

Position on the proposed EU Regulation on prohibiting products made with forced labour on the Union market or being exported out of the Union

February 2023

Context

In her **State of the Union address** in September 2021 and her communication on decent work worldwide (23/02/22), Ursula von der Leyen pledged to prohibit products made with forced labour from entering and leaving the internal market.

As a first step, the European Commission published a **proposal for a European Corporate Sustainability Due Diligence Directive** in February 2022: it requires companies to identify, prevent, mitigate and bring end to the negative impacts of their activities, and those of their subsidiaries, on the environment and human rights, including the fight against forced labour. The political objective is to adopt the Directive in the second half of 2023.

Secondly, in September 2022, the Commission published a proposal for a regulation aimed at prohibiting the marketing of products made with forced labour.

In the current text, it is specified that the Commission will publish guidelines within 18 months of entry into force of the Regulation. These will include guidance on due diligence in relation to forced labour and information on risk indicators of forced labour, to provide guidance for companies and authorities.

General comments from AFEP and MEDEF

French companies have been committed for many years (see **appendix 1**) to contribute to the eradication of all forms of forced labour, which affects more than 27 million people across the world.

Whereas all stakeholders – including companies – need to be mobilised against forced labour, an issue which is highly complex, nothing would be more effective in the fight against forced labour than action at State level and implementation of the fundamental conventions of the ILO in national legislation, but also for States to support companies through social or tax policies and engage in the fight against the informal economy.

We support the objective of this Regulation. However, its wording should be adapted to better take into account companies' operational realities and ensure consistent implementation across the EU.

In particular, our organisations are calling for the Regulation to:

- 1. Provide for a graduated, proportionate response articulated with the Directive on Due Diligence (CS3D), before pronouncing a marketing ban or requiring products to be withdrawn.** It is foremost a question of providing for an intermediate stage prior to the ban on marketing products for companies with no records in terms of forced labour issues, or for sensitive products, which would be encompassed in a formal notification. To ensure consistency of approaches between this Regulation and the CS3D, this formal notification would be accompanied, in conjunction with the competent authority, by the drafting of a corrective or remedial action plan to eliminate forced labour in the value chain, as proposed in the Directive on Due Diligence. At the end of the period set by the formal notification, the competent authority would decide, as for the other products, whether to end the marketing of the products in question;

2. **Extend the time limit imposed on companies to transmit information to the competent authorities** (Article 4 provides for only 15 working days to respond);
3. **Align penalties across Member States** to avoid any distortion in the treatment of companies and ensure a level playing field on the single market, and guarantee the principle of proportionality according to the seriousness of the offense;
4. **Better articulation of this Regulation with the future Directive on Due Diligence**, so as not to duplicate investigations relating to the same products/facts;
5. **Assign an investigative role to the European Commission for non-European economic players**;
6. **Specify the responsibilities relating to the withdrawal of products for B2C trade** (distributor versus importer/manufacturer);
7. **Clarify the burden of proof** and, in this respect, the status given to the database on which operators will rely to carry out their due diligence.

Detailed comments from AFEP and MEDEF

Below are detailed comments and questions raised by the respective members of AFEP and MEDEF.

I. Cross-cutting comments:

- **Lack of definition of the concept of supply chain and indiscriminate use of the concepts of supply chain and value chain**
 - The Regulation uses the concept of “supply chain” and “value chain” interchangeably in Article 2 (f) and (g); Article 4 paragraphs 2, 3 and 6; Article 5.3(a); Article 6.6; Article 14.1 and in recitals 5, 8, 9, 10, 19, 22, 24, 25, 33, 34, 42 and 45.
 - The concept of supply chain, used numerous times in the proposed Regulation, is not defined. However, it is this concept that makes it possible to determine the scope and limits of operators' obligations as well as their liability.
 - From a reading of the proposal (e.g., see definition of product, product made with forced labour), we understand that the responsibility of economic operators is limited to upstream activities (extraction, harvesting, production or manufacturing, including working or processing related to a product) and not downstream activities (use, product disposal).

