

AIM commentary

**Proposal for a Regulation prohibiting products made with
forced labour on the Union market**

Executive summary

[AIM - The European Brands Association](#) strongly supports the European Commission's ambition to eradicate forced labour from supply chains. AIM and its members firmly believe that forced labour is an unacceptable practice and are committed to addressing forced labour risks in their operations and across their business relationships. We also acknowledge the calls made by both the Council of the EU¹ and the European Parliament² to step up action at EU level to address the issue of forced labour.

Brand manufacturers represented in AIM operate and source globally. Many of our member companies are leading on responsible sourcing practices, seeking to minimise environmental impacts and ensure respect of human rights across their supply chains. From experience gained through our global collaborative sourcing initiative [AIM-Progress](#), it has become clear that supply chain due diligence, coupled with capability building and remedy approaches jointly with local suppliers, rightsholders, public authorities and other stakeholders in risk-prone sourcing regions, are key to ensuring continuous improvement and sustainable supply of relevant commodities in a global trading environment. Beyond banning products on the EU market, the proposed EU Regulation on prohibiting products made with forced labour on the Union market (hereunder "EU Regulation") must primarily promote improving working conditions and yielding positive outcomes for individuals and communities at risk of forced labour.

AIM would like to make the following recommendations for consideration, with the intention of strengthening the European Commission's proposal to achieve the stated objectives:

- Ensure coherence with the proposed EU Directive on Corporate Sustainability Due Diligence, as the latter will provide the overall EU framework for companies' due diligence obligations.
- Maintain the approach taken in the Commission proposal whereby competent authorities in EU Member States should carry the burden of proof to establish that forced labour has been used and whereby economic operators should have the opportunity to provide information in their defence to the competent authorities.
- Ensure EU-wide harmonisation in applying the same standards across Member States through implementation guidance for competent authorities (including a common EU approach to penalties), and for businesses.
- Allow for a 12-month adaptation period for Member States to comply with the EU Regulation, meaning that the date of application should intervene 2.5 years after its entry into force.
- Implement a risk-based approach, both by competent authorities in evaluating the risk of forced labour and by companies who are required to apply the relevant due diligence standards and legislation.
- Recognise that when areas or products are classified as entailing negligible risk in the database provided for in the EU Regulation, this should be taken into account as a mitigation factor for companies, who should focus their due diligence efforts where risks are the highest.
- Set clear guidance on how products sourced through a mass balance approach should be handled under the new EU Regulation.
- Clarify that the economic operator with whom responsibility for compliance lies is the first importer/placer of a product on the EU market or the exporter.

¹ Council Conclusions of 1 December 2020 on Human Rights and Decent Work in Global Supply Chains (13512/20)

² European Parliament resolution of 9 June 2022 on a new trade instrument to ban products made by forced labour (2022/2611(RSP))

- Entitle companies that have been subject to wrongful decisions by competent authorities to receive compensation or damages.
- Foresee additional measures to tackle the root causes of forced labour in global supply chains, including capacity building and public funding, as well as engagement and partnership agreements with third country governments.

Detailed commentary of the proposed Regulation

1. Coherence with future Directive on Corporate Sustainability Due Diligence

We believe that the proposed Directive on Corporate Sustainability Due Diligence should become the cornerstone EU legislative framework to address the responsibility of businesses to respect human rights in their operations and supply chains through an obligation to carry out human rights due diligence in line with the UN Guiding Principles on Business and Human Rights (UNGPs) and the OECD Guidelines for Multinational Enterprises. By undertaking effective due diligence, companies will be able to identify and address forced labour risks in their supply chains. Therefore, to ensure coherence between the two EU legal instruments, a company's compliance with its due diligence obligation foreseen under the EU Directive on Corporate Sustainability Due Diligence should be taken into account by competent authorities in carrying out their investigation and enforcement obligations as per the EU Regulation.

