

## How Cos. Can Prepare For EU's Forced Labor Regulation

By **Vassilis Akritidis and Jean-Baptiste Blancardi** (May 1, 2024, 3:34 PM BST)

On March 5, European Union legislators reached a provisional agreement on the content of the regulation prohibiting products made with forced labor, the EU Forced Labour Regulation. And on April 23, the European Parliament gave its final approval to the regulation.

This did not come as a surprise to careful readers of the EU's Official Journal, who will have noticed the sudden surge in legislation restricting access to the EU internal market.

With the new tools of foreign direct investment screening mechanisms in almost all member states;<sup>[1]</sup> control of foreign subsidies unfairly affecting competition and trade;<sup>[2]</sup> protection against economic coercion from third countries;<sup>[3]</sup> and now the upcoming EU Forced Labour Regulation, the 2020s have tightened the regulatory landscape of international trade in goods and services alike.

The EU remains outstandingly open to trade and foreign investments in comparison to other economic areas. Still, Brussels increasingly leverages the entry to the internal market to achieve policy objectives, in particular when its own policy objectives require provoking a change of practices outside the territories of the member states, transitioning from a traditional multilateral framework to neo-unilateralism.

With the growth of the international supply chain and the relocation in third countries of a substantial part of the EU industry, member states have lost visibility over the production of numerous goods.

This has had several adverse impacts, most notably in terms of national security, EU industry competitiveness, and human rights and climate change mitigation. All of these issues called for stricter supply chain monitoring.

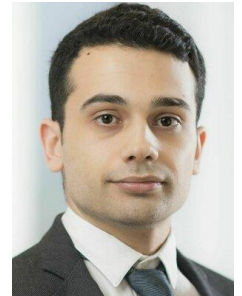
Thus far, it has been largely voluntary.<sup>[4]</sup> However, faced with a lack of results, and amid a tensed geopolitical context, a more frontal approach became a necessity.

Against this background, the question for the EU legislature is how to implement such monitoring without imposing too heavy a burden upon economic operators.

Many member states have consistently opposed a regulation that would penalize businesses and feared



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burdensome paperwork that would hinder economic activity, most notably of small and midsize enterprises, a consistent criticism of environmental, social and governance regulations.

The Forced Labour Regulation reflects this equilibrium. It aims to achieve clear and ambitious EU policy objectives and, in particular, to align EU policies with the United Nations Sustainable Development Goal 8.7, which seeks to eradicate forced labor globally by 2030, by banning from the internal market products made with forced labor.

Where customs authorities find that products are made with forced labor, operators are prohibited from placing or making available the so-called at-risk products in the EU market and from exporting them, they must withdraw the targeted products from the EU market, and they must dispose of these products in accordance with national law, consistent with EU law.

Yet, at the same time, the ban is limited to the part of the product that is made with forced labor, but not the whole product if the noncompliant part can be replaced.

Furthermore, the Forced Labour Regulation does not allow authorities to block entry of products that were suspected of being made with forced labor, as it is the case in other jurisdictions.

The idea is to ban only products that are the direct and certain result of forced labor, and not those that are merely suspected of being made with forced labor.

To achieve this objective, the EU legislature relies heavily on the commission's supervision rather than on extensive supply chains monitoring carried out internally by operators.

This choice is most notably visible in the so-called risk-based approach that enjoins businesses to assess if a product is compliant with the Forced Labour Regulation based on the likelihood of a product being made with forced labor.

This assessment largely depends on the information and guidelines shared by the commission's future forced labor database.[5]

With the Forced Labour Regulation expected to enter into force in 2027 and the commission having 18 months thereafter to issue guidelines, economic operators will have to prepare their Forced Labour Regulation compliance without having all the tools at their disposal to identify forced labor risks. In the meantime, solutions exist to ensure compliance.

## **Preparing To Comply**

### ***Identifying Usual Suspects***

Businesses should first take a close look at the procedures pursuant to Section 307 of the U.S. Tariff Act and the Uyghur Forced Labor Prevention Act and treat American cases as documentation to inform their supply chains monitoring.

The Forced Labour Regulation is based on accurate knowledge of the supply chains. Given the amalgam of supply chains used by multinational companies, export products both in the U.S. and in Europe share supply chains in third countries. It is very likely that the commission will, at least initially, piggyback on the work done in other jurisdictions to identify areas and products where forced labor has already been

established and sanctioned.

Thus, businesses should monitor closely supply chains in the People's Republic of China, Malaysia, Vietnam and Thailand, which are the main countries for which the U.S. customs authorities have stopped and denied shipments.[6]

### ***EU Commission As Strategic Enforcer***

Another point of comparison is whether the commission will use the Forced Labour Regulation strategically in the context of the EU's trade relations with third countries, as is the case in the U.S.

Under the Forced Labour Regulation, the commission is highly involved in the determination of products made with forced labor.

It not only guides the economic operators in identifying the products and areas prone to having recourse to forced labor but is also the natural lead competent authority in the investigation phase.[7]

As such, its role can be linked to U.S. customs and border protections in terms of providing the strategic orientations for the enforcement of the Forced Labour Regulation.

The legal standards for banning a product, or even launching a forced labor investigation, are much higher than in the U.S. The EU regulation requires the existence of a "substantiated concern" that a product is made with forced labor, whereas, in the U.S., authorities can launch a forced labor investigation if it merely appears to be warranted by the circumstances.

In addition, no region of the world is specifically targeted in the law, as it is explicitly the case in the Forced Labor Prevention Act.