Recommendation:

- **In order to avoid any risk of conflicting interpretations and to reduce legal uncertainty, the concept of value chain should be replaced by the concept of supply chain throughout the text.** A definition should therefore be included in Article 2.
- **Avoid the duplication of investigations relating to the same products/facts**

The Regulation does not provide for avoiding the duplication of investigations relating to the same facts under the CS3D, the whistle-blowers' protection directive (and national laws transposing this directive) and the Regulation on forced labour.

Recommendation:

- **The Regulation needs to be amended to avoid duplicating investigations under these various legislative frameworks.** In particular, provision should be made for automatic jurisdiction of the competent authority of the Member State on whose territory acts of forced labour tainting the value chain of a product are reported.
- In other cases, coordination between the competent national authorities should be provided for in the regulation, if investigations are launched for similar grievances/facts under the aforementioned texts. Provision should therefore be made for a mechanism specifying that when several authorities open an investigation relating to the same products or the same economic operators or the same facts, then the authority opening the investigation subsequent to another withdraws in favour of the first. In this case, the authorities would cooperate and share information with each other.
- **In any case, investigations targeting acts of forced labour in third countries should be systematically carried out by the European Commission and the EU delegations in the countries concerned,** to avoid disparities in resources between Member States and diplomatic pressure on some of these (see choices made for investigations into foreign subsidies likely to distort competition within the internal market).

II. Questions and Recommendations relating to various Articles:

➤ **Article 2 – Definitions**

Recommendation:

- The Regulation needs to include a definition of the “supply chain” consistent with the definition of “chain of activities” provided for in the Council’s general approach on the European Directive on Due Diligence.

➤ **Article 4 - Preliminary phase of investigations**

This article raises several issues:

- **Firstly, there is insufficient articulation with the proposal for a European Directive on Due Diligence (CS3D).** Indeed, the CS3D provides that information may be brought to the attention of the national supervisory authority that may, if necessary, initiate an investigation. The proposed Regulation on forced labour also provides for this option based on information received by relevant national authorities from stakeholders. There is therefore a risk of a duplication of investigations potentially relating to the same facts/information. Other investigations could also be carried out, potentially by other authorities, under the European whistle-blowers’ protection directive, since national authorities will be able to trigger investigations on the basis of information received from whistle-blowers.
- **Secondly, the investigations do not sufficiently take into account the future obligations of companies under the European Directive on Due Diligence.** Indeed, the proposed Regulation does not provide for modulating investigations and requests for information depending on whether or not the company is subject to due diligence obligations under the future CS3D, which also covers the fight against forced labour. In other words, a VSE could be asked questions as complex and specific as larger companies subject to the CS3D. This indirectly amounts to imposing the same risk prevention requirements for all companies regardless of their size.

- **Thirdly, the deadline of 15 working days to respond to requests for information from the authorities is too short.** Indeed, companies will not have enough time to check the information, or even to carry out due diligence (e.g., on-site audits where it is sometimes necessary to apply for visas to visit a third country), then consolidate the results for transmission to national authorities.

Recommendations:

- **The Regulation needs to be amended to avoid duplicating investigations relating to the same facts/information** (see cross-cutting comment and above comment under the heading “Avoid the duplication of investigations relating to the same products/facts”).
- **Requests for information and inquiries relating to companies with 1 to 250 employees need to be simplified**, given the fact that these companies are not currently subject to the Directive on Due Diligence.
- **The deadline for responding to requests for information from the competent authorities should be extended to 30 working days**, with the possibility for the competent authorities to extend this deadline by a further 15 days at the reasoned request of economic operators.
- **In order to avoid any unfair proceedings, the information transmitted by stakeholders to the competent authorities should be based on objective and verifiable facts**, as provided for in Article 19 of the CS3D on the assessments carried out by supervisory authorities on the basis of “*substantiated concerns [...] on the basis of objective circumstances, that a company is failing to comply with the national provisions adopted pursuant to this Directive*”.