Given the importance of EU-wide due diligence legislation being in place to enable companies to demonstrate compliance, AIM urges the Commission to ensure that the timing of the entry into force and application of the EU Regulation on forced labour is parallel or consecutive to the entry into force and application of the proposed Directive on Corporate Sustainability Due Diligence. This will ensure legal certainty and a level playing field for companies, allowing them to set up their due diligence processes.

2. Burden of proof

Recital 26 of the proposed EU Regulation provides that “competent authorities should bear the burden of establishing that forced labour has been used at any stage of production, manufacture, harvest or extraction of a product, including working or processing related to the product on the basis of all information, and evidence gathered during the investigation, including its preliminary phase. To ensure their right to due process, economic operators should have the opportunity to provide information in their defence to the competent authorities throughout the investigation.”

AIM supports the approach taken in the Commission proposal whereby competent authorities in EU Member States should carry the burden of proof to establish that forced labour has been used. Given the complexity of identifying instances of forced labour, multiple indicators and information sources will need to be used. In this regard, we also support that economic operators should have the opportunity to provide information in their defence to the competent authorities throughout the investigation”, as per Recital 26 of the proposed EU Regulation, and further detailed in Article 4.³

³ Under the proposed Regulation on forced labour, competent authorities are required in Article 4 to take a risk-based approach in assessing the likelihood of economic operators violating Article 3, i.e., not complying with the forced labour ban. This risk-based approach includes requesting, from the economic operators under assessment, information on actions taken to identify, prevent, mitigate or bring to an end risk of forced labour in their operations

The burden of proof for violations being with the authorities is a foundational and basic legal principle in both EU and international law⁴ and is commonly applied across different areas of EU law, e.g. European competition law and product specific regulations. Although there are very exceptional situations that EU law provides for a reversal of the burden of proof, the forced labour regulation should not deviate from this foundational principle.

3. EU-wide harmonisation – Applying the same standards

Guidance for competent authorities

Competent authorities in each EU Member State will be responsible for assessing the likelihood of products having been made with forced labour and taking decisions to ban products from being placed or made available on the EU market. The proposed EU Regulation on forced labour sets out the process for how assessments, investigations and decision-making are to be carried out. This process depends heavily on competent authorities having at their disposal the necessary information, data and guidance to be able to make transparent and well-founded decisions.

In Article 23 of the proposed EU Regulation, the Commission provides for the issuance of necessary guidelines by 18 months after the entry into force of the regulation. The application date for the regulation at Member State level is 24 months after entry into force of the regulation. AIM members remain concerned that despite the 6 months gap, the guidelines may not be fully understood and implemented by competent authorities in EU Member States at the time of application of the EU Regulation at national level; but more importantly that there remains a risk of divergent interpretation of how to assess forced labour risks across the EU. This could lead to different standards being applied in terms of interpretations of forced labour risk indicators, and what level of evidence is required to trigger an investigation, with the ultimate outcome being that there could be “forum-shopping” by economic operators on which EU Member State to import/export through. Even though the proposed EU Regulation provides for mutual recognition of Member State decisions (Recital 42), the initial decision will lie in the hands of the Member State(s) where the product is being imported to or exported from, thus setting a precedent for other Member States. AIM would therefore advocate allowing for a 12-month adaptation period for Member States, which would mean that the date of application of the EU Regulation should intervene 2.5 years (instead of 2 years) after its entry into force.

AIM would also suggest that the guidance for competent authorities, provided for in Article 23 of the proposed EU Regulation, makes a clear distinction for risk evaluation between forced labour risks in the private sector and forced labour imposed by state authorities, as referenced in the Commission proposal, in order to feed into the database of forced labour risk areas and products foreseen in Article 13 of the proposed EU Regulation. Whilst the former can be addressed through effective due diligence and collaborative

and supply chains with respect to the products under assessment, including applicable EU legislation on due diligence and transparency. The competent authority shall duly take into account where the economic operator demonstrates that it carries out due diligence on the basis of identified forced labour impact in its supply chain, adopts and implements measures suitable and effective for bringing to an end forced labour in a short period of time. Competent authorities shall not open an investigation where it is demonstrated that prescribed due diligence measures are being complied with in a way that mitigates, prevents and brings to an end the risk of forced labour.

