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Revised and additional comments on the Forced Labour proposal

(Regulation - COM(2022)453)

Since we submitted our input on this proposal the 30th November 2022, we have been in extensive dialogue with stakeholders and as new evidence has emerged, we have revised our position accordingly. This paper reflects our current position on the proposal.

Key messages

- The Confederation of Swedish Enterprise supports EU-legislation aimed at stopping the use of forced labour. The legislation must be based on existing ILO-conventions and definitions and the methodology to address the issue should be based on the existing NLF-method for regulating goods on the internal market.
- The direct legal obligations for businesses must stop at the level of direct contractual relationships. However, the focus of the legislation should be on establishing and upholding processes for businesses to conduct efficient due diligence in the supply chain to detect and stop any forced labour
- The burden of proof must lie with the authorities responsible for the new regulation and there must be a clear and transparent processes for starting an investigation.
- Products should not be withdrawn if already put on the market provided they fulfil EU product regulations, hence we oppose the so-called withdrawal mechanism. Instead, we propose that products that have been produced with forced labour shall be prohibited from entering the European market. Firms putting them on the market shall be sanctioned with financial remedies based on the NLF, if either (1) the violation has occurred within their direct control in the first tier of the supply chain, or (2) if proper due diligence has not been observed.
- Many practical issues need to be resolved before the new regulation can become operational. This includes providing competent authorities with the new necessary resources, establishing a database for risk-assessment and methods for authorities and businesses to cooperate.
- Due to the many unclear aspects of the regulation, we call for a thorough impact assessment before proceeding with the legislation

Starting point

The Swedish business community wants to uphold the highest standards for sustainable conduct, including working constructively with public authorities to stop violations to basic human rights, such as forced labour. We therefore welcome the ambition behind the proposal to develop an approach to address forced labour. Such approach should be based on already existing ILO-conventions and definitions and use a harmonized EU approach in the form of a regulation based on the existing model in the New Legislative Framework (NLF).

We still fail to understand why there is no impact assessment, especially since the ongoing discussion clearly points at increasingly numerous complications that needs to be analyzed.

Due diligence procedures are key

The use of pro-active procedural activities among economic operators to identify and act to cease, prevent or mitigate suspicious forced labour is the major enabler to achieve improvements of working conditions, without jeopardizing global trade and income opportunities for the suppliers and for the countries in question. This is why these activities must be included in the Forced Labor Regulation as a key requirement alongside the factual evidence of any forced labour when assessing a potential violation.

It is important to clarify the relationship between this regulation and other EU initiatives, especially the Corporate Sustainability Due Diligence Directive (CS3D) that also aim at ensuring that companies have such procedures. Many of these procedures will be the same for the two laws and therefore we should strive to avoid duplications or contradicting procedures as well as unnecessary additional administrative burdens and costs for companies.

Base the regulation on the NLF

It must be ensured that the proposal does not undermine the architecture of free movement of goods in the EU internal market, based on the New Legislative Framework for products. The NLF has been working well for decades and is well established amongst both businesses and government agencies. It has made the single market a common market of the safest products on the globe. Therefore, we propose to use the NLF as a basis for this regulation¹.

The NLF only regulates the relationship between the economic operator putting a good on the single market and their immediate supplier in the first tier. Firms should only be held legally accountable for this relationship, as anything else is beyond their direct control.

However, the NLF also necessitates information exchange beyond the first tier. An economic operator must conduct due diligence, by asking relevant questions, checking and verifying facts and following up, when needed, to minimize risks of forced labour.

¹ The NLF scope should also include all products covered by the General Product Safety Directive, GPSD. This will in the end of 2024 be replaced by a regulation, GPSR, with basically the same scope and regulation.

Hence, the regulation should make it possible to sanction a firm, and its products, even if a violation has occurred outside of the direct contractual relationship if, and only if, due diligence has not been observed.

The regulation needs to enable dedicated competent authorities and economic operators to work together to address the issue, while not imposing undue economic and administrative burdens on companies that are in compliance with EU requirements on health, environment and consumer production, while taking steps to ensure responsible business conduct among its suppliers.

Furthermore, the market surveillance authorities today only deal with issues related to the characteristics of the products, not *how* they were made, which is a fundamentally different issue. Therefore, the regulation requires that the relevant authorities develop the competence and capacity needed for these new tasks. Here, the use of external expertise like conformity assessment bodies that already today review value chains for forced labour could be activated.

In general, market surveillance needs to be improved by increasing the number of assessed companies/products as well as an extended cooperation within the member states to achieve its purpose. This is pure fairness to the economic operators and a trust-building activity for the authorities and the legislation as a whole. This is necessary regardless of the forced labour regulation, however it becomes even more imperative as a result of it.

Financial sanctions better than a withdrawal mechanism

There should however be one important exception from the liability of an economic operator in the NLF. That is the requirement of withdrawal or modification of the product on the market in case the product should be considered in violation of the Forced Labour Regulation, as long as product and safety requirements are met.

Having a withdrawal mechanism creates numerous problems, such as what to do with a withdrawn product. Destroy it? And if a product has a large number of components and it turns out that *one* of them has been produced by forced labour, should the entire product be withdrawn? That is not proportionate. Furthermore, if a product is made with recycled materials and has to be withdrawn, the regulation undermines circular economic models. As such, the resource and environmental impact will be unnecessary high.