➤ **Article 5 – Investigations**

Recommendations:

- **The Regulation needs to be amended to avoid duplicating investigations** (see cross-cutting comment and comment on Article 4).
- **Companies not subject to the obligations of identification, prevention, mitigation and remediation of risks related to human rights and forced labor:** the investigations carried out by the national competent authorities should take into account the fact that the covered company is or isn’t subject to these compliance obligations. For instance, **requests for information and inquiries relating to companies with 1 to 250 employees need to be simplified**, given the fact that these companies are not currently subject to the Directive on the Due Diligence and thus, have not dedicated human or financial means on these matters.
- **The deadline for responding to requests for information from the competent authorities should be extended to 60 working days**, with the possibility for the competent authorities to extend this deadline by a further 15 days at the reasoned request of economic operators.
- **For investigations in third countries, it would be more judicious for the European Commission to be in charge**, to avoid potential reprisals against companies in a Member State. The Commission could also be empowered to conclude agreements with third countries to facilitate investigations.
- **In order to avoid any unfair proceedings, the information transmitted by the stakeholders to the competent authorities should be based on objective and verifiable facts**, as provided for in Article 19 of the CS3D on the assessments carried out by supervisory authorities on the basis of “*substantiated concerns [...] on the basis of objective circumstances, that a*

company is failing to comply with the national provisions adopted pursuant to this Directive”.

➤ **Article 6 – Decisions of competent authorities**

Recommendations:

- **In accordance with the graduated approach recommended by AFEP and MEDEF** (see general comments) and in view of the considerations for responsible disengagement set out in the “*Guidance on due diligence for EU businesses to address the risk of forced labour in their operations and supply chains*” published by the Commission and the European External Action Service¹, **a formal notification mechanism aligned with the European Directive on Due Diligence should be able to be activated before the imposing, as a last resort, of measures to prohibit placing on the market or for the withdrawal of products already marketed mentioned in paragraph 4.** Thus,
 - a) when a company producing or marketing a product for which a violation of Article 3 has been found for the first time; or
 - b) when the company produces or markets products that are difficult to substitute and which are of strategic importance for the EU;

the competent authority would take a decision, giving formal notification to the producer or distributor of the product concerned, to put an end to the violation by any means within a **period of three months** from the date on which the investigation determined the violation of Article 3, attaching a penalty payment to the measure where appropriate. This would give companies time to implement corrective actions aimed at stopping and minimizing the extent of this violation, up to the total elimination of forced labour. This action plan could be discussed with or even approved by the competent national authority (e.g., in order to take into account the impacts on the imports of critical raw materials).

- At the end of the three-month period, in the absence of proof of termination of the violation (e.g., a change of supplier, an action plan implemented by suppliers, change of production or supply country), the competent authority may then pronounce the measures provided for in paragraph 4.
- In all other situations (e.g., companies whose usual products or suppliers have already been the subject of a report), the competent authority could directly impose the measures provided for in Article 6 § 4.
- **Suspension or termination of a business relationship:** the CS3D provides that companies suspend or even terminate a business relationship in the event of human/environmental adverse impacts. Furthermore, in the general approach adopted by the Council, the European Directive also provides for derogations from these obligations, for example if the negative consequences of the suspension/termination are more severe than the actual adverse impact or where there is *"no available alternative to that business relationship,*

¹ [Guidance on due diligence for EU businesses to address the risk of forced labour in their operations and supply chains \(europa.eu\)](#) advocates in its considerations for responsible disengagement that in cases of forced labor “...Disengagement from a business relationship is appropriate as a last resort after failed attempts at preventing or mitigating severe impacts, when adverse impacts are irremediable, where there is no reasonable prospect of change, or when the entity causing the impact does not take immediate action to prevent or mitigate identified impacts...”.

that provides a raw material, product or service essential to the company's production of goods or provision of services²".

On these two aspects, our organizations recommend that the national competent authorities in charge of this Regulation and the CS3D coordinate before issuing a decision to avoid any contradictions (e.g., ban on marketing a product when an exception is granted to continue the business relationship for a raw material, good or service under the CS3D).

- **Articulation with the Whistleblowing Directive and national rules:** it is necessary to anticipate the fact that stakeholders will use all the channels offered under the European Directive on whistle-blowers' protection (transposed in France by the law n° 2022-401 of March 21, 2022 and decree n° 2022-1284 of October 3, 2022), the CS3D, this regulation on forced labor and possibly other legislative frameworks (e.g., Regulation on imported deforestation, EU Regulation on conflict minerals). In this case, a single point of contact leading the investigation must be designated both for the company and the stakeholders involved.
- **Companies not subject to the CS3D's obligations:** when carrying out investigations and issuing, national competent authorities should take into account the fact that the company is or isn't subject to these compliance obligations (principle of proportionality). For instance, as suggested above in the formal notification to the producer or distributor of products concerned by potential violations, the national competent authorities set reasonable deadlines considering the obligations to which the company is or is not subject.
- **Specify the responsibilities relating to the withdrawal of products for B2C trade** (distributor versus importer/manufacturer);
- **Economic operators should be able to benefit from a right of appeal for any decision taken,** as indicated in paragraph 5 of Article 8.