⁴ The EU Charter of Fundamental rights (which is legally binding on the EU and its Member States) outlines this foundational principle in its Article 48, which provides that “*everyone who has been charged shall be presumed innocent until proved guilty according to law.*” Placing the burden of proof on the State vs. the accused is also a long-standing legal principle in Article 11, Section 1, of the United Nations Declaration of Human Rights (UDHR), in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and in Article 14, Section 2 of the the United Nations International Covenant on Civil and Political Rights.

approaches, the latter will likely involve issues related to forced labour imposed by state authorities which cannot be tackled by companies alone, except through disengagement. Competent authorities should prioritise forced labour imposed by state authorities as part of their risk-based enforcement of the EU Regulation.

Finally, AIM supports the creation of the interconnection for decisions (Article 22), as well as the EU network for coordination (Article 24) to ease the communication between national competent authorities, Member States, and the European Commission. This should work to ensure harmonised implementation and enforcement across the EU Single Market. AIM calls, however, for the establishment of a centralized enforcement authority at EU level, in order to avoid divergences in the implementation and enforcement of the EU Regulation between Member States.

Implementation guidance for business

Experience with the current debates around the proposed Regulation on Deforestation-Free Products and with US legislation on forced labour has shown that implementation guidance for business is absolutely key, and AIM strongly welcomes the fact that the Commission proposes to build on existing relevant guidance already published in July 2021. Such additional guidance should be foreseen in Article 23 of the EU Regulation and clarify the expected steps for due diligence necessary to comply with the new EU rules. The guidance should be harmonised at EU level to avoid divergent requirements across EU Member States, which would otherwise lead to legal uncertainty and increased administrative burden for companies striving to comply with the new EU rules. Adopting an EU legislative framework without developing and making available such implementation guidance at the time of entry into force of the EU Regulation would be problematic for both operators and enforcement authorities. Furthermore, this guidance should be coherent with relevant guidance provided for in the proposed Directive on Corporate Sustainability Due Diligence and Regulation on Deforestation-Free Products.

Penalties

Another point of concern for AIM is the fact that the laying down of rules on penalties applicable to non-compliance is left to EU Member States, in accordance with national law. We would advocate an EU-harmonised approach to penalties to avoid “forum-shopping” by importers and exporters where penalties are the lowest. This could be achieved through clear guidelines laying down principles, such as proportionality, and through a monitoring mechanism implemented by the European Commission.

4. Implementing a risk-based approach / Avoiding negative side effects

Status of negligible risk

The proposed EU Regulation calls for a risk-based approach, both by competent authorities in evaluating the risk of forced labour and by companies who are required to apply the relevant due diligence standards and legislation, which, by definition, is risk-based.

For companies, there may be scenarios whereby full and proper due diligence was undertaken, forced labour risks were addressed but due to the complexity of the issue, including systemic factors beyond a company’s control, a negligible level of risk of forced labour remains in a certain supply chain. Given the risk-based prioritisation of severe adverse impacts, this could lead to products being imported where a negligible risk of forced labour is present, while the company continues to mitigate and ultimately prevent the risk through continuous improvement. It remains unclear whether affected products would still be allowed on the EU market if companies would be able to prove only a negligible risk. AIM believes that the fact that areas or

products are classified as entailing negligible risk in the database provided for in Article 11 of the proposed EU Regulation should be taken into account as a mitigation factor for companies, who should focus their due diligence efforts where risks are the highest. If risks are identified in a non-prioritised sector or supply chain, the EU Regulation should allow a reasonable timeframe to address them.

Mass balance sourcing

For ingredients sourced with a mass balance approach, which is a widely used practice in complex agriculture supply chains where commodities are supplied in bulk and mixed during shipping and manufacturing, risks of forced labour are more challenging to identify and address. Given the prevalence of mass balance for critical commodities, it is important to set clear guidance on how products with such ingredients should be handled under the new EU Regulation.

