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## European Commission Proposes Sweeping Regulation to Ban Products Made with Forced Labor

Last week, the European Commission proposed a new Regulation that would prohibit products made with forced labor from being imported into or exported from the European Union, or otherwise made available on the EU market. The Regulation would apply to all products and levels of production. It would be broader than any of the product-related forced labor bans adopted thus far anywhere in the world. In this Alert, we provide an overview of the proposed Regulation.

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### The Regulation in Context

Forced labor is a significant global issue. According to the International Labour Organization, 27.6 million people were engaged in forced labor in 2021, an increase of 11% compared to 2016. Underscoring the pervasiveness of this issue, legislation addressing forced labor in supply chains already exists and has been gaining momentum.

U.S. legislation banning the importation of goods produced with forced labor – Section 307 of the Tariff Act – dates back almost a century, although that section was largely dormant until 2016. Since 2016, U.S. Customs and Border Protection forced labor-related product detentions and withhold release orders have significantly increased. Furthermore, additional U.S. legislation has been enacted that creates forced labor presumptions for purposes of Section 307 of the Tariff Act. The Countering America's Adversaries Through Sanctions Act, which applies to North Korean labor, was adopted in 2017 (see our Alerts [here](#), [here](#) and [here](#)). In late 2021, the Uyghur Forced Labor Prevention Act was adopted (see our Alerts [here](#) and [here](#)). That Act creates a forced labor presumption for goods produced in the Xinjiang Uyghur Autonomous Region of China, or with labor linked to specified Chinese government-sponsored labor programs. The UFLPA forced labor presumption took effect this summer, on June 21. In addition, restrictions on forced labor in U.S. government supply chains were added and further strengthened in 2015 and 2019, respectively (see our Alerts [here](#) and [here](#)).

In connection with the United States-Mexico-Canada Agreement, the successor to NAFTA, a Canadian forced labor import ban took effect on July 1, 2020 through an amendment to the Customs Tariff. A forced labor import ban also was proposed in Australia. That bill was passed by the Australian Senate in August 2021 but has since lapsed.

In addition, disclosure-only modern slavery legislation has existed since 2010, when the California Transparency in Supply Chains Act was adopted. The CTSCA was followed by the adoption of the U.K. Modern Slavery Act in 2015 and the Australian Commonwealth Modern Slavery Act in 2018. See [here](#) and [here](#) for some of our resources on the U.K. and Australian Commonwealth Modern Slavery Acts, respectively.

More recently, mandatory human rights due diligence legislation has been in the ascendancy. These instruments require subject companies to assess, address and make disclosures relating to a broad range of human rights risks and adverse impacts, including forced labor. For example, MHRDD legislation took effect in Norway in July (see our Alert [here](#)) and takes effect in Germany at the beginning of 2023 (see our Alerts [here](#) and [here](#)).

In February, the European Commission proposed a Corporate Sustainability Due Diligence Directive (see our Alert [here](#)). The proposed Regulation and CSDD Directive are linked, since effective supply chain due diligence by an economic operator would be taken into account by the competent member state authorities under the Regulation as part of a forced labor risk assessment involving the operator's products.

## An Overview of the Proposed Regulation

The proposed Regulation was anticipated well in advance of its release. It was first announced by Ursula von der Leyen, President of the European Commission, in her State of the Union speech in September 2021. The general elements of the proposal were laid down in February 2022 in the Commission's "Communication on decent work worldwide" and in the Commission's proposal for the CSDD Directive. Even before the formal announcement, in July 2021, the Commission and the European External Action Service published guidance to assist EU businesses in addressing forced labor risks in their operations and supply chains, as a bridge to legislation targeting forced labor.

Under the proposed Regulation, economic operators would be prohibited from placing or making available on the EU market products that are made with forced labor. They also would be prohibited from exporting such products from the European Union. An "**economic operator**" would be defined broadly as any natural or legal person or association of persons who is placing or making available products on the EU market or exporting products.

The Regulation would incorporate by reference as "**forced labor**" the definition of forced or compulsory labor in the ILO Forced Labour Convention. The ILO Forced Labour Convention defines forced or compulsory labor as all work or service which is exacted from any person under the menace of any penalty and for which the person has not offered himself or herself voluntarily (subject to several narrow exceptions). Under the Regulation, this would include forced child labor.

The prohibition under the Regulation would apply to products for which forced labor has been used in whole or in part at any stage of the product's extraction, harvest, production or manufacture, including working or processing related to the product at any stage of its supply chain. The prohibition also would apply to all products, of any type, including their components, and irrespective of the sector or origin of the products.

