

Access to remedy and forced labour ‘import bans’: Recommendations for the proposed Regulation on Prohibiting Products Made With Forced Labour on the Union Market COM(2022) 453

Introduction

In September 2022, the European Commission published its proposal for a regulation (the **Proposed Regulation**) to prohibit products made with forced labour on the European Union (**EU**) market.¹ Coinciding with the Proposed Regulation, The Remedy Project has recently conducted a study on ‘import bans’ under the US Tariff Act of 1930 on goods made with, or using, forced labour. The study looks at the effectiveness of import bans under the Tariff Act as a tool to secure access to remedies for workers in conditions of forced labour and other affected rights holders.

The report considers nine case studies of companies or industries that have been subjected to actual or threatened import bans under the Tariff Act – covering eight industries, and seven jurisdictions. These case studies have been developed through a combination of primary field research with over 50 directly affected workers, as well as interviews with civil society groups, field investigations, and desk-based research.

The report seeks to identify what remediation measures companies have undertaken in response to import bans under the Tariff Act, and the extent to which those responses led to the provision of remedies workers and other affected rights holders. The report also seeks to identify the factors which contribute to, or undermine, the effectiveness of import bans as a tool to secure the provision of remedies to workers and other affected rights holders.

1 European Commission, COM(2022) 453 *Proposal for a regulation on prohibiting products made with forced labour on the Union market*

Introduction

This briefing offers recommendations for EU policymakers on the further development of the Proposed Regulation, based on the report's key findings and recommendations.

All Article references below are to the draft of the Proposed Regulation published by the European Commission on 14 September 2022. Unless otherwise stated, terms used in this briefing have the meaning given to them in the Proposed Regulation.

1. Ensure effective consultation with stakeholders, including workers, workers' credible representatives, trade unions, and civil society, in the decision-making process

Our research has shown that effective communication between competent authorities and affected stakeholders - especially workers, workers' credible representatives, trade unions, and civil society - can contribute to the effectiveness of import bans as a tool to provide access to remedies for workers and effective rights holders, and can help ensure that import bans do not have unintended adverse consequences for workers or other affected rights holders.

In part, the Proposed Regulation aligns with this approach by encouraging two-way dialogue between Competent Authorities and Economic Operators during the preliminary and investigative stages of the decision-making process. Among other things, the Proposed Regulation requires Competent Authorities to notify Economic Operators when opening the preliminary phase of an investigation in relation to products allegedly made with or using, forced labour, and request information from them.² Competent Authorities must also notify Economic Operators if an investigation moves into the investigation phase, and Economic Operators may be given another opportunity to submit additional information to competent authorities at this stage.³

However, as it stands, the Proposed Regulation incentivises Competent Authorities to base their decisions principally on information submitted by Economic Operators. However, information submitted by Economic Operators may not offer a balanced or accurate representation of true working conditions. Workers, workers' representatives, and other civil society stakeholders are often better placed to credibly identify potential indicators of forced labour than Economic Operators under investigation.

2 Proposed Regulation, Articles 4(3) and (4)
3 Proposed Regulation, Articles 5(2) and (3)

1. Ensure effective consultation with stakeholders, including workers, workers' credible representatives, trade unions, and civil society, in the decision-making process

While the Proposed Regulation permits workers, workers' credible representatives, trade unions, civil society groups, and other stakeholders to submit information to Competent Authorities, there is no provision for Competent Authorities to proactively seek information from these groups.⁴ Workers, workers' credible representatives, trade unions and civil society groups are unlikely to know that an Economic Operator is under investigation, and hence will not know there is an opportunity to share information with the Competent Authority. They may also not know how to submit information to Competent Authorities, or may not be able to do so for practical reasons (e.g., due to safety and security concerns, or fear of reprisals). To address these power imbalances, it is incumbent on Competent Authorities to proactively engage with a broad and representative range of stakeholders – including workers – to ensure that decisions made under the Proposed Regulation are based on balanced information.

Recommendation: The Proposed Regulation should empower and compel Competent Authorities to proactively seek information from a broad range of stakeholders – especially workers and workers' credible representatives, trade unions, or civil society– and not just Economic Operators. Such engagement should occur throughout the enforcement process, but especially in the preliminary phase and investigation phase.



⁴ Competent authorities may have regard to any submissions made by any legal or natural person (Proposed Regulation, Article 4(1)), but they are not required to proactively seek information from any stakeholder other than the Economic Operator in question.

2. Reduce the reliance on ‘social audits’ as the primary form of evidence relied on by Competent Authorities in the decision-making process

Complementarity between the Proposed Regulation and the Proposed EU Directive on Corporate Sustainability Due Diligence (**CSDDD**)⁵ can help ensure the effectiveness of both instruments. The clear linkages with the CSDDD in the Proposed Directive are therefore highly welcomed.

However, the Proposed Regulation risks encouraging Competent Authorities to rely excessively on company-commissioned ‘social audits’ as the primary form of evidence used in their decision making.⁶ During the preliminary phase of investigations, Competent Authorities are instructed to have regard to due diligence conducted by Economic Operators on at least four distinct occasions.⁷ While the Proposed Regulation does not specify the form that such due diligence must take, in most cases, it is likely to take the form of a social audit commissioned by the Economic Operator under investigation.