Nevertheless, the EU has used its recent trade instruments to address issues with China, in particular the Foreign Subsidies Regulation and the Anti-Coercion Instrument, in addition to a wave of anti-subsidy and anti-dumping cases against China.[8]

In this context, an alignment with the U.S. authorities on investigating supply chains involving China should be expected.

### ***Unlikely Weaponizing of Regulation***

In fact, the requirement of a substantiated concern will probably prevent, first and foremost, the weaponization of the Forced Labour Regulation by economic operators. Benefiting from the low threshold in U.S. law to launch forced labor investigations, competitors are prone to forward suspicions of the use of forced labor to the competent authority, as a tactic to slow down or ban competing operators' business.

This strategy will prove inadequate under the current framework of the Forced Labour Regulation.

Likewise, the Forced Labour Regulation's instrumentalization by nongovernmental organizations is unlikely. Although the Forced Labour Regulation allows third parties to share information, and for publicly available information to be used in the context of a forced labor investigation, customs authorities and the commission maintain the initiative on the opportunity of a Forced Labour

investigation.

Furthermore, investigations should prioritize the most severe and clear-cut cases,[9] and the competent authority must consider factors such as whether the operator is a small or midsize enterprise, and the complexity of the supply chain, before launching an investigation.

This limits risks of counterproductive use of the Forced Labour Regulation under pressure from third parties.

## **Building Off Knowledge From Existing Guidelines**

### ***Commission's Previous Guidelines***

Until the commission publishes the guidelines for the Forced Labour Regulation, operators seeking guidance can refer to other texts that form an adequate starting point to prepare for the enforcement of the Forced Labour Regulation.

First, they should consult the "Guidance on due diligence for EU businesses to address the risk of forced labor in their operations and supply chains," published in July 2021.[10]

This text provides guidance in the context of traditional due diligence and details good practice when confronting instances of forced labor in one's supply chains.

Although concise in its recommendations, which take the form of a list, the guidance provided by the commission and the European External Action Service is useful in addressing key elements of responsible supply chain monitoring, including risk assessment, mitigation, disengagement and remediation.

The future guidelines that are specific to the Forced Labour Regulation are set to build off this text.[11]

As such, economic operators have an interest in already implementing the guidelines issued by the commission and the European External Action Service to monitor the risks of the use of forced labor within their supply chains.

### ***Relying on International Organizations' Recommendations***

In addition, operators can also rely on guidelines issued by organizations other than the commission. In fact, the commission's guidelines are in no way binding, and alternative organizations can serve as a basis to comply with the Forced Labour Regulation.

The EU legislature mentions the UN, the International Labour Organization and the Organization for Economic Cooperation and Development, but opens the door to other relevant international organizations, especially when those recommendations relate to the product or area subject to the investigation.

The idea is not to deter the operator from following recommendations that are tailored for a particular situation, and may be more specific and therefore effective than the EU guidelines.

## **Keeping Up With National Supply Chains**

Finally, at the EU and national level, operators should take a close look at legislation like the Corporate Sustainability Due Diligence Directive, and, notably, litigation related to the Corporate Sustainability Due Diligence Directive.

These laws create due diligence obligations for companies to prevent or remediate human rights and environmental violations. In the EU, France, followed by Germany, has already adopted such laws. They encompass forced labor among other human rights issues susceptible to arise in supply chains.

The French and German laws being fairly recent, only a few claims have been made on this legal basis for now. Still, litigation in France is becoming increasingly frequent, with already a first successful claim, and the creation of a court dedicated to these issues, which are expected to multiply.

Meanwhile, in Germany, there is already an ongoing case concerning allegations of products made with forced labor in the Xinjiang region in China.

Thus, the Forced Labour Regulation and laws like the Corporate Sustainability Due Diligence Directive follow very different logic, findings in the former might inform investigations in the latter.

For this reason, businesses should keep a close eye on the upcoming case law, which will be relevant to supply chains monitoring and compliance.

## **Conclusion**

In essence, the Forced Labour Regulation is the latest iteration in the wave of customs instruments dealing with ESG, and compliance should be integrated into the company's global supply chains vigilance strategy — in contrary to the Corporate Sustainability Due Diligence Directive, the Carbon Border Adjustment Mechanism and the Regulation on Deforestation-Free Products.

Case law and, more importantly, the commission's practice, will dictate the level of scrutiny required going forward. This is a new area of law and practice for everyone in the EU.

In the meantime, operators should keep abreast of discussions on forced labor taking place in other jurisdictions and begin to familiarize themselves with international standards for combating forced labor.

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[1] Regulation (EU) 2019/452 of 19 March 2019, and Commission Proposal repealing Regulation (EU) 2019/452 of 24 January 2024.

[2] Regulation (EU) 2022/2560 of 14 December 2022.

[3] Regulation (EU) 2023/2675 of 22 November 2023.

[4] Directive 2014/95/EU of 22 October 2014.

[5] Article 11 of the FL Regulation.

[6] CBP Updates Forced Labor Enforcement Statistics, <https://www.strtrade.com/trade-news-resources/str-trade-report/trade-report/february/cbp-updates-forced-labor-enforcement-statistics>.

[7] Article 15 of the FL Regulation.

[8] The Commission opened two in-depth investigations under the FSR, initiated ex officio an anti-subsidy proceeding as announced by the Commission's president, [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_24\\_1803](https://ec.europa.eu/commission/presscorner/detail/en/ip_24_1803).

[9] Article 18(3), FL Regulation.

[10] [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_21\\_3664](https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3664).

[11] Recital 36 of the FL Regulation.