➤ **Article 7 – Content of the decision**

Recommendation:

- In accordance with Article 8 paragraph 5, the decision communicated to the operator must set out the procedures for reviewing/appealing the decision.

➤ **Article 10 – Submission of information regarding violations under Article 3**

Recommendation:

- **In order to avoid any unfair proceedings, the information transmitted by stakeholders to the competent authorities should be based on objective and verifiable facts,** as provided for in Article 19 of the CS3D on the assessments carried out by supervisory authorities on the basis of *“substantiated concerns [...] on the basis of objective circumstances, that a company is failing to comply with the national provisions adopted pursuant to this Directive”*.

² Article 8, paragraph 8 (b)

➤ **Article 11 – Database of forced labour risk areas or products**

Recommendations:

- If companies rely on the information in this database to prevent the risk of forced labour, the authorities in charge of investigations should take this into account.
- It is recommended that **specification of the customs nomenclatures (with HS codes) be provided for the products identified as being at risk, in order to facilitate the due diligence efforts of companies.**
- To facilitate the due diligence of companies, **this database should be supplemented by specific geographical areas of risk within countries.** This would allow European companies to more easily justify to their partners the need for them to answer their questionnaires and accept the contractual clauses proposed, in particular under the forthcoming European Directive on Due Diligence.

➤ **Article 12 – Competent authorities**

Recommendations:

- The Regulation needs to be amended to avoid any duplication of investigations (see cross-cutting comment). See comment above under the heading “Avoid the duplication of investigations relating to the same products/facts”.
- The penalties incurred should be specified in the Regulation to avoid distortions in treatment between operators from one Member State to another. Financial penalties should be capped in the Regulation (e.g., as a percentage of the value of the products under investigation).

➤ **Article 14 – Recognition of decisions**

Recommendations:

- **If several authorities from different Member States launch an investigation into the same products, priority should be given to the competent authority of the Member State on whose territory the economic operator whose products are subject to an investigation is located.** If the company in question or its subsidiaries is present/established in several Member States, the competent authorities should be those of the country in which the **greatest turnover** is achieved.
- **The European Commission should ensure that the national authorities do not have diverging evaluations regarding their decision-making,** particularly in terms of finding the existence of forced labour practices.

➤ **Article 19 - Refusal of release for free circulation or export**

Recommendations:

- **The refusal to release products for free circulation or to export products made with forced labour should be the general rule.** However, this approach can have serious consequences, for example in terms of the supply of strategic products. This could also directly or indirectly impact the sovereignty of Member States (e.g., spare parts required for the proper functioning of a public infrastructure). It could also lead to a breakdown of business relationships and have negative impacts for stakeholders.

- In addition, **the termination of a business relationship should be considered as a last resort after unsuccessful attempts to prevent or mitigate serious impacts** (see the comments above on responsible disengagement). It is therefore necessary to provide for a graduated approach with temporary derogations for strategic products, for example accompanied by a phase of gradual elimination of forced labour during the time necessary to:
 - o achieve compliance by eradicating forced labour; and/or
 - o find an alternative supply if it is impossible to end the forced labour.

➤ **Article 23 - Guidelines**

Recommendation:

- Same Recommendation as for Article 11 in order to facilitate companies' due diligence, the Commission should integrate the risks/countries within the framework of these guidelines.

➤ **Article 30 – Penalties**

Recommendations:

- **The Regulation should standardise the applicable sanctions in order to avoid any distortion of treatment between European companies.** A cap on financial sanctions should also be provided.
- If a company has already been sanctioned under the Directive on Due Diligence, it should not be sanctioned a second time for the same facts under this Regulation.
- The Regulation should provide for a sanction proportionate to the offense committed (severity of the violation observed).