Social audits can play a role in supporting companies to identify, prevent, mitigate, and remedy forced labour risks in their value chains. However extensive research has shown that company-commissioned social audits have limited usefulness in effectively identifying forced labour, and can, in fact, increase human rights risks.⁸ There have been multiple instances in companies received clean bills of health from social audits, only for the company to receive an import ban shortly afterwards due to the presence of forced labour in its value chain.⁹

Recommendation: The Proposed Regulation should discourage reliance on social audits as the primary form of evidence relied upon by Competent Authorities in their decision making. Social audits should form just one of many data points considered by Competent Authorities. Among other things, Competent Authorities should consider direct worker testimony and submissions from workers’ credible representatives, trade unions, and other civil society organisations. These sources of information should be given at least equal – if not greater – weight than social audit reports provided by Economic Operators.

5 Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, COM/2022/71 final

6 Proposed Regulation, Articles 4(1), (3), (6) and (7)

7 Proposed Regulation, Articles 4(1), (3), (6) and (7)

8 See, e.g., Human Rights Watch (November 2022) [Obsessed with Audit Tools, Missing the Goal](#); European Center for Constitutional and Human Rights, Brot für die Welt, MISEREOR (2021) [Human rights fitness of the auditing and certification industry?](#); Transparentem (2021) [Hidden Harm: Audit Deception in Apparel Supply Chains and the Urgent Case for Reform](#); Clean Clothes Campaign (2019) [Fig Leaf for Fashion. How social auditing protects brands and fails workers](#); SOMO (2022) [A piece, not a proxy: The European Commission’s dangerous overreliance on industry schemes, multi-stakeholder initiatives, and third-party auditing in the Corporate Sustainability Due Diligence Directive](#)

9 See, e.g., The Edge Markets (2 November 2020) [Top Glove downgraded from A to D in social compliance audit — report](#); Reuters (19 May 2021) [‘Slavery’ found at a Malaysian glove factory. Why didn’t the auditor see it?](#); Human Rights Watch (November 2022) [Obsessed with Audit Tools, Missing the Goal](#)

3. Avoid offering ‘safe harbours’ based on due diligence alone

The Proposed Regulation provides that Competent Authorities shall not initiate an investigation where the Competent Authority considers there is “no substantiated concern” of forced labour due to, among other things, “*the applicable legislation, guidelines, recommendations or any other due diligence in relation to forced labour.*”¹⁰ This provision could be interpreted as offering a ‘safe harbour’ to Economic Operators that can demonstrate they conduct due diligence in a way that “*mitigates, prevents and brings to an end the risk of forced labour.*”¹¹

However, as noted above, due diligence in the form of company-commissioned social audits is not a reliable tool for effectively identifying the presence of forced labour. Economic Operators should therefore not be offered any form of safe harbour based on self-reports about the effectiveness of their own due diligence mechanisms – especially where this stands in contrast to evidence from workers, workers’ credible representatives, trade unions, and other civil society organisations that indicate the presence of forced labour.

Moreover, the Proposed Regulation does not incentivise Competent Authorities to seek diverse sources of information from actors other than the Economic Operator (e.g., from workers, workers’ credible representatives, trade unions, and civil society organisations). Without these diverse sources of information, Competent Authorities are unlikely to be able to critically assess whether Economic Operators’ due diligence mechanisms do in fact, effectively mitigate, prevent, and bring an end to, the risk of forced labour.

Under the Proposed Regulation, Competent Authorities should therefore be encouraged to proactively, safely, and meaningfully engage with workers, workers’ credible representatives, trade unions, and other civil society groups to triangulate and verify information submitted by Economic Operators. Such an approach may also help mitigate the risk of reprisals against workers and other rights holders by Economic Operators.

Recommendation: Clarify that Article 4 of the Proposed Regulation does not purport to offer ‘safe harbour’ to Economic Operators based on the adequacy of Economic Operators’ due diligence mechanisms alone.



4. Ensure that access to remedies (as defined in the UN Guiding Principles on Business and Human Rights) for workers and other affected rights holders has been provided, as a precondition to the removal of measures against Economic Operators

Under the Proposed Regulation, a Competent Authority shall withdraw its decision to impose measures against an Economic Operator, if that Economic Operator has "*eliminated forced labour from their operation or supply chain with respect to the products concerned.*"¹² The Remedy Project welcomes the high threshold adopted in the Proposed Regulation for the removal of enforcement measures. Requiring companies to demonstrate they have "*eliminated*" forced labour can help ensure that Economic Operators undertake comprehensive and thorough remediation that addresses the root causes of exploitation and prevents future harm.

However, the Proposed Regulation does not clarify how Competent Authorities should decide if forced labour has been "eliminated". In particular, it is not clear if the provision of remedies to workers and other rights holders in conditions of forced labour is part of the "elimination" of forced labour.