Geographical / commodity scope of bans

AIM supports the Commission's approach of focusing on individual instances of forced labour. Applying the ban to a whole region or commodity sector when an instance of forced labour is discovered for a product in one part of that region or commodity sector should be resisted, to avoid unduly penalising responsible companies located in the same geographical area where no forced labour is occurring.

5. Responsibility

Similar to what is being discussed in the framework of the proposed EU Regulation on Deforestation-Free Products, it is key to clearly identify the economic operator with whom responsibility for compliance with the EU Regulation lies in cases where an investigation is launched by competent authorities. AIM argues that this responsibility should lie with the first importer/placer of a product on the EU market or the exporter, who should show evidence, upon request by competent authorities while performing their investigation duties, that relevant due diligence has been carried out prior to placing the products on the EU market or exporting them.

The current prohibition in Article 3 of the proposed EU Regulation also seems to apply to economic operators "making available" products on the EU market, thereby potentially duplicating compliance responsibility for both importers/exporters and other economic operators in the supply chain.

6. Remedies

AIM welcomes the remedies foreseen in the proposed EU Regulation enabling economic operators to contest decisions affecting them before competent authorities.

Although Article 8(5) of the proposed EU Regulation gives access to court reviews on both procedural and substantive grounds, companies that have been subject to wrongful decisions by competent authorities should be entitled to compensation or damages, taking into account the material costs and disruptions of the enforced prohibition/withdrawal/destruction of products for impacted operators.

In addition, Article 18(1)(1) of the proposed EU Regulation gives the authorities a right to maintain the suspension of a product beyond 4 initial days, whereas we believe that this provision should specify a maximum time (of 8 days) during which the authorities can maintain the suspension of the goods.

7. Additional measures to tackle the root causes of forced labour

Whilst AIM members understand the urgency for EU action on forced labour, we remain convinced that an approach banning the import/export of products will be largely inefficient in tackling the root causes of forced labour unless the proposed EU Regulation is supported by additional measures. As a priority, any measure undertaken should yield positive outcomes for vulnerable individuals and communities at risk of forced labour. Simply stopping relevant products from entering certain markets through demand-side focused measures risks deviating the flow of these products to other regions, as acknowledged by the European Commission in its [call for evidence](#). Producers improving working conditions and respect for human rights in geographical areas prone to occurrences of forced labour risk being penalised by a blanket approach without any positive outcomes on people in the supply chain.

Brands will continue to implement approaches to understand, address and prevent forced labour risks across supply chains – working with suppliers across the value chain –, in line with the UNGPs and OECD Guidelines. At the same time, we call for the adoption of additional accompanying measures including capacity building and public funding to support workers, human rights defenders, SMEs, smallholders and local communities in their efforts to root out forced labour from global supply chains.

AIM calls on the EU and its Member States to exert direct leverage and support enabling environments by engaging with partner country governments whose role remains critical, as they implement their internationally recognised duties to protect and promote human rights. Partnership agreements should include time-bound frameworks for action for all parties involved to address forced labour, placing a particular emphasis on public policy by producer governments, and include incentive mechanisms and support from the EU and its Member States to ensure that the necessary actions can be implemented successfully.

About AIM

AIM is the European Brands Association representing brand manufacturers in Europe on key issues which affect their ability to design, distribute and market their brands.

AIM comprises 2500 businesses ranging from SMEs to multinationals, directly or indirectly through its corporate and national association members. Our members are united in their purpose to build strong, evocative brands, placing the consumer at the heart of everything they do.

AIM's mission is to create for brands an environment of fair and vigorous competition, fostering innovation and guaranteeing maximum value to consumers now and for generations to come. Building sustainable and trusted brands drives investment, creativity and innovation to meet and exceed consumer expectations. AIM's corporate members alone invested €14 billion in Research & Development in Europe in 2014, placing them fifth in the EU ranking of R&D investment.

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