➤ **Article 30 bis – Revising of the Regulation**

Recommendation:

- **Implementation of the Regulation should be subject to regular impact studies as well as annual reports made public by the Commission.** The impact study should be conducted from the first year and then every 3 years. The report would be drawn up each year and presented to the Council and the European Parliament. In the event of unintended consequences, in particular with regard to strategic sourcing, the Commission should present a legislative proposal amending this Regulation.

Annex on companies' initiatives

Joint contribution of AFEP, B4IG, EDH, ICS and MEDEF of 1 June 2021 as part of participation in work aimed at France gaining the status of Alliance 8.7 “pathfinder country”.

French companies are committed to the fight against forced labour, child labour and modern slavery, and they are unanimous in terms of the urgency and priority required to deal with the problem.

Economic stakeholders have identified the risks for their production sites or subsidiaries, and the suppliers and subcontractors in their supply chain. Some companies and certain sectors of activity are more advanced than others in terms of deploying tools and methodologies: their experience and expertise are particularly relevant to moving forward and showing the way for all economic stakeholders.

Companies nevertheless note the complexity of the problem, which comprises several dimensions (social protection, fight against the informal economy, etc.), and requires in-depth work with numerous stakeholders. Companies on their own, even the largest, cannot provide sustainable solutions without the support of the surrounding ecosystem and States.

A “French approach” to these issues can be observed, linked in particular to the fact that France has adopted ambitious legislation in this area (Law on Due Diligence of March 2017). Due diligence plans are considered the preferred framework for dealing with these issues.

Companies have formulated proposals to contribute to the achievement of target 8.7 with the help of other stakeholders, in a spirit of continuous improvement and better ownership of the issues:

Concerning companies

- Continue raising awareness among companies, especially SMEs downstream of value chains
- Further develop cooperation between companies within a sector or between sectors to improve essential education and ownership of the issues
- Participate in multi-stakeholder initiatives, pilot projects involving all stakeholders already exist at national or international level, but they would benefit from being reinforced, shared, and duplicated in order for everyone to benefit from the progress already made
- Reinforcing the commitment of company leaders and all the various divisions and functions concerned is key, as well as raising everyone's awareness
- More resources and means should be employed

Concerning French public authorities and administrations

- **A stable national regulatory framework**

The French legal framework is extensive and would benefit from stability, in order to be assimilated by stakeholders in value chains and to avoid legal uncertainty for companies: the ownership of the risks and the implementation of actions require time.

- **A European legislative framework that is consistent with our current national framework**

We support the need for a European legislative framework in terms of due diligence, in order to move towards a legal environment similar to that of our competitors, while considering that it needs to take into account the complexity of the issues, with defined obligations. It is necessary to ensure consistency between this European framework and national frameworks, in order to avoid any contradiction between legal obligations and a fragmentation of the latter.

All companies are responsible, but not all companies should be liable for the same obligations; SMEs that make up the bulk of global economies and supply chains should only be subject to limited obligations, proportionate with their technical and operational capacity.

Consistency of initiatives, public policies of the various ministries and exemplary public stakeholders (AFD, Businessfrance, etc.).

The current “France pathfinder country” initiative makes it possible to carry out this inventory and to note the multitude of public policies already in place. The various Ministries involved need to continue their work coherently.

Moreover, these actions and policies carried out at the national level should be supported by the State in its relations with other countries; trade and investment agreements concluded with certain non-EU countries should continue to promote commitments to eradicate forced labour or child labour on their territory, based on the fundamental conventions of the ILO. As is required of companies, an exemplary attitude is required on the part of public stakeholders, particularly relating to risk prevention and in public procurement.

- **Operational assistance at national level**

Companies, especially SMEs, are in favour of the idea of being able to request an operational service or Helpdesk to help them identify, understand and prevent risks, similar to those put in place in other countries.

For example, the German Agency for Business & Economic Development provides a “Helpdesk on Business & Human Rights”, which offers free confidential support and advice to companies of all sizes, to help them carry out due diligence throughout their supply chain. This tool is part of the German Government’s “National Action Plan (NAP) on business and human rights”. Any company can make an appointment and receive advice on identifying human rights risks, the appropriate actions to mitigate these risks, as well as the establishment of extra-judicial complaint mechanisms.