The provision of remedies to rights holders affected by adverse human rights impacts is a core pillar of the UN Guiding Principles on Business and Human Rights (**UNGPs**) and the CSDDD.¹³ The provision of remedies to affected rights holders is therefore an essential component of the effective "elimination" of forced labour. Our research has shown that the lack of a specific mandate on remedy has hindered the potential of the US import ban mechanism as a tool to secure access to remedies for people in conditions of forced labour.

Consistent with the UNGPs, Economic Operators should therefore be expected to demonstrate that adequate remedies have been provided to workers and other affected rights holders as part of the process of "*eliminating*" forced labour. 'Remedy' should be defined in a manner consistent with the UNGPs, and should include a comprehensive package of measures that aim to "*counteract, or make good, the adverse impact*"¹⁴ on workers and rights holders as a result of forced labour. The form that such remedies take will vary depending on the circumstances and may include financial and non-financial compensation, restitution, rehabilitation, sanctions and legal accountability for perpetrators, and policy and operational reforms to ensure the non-repetition of future harm.¹⁵ Crucially, such remedies should be designed, developed, and delivered based on meaningful consultations with workers and their credible representatives, trade unions, and civil society organisations.¹⁶

12 Proposed Regulation, Article 6

13 UNGPs, Pillar III; CSDDD, Article 8(3); Explanatory Memorandum to Proposal for a Directive of the European Parliament and Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937.

14 United Nations Office of the High Commissioner for Human Rights (OHCHR) (2012) *The Corporate Responsibility to Respect Human Rights, An Interpretive Guide*, page 7

15 See United Nations Office of the High Commissioner for Human Rights (OHCHR) (2012) *The Corporate Responsibility to Respect Human Rights, An Interpretive Guide*, page 7

16 See, e.g., UNGPs, Principle 31(h) and CSDDD Article 8(3)(b), which requires companies' corrective action plans to be developed in consultation with stakeholders.

4. Ensure that access to remedies (as defined in the UN Guiding Principles on Business and Human Rights) for workers and other affected rights holders has been provided, as a precondition to the removal of measures against Economic Operators

Recommendation: The Proposed Regulation should require Competent Authorities to consider a wide range of factors before being satisfied that an Economic Operator has "*eliminated forced labour from their operation or supply chain*". These should include:

- a. Has the Economic Operator provided effective remedies to workers and other rights holders in conditions of forced labour?¹⁷
- b. Do these remedies correspond to, and address, the human rights violations experienced by affected workers and rights holders?
- c. Do workers and other affected rights holders consider the remedies provided by the Economic Operator to be adequate?
- d. Has the Economic Operator designed, developed, delivered these remedies in meaningful consultation with workers, workers' credible representatives, trade unions, and other civil society organisations?
- e. What measures has the Economic Operator taken to ensure the non-repetition of future harm?



17 Which should be defined in accordance with the UNGPs and guidance from OHCHR. See United Nations Office of the High Commissioner for Human Rights (OHCHR) (2012) *The Corporate Responsibility to Respect Human Rights, An Interpretive Guide*, page 7

5. Prioritise investigations based on the extent to which Economic Operators have caused, contributed to, or profited from, forced labour

The Proposed Regulation directs competent authorities to focus their investigations on Economic Operators who are *"as close as possible to where the likely risk of forced labour occurs"* rather than those who may hold greater economic power or leverage over the supply chain.¹⁸

While recognising that direct responsibility must first lie with the Economic Operators that subject their workers to conditions of forced labour, companies should not escape accountability simply because they are not the *"closest"* to forced labour. Exploitation in global value chains is often driven by international companies' purchasing and sourcing practices, as well as poor governance, due diligence, and oversight, as much as it is by the conduct of their overseas suppliers.

Focusing on companies *"as close as possible"* to forced labour in the value chain can also be detrimental to efforts to provide effective access to remedy to affected rights holders. Large international buyers and brands are likely to have greater access to resources, expertise, and capacity to support the implementation of programs to remedy forced labour in their overseas value chains, compared to their smaller or mid-sized overseas suppliers.

The Proposed Regulation should therefore ensure that economic operators are not excluded from the scope of investigations simply because they are not *"closest"* to forced labour. Indeed, given the EU's parallel efforts to introduce a regulation on Corporate Sustainability Due Diligence, the Commission should expect economic operators higher up in the value chain to adopt a higher standard of oversight and responsibility over human rights issues in their value chains – rather than effectively excluding them from the scope of investigations under the Proposed Regulation.

Recommendation: The Proposed Regulation should not direct Competent Authorities' investigations to focus on Economic Operators *"as close as possible to where the likely risk of forced labour occurs"*. Instead, the Proposed Regulation should allow Competent Authorities to investigate any Economic Operator having regard to that operator's degree of proximity to forced labour. In assessing proximity, the Competent Authority should have regard to the extent to which the Economic Operator has caused, contributed to, or profited from, forced labour in its value chain.



18 European Commission (2022) COM(2022) 453 *Proposal for a regulation on prohibiting products made with forced labour on the Union market*, Article 5(3)