



Public consultation on the proposal on prohibiting products made with forced labour on the Union market (EU) 2022/2069

Ibec position

24 October 2023

Introduction

Ibec welcomes the opportunity to respond to the Department's public consultation on the EU proposal on prohibiting products made with forced labour on the Union market (EU) 2022/2069. In this submission, Ibec would like to set out general views on the proposal.

We welcome the European Commission's ambition to position the European economy and global supply chains as the most responsible and sustainable. Irish business is fully committed to global sustainability and to driving more investment into sustainable business practices. Forced labour is a serious human rights violation that the Irish business community fully condemns.

In principle, Ibec considers that an effective legal framework should be practical for companies to comply with and for national authorities to enforce, as well as being complementary and additive to existing national laws in EU Member States and existing as well as future EU legislation. Ibec and its members, as responsible corporate citizens, consider that there are a number of positive aspects in the Proposal. However, we would like to provide views relating to a number of areas where this Proposal could be improved to ensure its effectiveness.

Coherence with relevant existing and proposed legislation

As noted in the consultation document, the Proposal is cross-cutting covering human rights, trade, customs and the internal market, while also seeking to align with international standards and other EU initiatives. It is not clear how the proposal will interact with related legislative initiatives such as the proposed Corporate Sustainability Due Diligence Directive (CSDDD), which is currently under interinstitutional negotiations. Although the proposal is intended to be a "marketing ban", it contains proposals for due diligence elements. To be effective, there should be a clear division between the contents of the two initiatives as well as clarification as to how they will work together to avoid overlap.

To meet its objectives, the Proposal must ensure coordination and regulatory coherence to avoid overlaps in related proceedings as well as potentially contradictory decisions. This means first, that coordination among responsible institutions must be ensured at national as well as at EU levels; second, that derogations enshrined in the CSDDD directive for specific cases must be considered before banning a product from the market; and third, that a graduated and proportionate procedure should be articulated by making use of the CSDDD, before any ban is imposed on a specific product.

To ensure legal certainty and consistency in implementation, some definitions should be clarified and aligned with relevant legislation, including the CSDDD. In particular, the terms 'end user' and 'value chain' should be well defined. It is not clear when a product will be deemed to have reached its end-use and the term 'value chain' could lead to economic operators being held responsible in circumstances beyond their control. This would detract from the identification and mitigation of salient risks in supply chains which organisations can influence. This should be restrained to ensure that the liability of companies can only relate to their own activities, those of their subsidiaries, and those of its immediate contracting parties.

Internal Market Fragmentation

It is welcome that the Commission has proposed a Regulation, rather than a Directive, in support of a harmonised approach across the EU. It is important that the Proposal does not undermine the architecture of free movement of goods in the EU single market, in line with the New Legislative Framework for products that has been working well. Likewise, it should not undermine other policy objectives through other regulations, such as the proposed Ecodesign for Sustainable Products Regulation (2022/0095).

To avoid a fragmented application across the EU, greater clarification is needed on the relationship between the proposal and existing national legislation. Similarly, the proposal should guarantee uniformity in the application of penalties based on objective criteria to guarantee a minimum level across the EU. For example, a maximum sanction based on the value of the product.

Investigation process

The timeline for economic operators to provide evidence (Article 4) must help ensure effectiveness in the investigation phase. The proposal of 15 days should be extended to at least 40 days to ensure that companies can retrieve all the necessary information, taking into account the complexity and sensitive nature of allegations. Decisions should also consider the overall impact on the market and avoid disruptions.

Likewise, the period for companies to withdraw products that are in violation of the Regulation (Article 7) should be extended from 30 days to 60 days. Greater clarity is required on how the withdrawal process would work in practice, including how the products should be destroyed, if required. This must avoid incompatibilities with existing legislation, including the Waste Framework Directive, as well as the proposed Ecodesign for Sustainable Products Regulation (2022/0095).

Companies should be given adequate opportunity to engage and comply with investigation – excessively short timelines will not be conducive to effective engagement. Timeline extensions, where appropriate and justified, should be an option throughout the preliminary and actual investigation as the information requested is likely to be complex and require engagement with multiple partners.

The investigation process should be done independently and use reputable and reliable sources like the International Labour Organization (ILO) reports. The Regulation should clarify that investigations in third countries should be pursued by the European Commission considering that it may be related to several Member States as well the disparity of resources at Member State level. Information provided by companies should be treated sensitively.

Basis of evidence

Submissions by natural or legal persons must be evidence based. The Regulation must set clear conditions for the acceptance of such submissions and include basic transparency or own interest disclosure requirements for the entity that is making the submission.