A better way to sanction products that have been found in violation of the regulation is to use the sanctions under the NLF, both fines and member state legal procedures for firms that have put such products on the market in Europe. Furthermore, work with customs to establish an import ban for products that have been shown to have been produced with forced labour. The size of such financial sanctions has to be proportionate to both the seriousness of the violation itself and/or if it can be proved that the company putting the product on the market has failed in their due diligence procedures.

Burden of proof must be with the authorities

The Commission needs to elaborate on when it will consider a submitted concern of forced labour to be substantiated enough to warrant an investigation. There should be minimum requirements that a concern should comply with to avoid resources being used for unsubstantiated allegations. Clear and transparent processes for filing allegations thus need to be established, with criteria that ensure that allegations are well-developed, based on verifiable facts and made in good faith. For the actual investigation it needs to be made clear

what type, nature, and extent of the evidence demonstrates that goods have been produced, extracted, or harvested by forced labour.

There is furthermore no compensation for wrongful assessments and decisions included in the proposal. Considering the timelines proposed, this could harm an economic operator economically and ruin their brand. The assessment must be carried out under non-disclosure until a claiming verdict is presented for reputation reasons and company secrecy reasons. Any assessment that does not lead to a verdict must leave the companies unharmed.

One could envisage a mechanism to share allegations and evidence with affected companies and importers. This would allow for fairness, due process and the presentation of documentation necessary to address any allegations of forced labour.

Investigations should give companies a realistic timeframe to respond to information requests. Such requests will require companies to compile information across business units and suppliers. A time frame between 30-90 days would give time for a meaningful assessment. However, timelines must take in account the complexity of supply chains and be adapted to the level of supply chain tiers under investigation.

Practical guidelines and databases are needed

While it is probably fairly easy to find sectors and regions where there is a risk of forced labour, how will it be possible for anyone to track a particular product to an act of forced labour? While technology can support, it is limited in assessing all aspects. Supply chain mapping and material traceability efforts are dependent on the quality of information being provided at every node in the supply chain, again highlighting the need for standardisation and guidance.

Tracking and finding forced labour in the value chains will have to be handled by an expanded collaboration between judicial authorities, market surveillance authorities and customs. Their work must be based on a risk-based approach, where focus should lie on countries, sectors and individual companies with a high prevalence of forced labour.

Responsible authorities need a proper mandate, the right competences and sufficient resources. This should be analyzed within the impact assessment, to assess the need for a capacity increase and the feasibility and practicability of such legislation.

Even if it may be practical to designate enforcement of the regulation to competent authorities in the member states, there is a risk that we will get a fragmented enforcement landscape. 27 countries with varying capacities to implement such a measure and with varying methods in doing so could cause an uneven playing field when it comes to interpretation of evidence and inconsistency in methodology. There cannot be different programs, different requirements, nor different enforcement mechanisms, for each of the 27 member states.

Apart from the need of an impact assessment there will also (as foreseen in the proposal) be a need for detailed guidelines to facilitate implementation and enforcement. The sooner the guidelines are presented, the better, to allow for a better preparation of competent authorities, customs authorities and economic operators. We believe that the guidelines therefore should be published at least 12 months before the regulation entering into force. This is especially important as implementing the regulation will imply additional costs, and require a new kind of expertise, for both authorities and many companies.

The guidelines should recognize industry due diligence schemes where suitable as one of the key instruments for a company to “identify, prevent, mitigate or bring to an end risk of forced labour.” Information on risk indicators should be based on internationally recognized standards of ILO.

A database is proposed to be developed providing information on forced labour risks in specific geographic areas or sectors. It is critical this is developed in a transparent way and built on internationally recognized sources and be shared between economic operators and competent authorities. Sources to the database can also be conformity assessment bodies/companies, NGO’s and trade unions after review of facts.

The database must be made available sooner than the suggested 24 months after the regulation enters into force in order for companies to prepare accordingly. The database must continue to make available the identified high risks in due time to enable proactive work from economic operators. It is not clear how this will be done.

Adverse implications for international trade should be avoided

The proposal, together with other EU initiatives, including CS3D and the Regulation on Deforestation, will have a cumulative administrative cost impact on trade. It will also increase risks that some firms choose to stop doing business with some regions in the world to mitigate those costs. That could leave those regions worse off than before, which is something that needs to be recognized. Not least LDCs are at risk of becoming abandoned as sources of supply. Resources will have to be devoted to aid vulnerable countries to establish the necessary competences to continue being part of global trade. Hopefully, some less developed countries can also gain from the regulation by addressing the issues of forced labour in a determined manner.

Furthermore, EU companies will sometimes be required to abide by conflicting legislations (EU legislation versus foreign jurisdictions). If they are required to obtain information relevant for the implementation and enforcement of the EU regulation, they might find that challenging or even impossible in a country where the forced labour is associated with actions sponsored by the state itself.

These challenges require coordinated efforts from the Commission to reach out to trading partners, increase awareness, provide information and explain how the proposed regulation will work in practice and how the EU can help its partners reduce risks related to forced labour.