Consistent with the intended broad scope of the Regulation, small and medium-sized enterprises would not be exempted, since that would impair the effectiveness of the Regulation. However, the impact on SMEs likely would be mitigated by the risk-based approach to enforcement contemplated by the Regulation, which is further discussed below.

### *Enforcement*

The EU Member States would be required to designate competent authorities responsible for enforcing the Regulation. Under the Regulation, the competent authorities would be required to focus on the economic operators involved in the steps of the value chain as close as possible to where the risk of forced labor is likely to occur. They also would be required to take into account the size and economic resources of the economic operators, the quantity of products concerned and the scale of suspected forced labor.

An investigation by a competent authority pursuant to the Regulation would be carried out in two phases. The preliminary phase would involve a risk-based approach to assess the likelihood that economic operators violated the forced labor prohibition. The assessment would be based on all the information available to the competent authority, including the following:

- Submissions made by natural or legal persons or associations.
- Risk indicators and other information pursuant to guidelines to be issued by the Commission, which are further discussed later in this Alert.
- A public database to be commissioned by the Commission.

The Commission would be required to call upon external expertise to publish an indicative, non-exhaustive, verifiable and regularly updated database of forced labor risks in specific geographic areas or with respect to specific products. Among other things, the database would be based on information from international

organizations and third country authorities. The database would be required to be made publicly available within 24 months after the Regulation enters in force. The database concept is broadly comparable to the database of conflict-affected and high-risk areas commissioned pursuant to the EU Conflict Minerals Regulation (as discussed in our Alert [here](#)).

- Information and decisions, including any past cases of compliance or non-compliance of an economic operator, recorded in the information and communication system to be established for use by the Commission, Member State competent authorities and customs authorities in connection with the Regulation.
- Information requested by the competent authority from other relevant authorities, where necessary, on whether the economic operators under assessment are subject to and/or carry out due diligence in relation to forced labor in accordance with applicable EU or Member State legislation setting out due diligence and transparency requirements with respect to forced labor (i.e., national legislation adopted pursuant to the CSDD Directive).

**“Due diligence in relation to forced labor”** is a defined term. It would mean the efforts by an economic operator to implement mandatory requirements, voluntary guidelines, recommendations or practices to identify, prevent, mitigate or bring to an end the use of forced labor with respect to products that are to be made available on the EU market or to be exported.

As part of a preliminary investigation, the competent authority would be empowered to request information on actions taken by the economic operator to identify, prevent, mitigate or end the risks of forced labor in its operations and value chains with respect to the products under assessment. The economic operator would be required to respond to the information request within 15 business days. The competent authority would have 30 business days after receipt of the information from the economic operator to conclude the preliminary stage of its investigation.

If the competent authority determines there is a substantiated concern of forced labor (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 labor), the investigation would proceed to the next phase. If that occurs, notice would be required to be provided to the economic operator. The proposed Regulation contains additional procedural requirements relating to investigations not discussed in this Alert.

If the competent authority determines the forced labor prohibition has been violated, under the proposed Regulation, it would adopt a decision containing the following:

- A prohibition on placing or making the relevant products available on the EU market and exporting them from the European Union;
- An order for the economic operator to withdraw from the EU market the relevant products that have already been placed or made available in the European Union; and
- An order for the economic operator to dispose of the relevant products.

If an economic operator is able to provide evidence it has complied with the decision and eliminated forced labor from its operations or supply chain for the relevant product, the competent authority would be required to withdraw the decision.

Customs authorities would, in cooperation with the competent authorities, enforce the Regulation by denying entry into or exit from the European Union of products made with forced labor. The proposed Regulation provides further detail regarding that process. In addition, the Regulation would empower the Commission to adopt delegated acts supplementing the Regulation that identify products or product groups for which information would be required to be provided to customs authorities in decisions.

### Additional Guidelines

Within 18 months after the Regulation enters into force, the Commission would be required to issue guidelines. The guidelines would be required to include the following, among other things:

- Guidance on forced labor due diligence that takes into account applicable EU legislation setting out due diligence requirements with respect to forced labor, guidelines and recommendations from international organizations and the size and economic resources of economic operators.
- Information on risk indicators of forced labor based on independent and verifiable information, including reports from international organizations, in particular the ILO, civil society, business organizations and experience from implementing EU legislation setting out due diligence requirements with respect to forced labor.
- A list of publicly available information sources of relevance for the implementation of the Regulation.
- Further information to facilitate the competent authorities' implementation of the Regulation.

### Status and Next Steps

The Regulation does not yet have legal effect. The next step in the legislative process is for the Commission's proposal to be presented to the European Parliament and the Council, who will provide their input. At the earliest, the Regulation would enter into force next year. As proposed, it would take effect 24 months after it enters into force, i.e., sometime in 2025 at the earliest.

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