Considering the wide scope of the proposal, it is important that it does not result in economic operators having to systematically prove that a good is not produced with forced labour. A reversal of the burden of proof would introduce significant burden on companies, which would likely lead to customs delays and impacts on the availability of products in the market.

The Commission should clarify the process for competent authorities to prove that allegations are substantiated and applicable to the company concerned at the time of the allegation, that sources are credible and that the supplier in question is being used in the product's supply chain.

Proportionality

For business, it is critical that the Regulation is proportional. In that regard, it must specify processes for handling situations where a component of complex end products is found to be or is suspected of being produced with forced labour. The aim of the proposed Regulation should be to prevent financial gain from the sale of non-compliant products. As such, non-compliant products should be recycled or donated in line with national and EU law, instead of being disposed of.

The legal framework should not incentivise irresponsible disengagement or de-risking of sourcing too early. It should encourage attempts to identify and mitigate risks, allowing companies to address the challenges without penalties, which would otherwise encourage 'cut-and-run' behaviour. Such behaviour could impact vulnerable communities dependent on economic operators for their livelihood.

Engagement and alignment with third countries

Given the global nature of forced labour it is critical that the EU seek to engage with third countries to ensure there is a good understanding of the implications of this Regulation. In addition, the EU should work closely with international organisations such as the ILO to avail of the practical tools and databases it has developed in this field that can be of use to both governments and economic operators.

The EU should wherever possible, align with like-minded trade partners on standards and with internationally accepted due diligence guidance such as the OECD Due Diligence Guidelines for Responsible Business Conduct, to set a common bar across industry with partners and allies, in order to reduce confusion and amplify efforts globally. Countries should align prospective efforts with existing regulatory reporting measures that companies are already complying with and build on industry best practices. Steps should be taken to ensure that there is a harmonised approach to enforcement, such as guidance on evidentiary standards in identifying forced labour, in order to prevent companies from facing fragmented global requirements.

The Regulation should carefully consider its approach to remedies, including that it would open the possibility that companies may receive claims for effective remediation to victims from suppliers in third country.

Guidance

The consultation document recognises that the scope is very broad covering the entire supply chain of all companies, including SMEs, and all products that are imported or made within the EU as well as exports, including their components regardless of the industry or geographical location concerned. Bearing this in mind, any legislation must be accompanied by the development of comprehensive guidelines by the European Commission in coordination with Member States, as suggested in Article 23. This guidance should be ready well in advance of the entry into force of the Regulation to ensure that economic operators and competent authorities can prepare appropriately. Additional guidance should be

considered for SMEs and regarding specific regions of risk within countries to help companies take the necessary steps in their supply chains.

These guidelines should rely on the ILO's interpretations and guidance to ensure a harmonised application, bearing in mind that companies operate global value chains under a myriad of different legal jurisdictions. Guidance should cover how companies are supposed to identify forced labour or otherwise document a lack of forced labour at all stages including extraction and component level. Guidance should be sector-specific to help companies comply and to help enforcement authorities ensure harmonisation and equitable implementation across the EU. A sectoral approach would also take into account the fact that some sectors are more advanced in their efforts to address the issue in scope of the Proposal. Challenges in identifying and solving the problems are different for different sectors, countries, regions and companies, so governments need to cooperate with companies and civil society to find the most effective approach to each situation and identify and mitigate the problem. Sectoral guidelines should be industry specific and should elaborate on specific commodities such as minerals and agriculture. To ensure legal certainty, guidance should be available in due time to help economic operators and national authorities implement the Regulation. Guidance should be clear and unambiguous to prevent diverging interpretations.

According to the proposal, the Commission would have up to 18 months to issue guidelines and that the Regulation would apply to companies 24 months after the Regulation enters into force. This could mean that the time period between the publication of the Commission's guidelines and the application of the new rules could potentially be only six months. We recommend a phased in approach with greater lead time for businesses.

Recognition of Industry Schemes

The Regulation should acknowledge the importance of industry schemes like the Responsible Business Alliance (RBA) which have shown to be effective in reaching the goals of identifying and preventing human rights violations in supply chains. Ibec believes that a mechanism should be built into this Regulation, as well as the CSDDD, to recognise existing and future industry schemes as is the case with the Responsible ("Conflict") Minerals Regulation.



About Ibec

Ibec is Ireland's largest lobby group and business representative. We campaign for real changes to the policies that matter most to business. Policy is shaped by our diverse membership, who are home grown, multinational, big and small and employ 70% of the private sector workforce in Ireland. With 36 trade associations covering a range of industry sectors, 6 offices around Ireland as well as an office in Brussels. With over 240 employees, Ibec communicates the Irish business voice to key stakeholders at home and abroad. Ibec also provides a wide range of professional services and management training to members on all aspects of human resource management, occupational health and safety, employee relations and employment law.

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