29 November 2022

CITHA- European Confederation of International Trading Houses Associations
Am Weidendamm 1A
10117 Berlin
Germany

Phone + 49 30 72 62 57 93
Fax +49 30 72 62 57 94

info@citha.eu
www.citha.eu

Jan Krückemeyer
President
info@citha.eu

Gregor Wolf
Secretary General
wolf@citha.eu

Transparency register

Identification number:
587054824187-06

Position Paper
Forced Labour - EU ban on products from forced labour

Introduction

The European Confederation of International Trading Houses Associations (CITHA) shares the Commission's objective: goods from forced labour have no place on the Union market. Forced labour should not be accepted either inside or outside the European Union. Nevertheless, we are of the opinion that the proposal has weak points and inaccuracies in many respects and threatens to massively overburden European companies.

On 14 September 2022, the EU Commission proposed to ban products made with forced labour from the EU market (COM (2022) 453). The proposed regulation covers products produced in the European Union for domestic consumption as well as for export or imported from third countries.

The national authorities of the member states are to be empowered to remove products produced in forced labour from the EU market after an investigation. EU customs authorities would then identify and stop these products at the EU's external borders.

Position

The Commission proposal is another EU human rights legal instrument, such as the Value Chain Directive (CSDD), the Corporate Sustainability Reporting Directive (CSRD) or the Conflict Minerals Regulation.

However, there are overlaps between these legal provisions, which result in a bureaucratic multiple burden for companies. Due to the multitude of regulations, the desired harmonisation within the internal market is not achieved.

Below we point out the exact weak points of the draft and explain our position.

Missing deadlines

We have major concerns about the timeframe in which the ban is to be implemented. The draft needs to be adapted by the legislator to ensure a smooth implementation.

There is no time limit set for the competent authorities for the period from the initiation of the preliminary investigation to the date of the request for information by the economic operators concerned (Article 4). This clearly stands out negatively in direct contrast to the clear time limits in Article 8.

There is no specific time limit for the maximum duration of an investigation by the competent authorities (Art. 6). In Article 6(1) there is only the requirement of a "reasonable time".

Missing or vague deadlines create the risk that decisions could be delayed for an unacceptably long time. This would also create competition-distorting handling in the member states and could, for example, detain goods indefinitely in customs or at the port.

Clarity needed – especially for SMEs

Even though article 4.2 mentions "… take into account the size and economic resources of the economic operators … " the proposed regulation does not include any provision to mitigate the increased cost of compliance for SMEs. Moreover, it does not explicitly give any indication about the "size" nor the "economic resources", thus it introduces uncertainty. Would very small companies be entitled to special treatment?

Article 4.6 establishes that relevant authorities should take into account if the economic operator has carried out due diligence. This clause calls for discrimination (i.e. priviledge treatment) in favor of big companies because they do have resources to carry out due diligence, while SMEs would not normally have enough resources to do it on a regular basis.

It is not clear how far back the due diligence has to go. Global value chains and the level of globalization that has been achieved makes it very normal that the production process of a product takes place in several countries by several economic operators in said countries. Big companies may have resources to carry out due diligence, but not small companies.

Clarity needed regarding the information to be provided to customs authorities

Article 16 provides that the Commission may adopt delegated acts supplementing the Regulation. This applies to the definition of certain products and product groups for which information on the identification of the product, information on the manufacturer or producer and information on the product suppliers would have to be provided to the customs authorities by economic operators.

Too often there is a gap between the prescribed compliance obligations and the technical implementation by member states. Neglecting the technical challenges ignores the very real impact that inadequate implementation of the regulations has on businesses.

With a view to the feasibility of performance and implementation by the economic operators, a higher degree of concreteness for the term "information on product suppliers" used in Art. 16(2) is already desirable in the regulation. This applies in particular with regard to the intended comprehensive coverage of the value chain, including all preliminary products.

Guidelines

Article 23 of the draft regulation provides that the Commission shall, no later than 18 months after the entry into force of the Regulation, publish due diligence guidelines on forced labour, taking into account, inter alia, the size and economic resources of economic operators.

Legal certainty requires clear rules and prohibitions. This in turn means that risk indicators must be practicable and unambiguous for economic operators and authorities throughout the internal market and should leave as little room as possible for divergent national interpretations.

Since the regulation applies two years after it enters into force, it is of great importance that this publication deadline is actually met so that the economy can prepare itself accordingly. A period of 12 months instead of 18 months would be desirable.

Specifically, the guidelines are expected to include a structure and process that provides a comprehensive pathway for companies to comply with the ban on forced labour.

Level-playing field

In practice, maximum harmonisation of the application of the law is of central importance with regard to the "level playing field" within the EU. With a regulation, the Commission has chosen the appropriate legal instrument to implement the desired effect in a comprehensive and practicable manner throughout the European Union.

Against this backdrop, it would be welcome if the regulation, within the framework of the final provisions, would establish a regular (e.g., 2-year) reporting obligation of the Commission on the application of the regulation in the individual member states. This should include a detailed evaluation of the application of the law in the individual member states.

Throughout the proposed regulation it is mentioned that it is important to preserve the EU common market and a fair playing field. However, as monitoring and implementation of the proposed regulation is assigned to individual member states, there surely can exist many disparities in the practical requirements and monitoring for compliance and in the cost of non-compliance.

Burden of proof

According to Article 6 (paragraph 4), the practical implementation of a traffic and export ban is the sole responsibility of the companies concerned. This can be very demanding, especially for SMEs. Withdrawing products from the market can be a very expensive task which SMEs, specially small companies, do not have the resources to carry it out. Moreover, a compulsory take out/withdrawl of the market of non-compliant products may be so high in terms of overall turnover of an SME that it might result in the backrupcy of said SME. Therefore, the responsibility for implementation should lie with the member states.

Article 30 also provides for sanctions to be determined by the individual member states. If this cannot be legally established in a uniform way in the European regulation, at least a uniform framework should be set that goes beyond the general requirements in Art. 30 paragraph 2 "effective, proportionate and dissuasive". Member states may establish penalties which greatly differ in economic terms, thus making non-compliance much more expensive in some Member States than in others. Similarly, this article requires Member States to “take all measures necessary to ensure that they are implemented …” Available resources of Member States to ensure compliance may vary significantly, thus penalizing economic operators of countries which do allocate abundant resources to this end.

Competent authorities

The national authorities are responsible for implementing the Regulation (Article 12).

From the date of entry into force of the regulation, the competent authorities should be operational. The competent authority must also have sufficient institutional financial and material resources to implement the prohibition of forced labour.

Customs

Customs authorities act at the external borders of the EU on the basis of decisions taken by the competent authorities of the Member States.

This can be a serious weakness. Companies have repeatedly experienced unfair practices between the different customs authorities of the member countries that lead to competitive disadvantages for companies from other countries.The absolute necessity of a compliant implementation of the regulation in the different member countries should be emphasised.

Customs authorities should cooperate with the competent authorities and not in addition to them. By the time businesses have to comply with the Regulation, accessibility and data processing should be operational.

The mere naming of the customs authority (Art. 2; Art. 15) is not sufficient. It is necessary that companies and stakeholders are given the opportunity to have official decisions reviewed by the courts.

Confederation of International Trading Houses Associations (CITHA)

CITHA is the umbrella organisation of European foreign trade associations. It's members include foreign trade associations from Italy, Spain, Germany, England, Switzerland and Austria.