and end-users.

CONCLUSION

Against this backdrop, the proposed EU Proposed Regulation will be consistent with reinforcing the global trend of eliminating and addressing forced labor goods at the creation, import, sale and export phases. When it enters into force – as it surely will– the Proposed Regulation will be an important further measure in seeking to eliminate forced labor at each major economic stage, and will further compel companies to conduct meaningful due diligence of their supply chains.

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¹ https://ec.europa.eu/commission/presscorner/detail/en/qanda_22_5416

² The term “substantiated concern” also appears in the CSDD.

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