Another tool made available to German companies is the “CSR Risk Check”, which is also available free of charge. It provides access to a mapping of environmental, social and governance risks according to products, services and geographical areas.

In terms of country-related data, the US State Department publishes annual reports on the state of human rights in various countries; these reports are currently one of the only public sources of information, updated on an annual basis, concerning human rights, with a strong focus on the issue of working conditions and other issues related to business and human rights. The availability of this type of report/analysis at French or European level, would be of benefit to European companies in terms of their due diligence.

The structuring of projects coordinated with stakeholders to validate the mechanisms relating to due diligence, along the lines of the Covenant project developed in the Netherlands, is an interesting example: <https://www.ser.nl/en/publications/publications/2016/agreement-sustainable-garment-textile.aspx>.

Companies are also interested in having access to a database of reference documents with a range of conventions and existing reference guides at sector and geographic levels, such as OECD guidelines.

The reference framework developed by Human Resources Without Borders to identify and assess risks, and locate people in situations of forced labour and child labour within a supply chain, is a valuable and relevant tool.

- **A common database, in open data, to help companies identify stakeholders at risk**

Companies are calling for easy access to different sources of information to allow them to analyse and assess risks in various countries and sectors. A database of stakeholders already convicted by courts, or known to have reoffended, at European or international level, would help guide audits and company actions.

- **The need for transparency and traceability in supply chains is essential**

This needs to be associated with prior work on identification tools and methods, in order to allow the communication of up-to-date and reliable information. The qualification of the factories at subcontractor level and the identification of the production processes for each subcontractor entity is a major mapping undertaking, which needs to be linked to the social and environmental risks identified at country, product and process level.

- **Operational support for companies via the network of Embassies, particularly for risk countries**

The French diplomatic network, which focuses on economic diplomacy and identifies key stakeholders in a given country (administrations, authorities, independent agencies, associations, international organisations, NGOs, etc.), should work in close contact with companies in order to facilitate multi-stakeholder cooperation. This cooperation would be better able to meet the challenges of forced labour and child labour than the actions of an individual company. The influence of French embassies with local authorities could therefore specifically aim to improve the practices of the various stakeholders concerned.

French Embassies should train at least some of their staff on the risks likely to exist, in the countries to which they are assigned, in terms of human rights, forced labour and child labour. These members of staff would be trained in the specific risks of the country in question, and could proactively manage a network for the exchange of best practices and support for French companies operating in that country.

Concerning international and European organisations

- **Influencing role in supporting States with weak governance and helping them progress towards a State of rule of law**

International and European organisations should strengthen their support for States in establishing an independent judicial system based on integrity and with sufficient resources, a precondition for the respect of human rights; reducing the informal economy; ratifying the fundamental conventions of the ILO and transposing them into domestic law.

- **Role of assistance from local agencies of international and European organisations**

These agencies should work closely with companies to implement action plans. The facilitated pooling of documents, reports, and studies that are useful for companies should be set up.

- **Make funding easily accessible**

Funding should be easily accessible to support projects aimed at preventing and remedying the risks identified via audits in particular.

Concerning collaboration with social partners at all company levels

- **Be committed stakeholders regarding these issues**

Staff representatives and trade union organisations within companies and their networks, particularly in countries at risk, can play a whistle-blower role but also communicate information. Commitments to action and collaboration could be developed via social dialogue, at all company levels, to support company initiatives.

It is appropriate to highlight and promote, including internationally, the important role of global framework agreements, the majority of which are signed by French companies. These usually contain clauses on mediation and dispute resolution mechanisms. Most provide for a partial or bipartite monitoring body, with representatives from the company and the union meeting on a regular basis to monitor compliance with the agreement.

The latest generation of framework agreements include the issue of suppliers and subcontractors within their scope. These agreements can therefore specify the expectations of a multinational company vis-à-vis its subcontractors or suppliers, in terms of respect for fundamental social rights. In concrete terms, compliance with the provisions contained in these agreements could be a condition for the establishment or continuation of commercial relations with a supplier or subcontractor.

Concerning collaboration with associations and NGOs

Some companies exchange or work with associations or NGOs that have developed expertise in these issues at local, national or global level; any cooperation is desirable if these actors provide solutions and engage in constructive cooperation, which implies taking into account the reality and operational constraints of economic stakeholders.