Combating forced labour: State players bear a particular responsibility

Position on Commission proposal for a regulation prohibiting products made with forced labour on the Union market of 14 September 2022 (COM(2022) 453)

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Introduction

Forced labour and products made with forced labour are despicable and have no place in the European single market. The German business community has long deployed with great commitment for respect of human rights along supply chains and defends European values both at home and abroad.

With the proposal for a regulation prohibiting products made with forced labour on the Union market, the Commission presents another EU legislative instrument for compliance with human rights. Further examples include the Corporate Sustainability Due Diligence Directive (CS3D), the Corporate Sustainability Reporting Directive (CSRD), the Conflict Minerals Regulation or other sector-specific rules. Yet this multitude of legal provisions creates full or partial overlaps: in day-to-day business practice, this manifests itself through duplicate regulatory burdens and an ever greater complexity, in particular for companies which are active in several Member States.

The uniformity within the single market which is rightly sought through the legal instrument of a regulation is not achieved as a result of the interplay with the other rules. Every time the European Union (EU) introduces a new instrument, it moves farther away from a holistic approach which companies are capable of managing, and impedes the urgently needed coherence in State requirements regarding human rights due diligence.

Moreover, additional rules must not undermine the secure supply of raw materials to the European economy. The proposal's foreign trade implications should be given sufficient consideration and be focused on measures which lead to a "stay and improve" rather than a "cut and run" mindset.

Detailed comments

Regulation targets the right audience

With the invitation for Member States to designate competent authorities responsible for enforcing the Regulation, the Commission addresses the right players. Not only is the battle against forced labour – enforcement of human rights – a task and a duty of care for the State in the first line. State power is also the more competent and influential institution for securing human

rights. European companies lack not only the knowledge to tackle problematic situations, but also the decisive State authority and power to tackle irregularities on the ground where infringements occur deep in the supply chain and companies themselves have no representation abroad.

Companies are also affected and burdened – exclude SMEs

The Regulation's requirements make too little distinction between large and small companies: this means that economic operators must collect and where appropriate pass on information irrespective of their size. In the event that forced labour is identified in the value chains of a product, companies must assume sole responsibility for its withdrawal from the single market. The potentially far-reaching economic consequences of this provision are similarly borne exclusively by companies – regardless of their own responsibility. All participants in the single market are equally affected with the general concept of "economic operator" (article 2 (h)). It is important here to introduce threshold values which categorise companies by their capacities, in particular in order to protect small and medium-sized enterprises against being overwhelmed by State measures by removing them from the scope ("think small first").

Choice of regulation ensures a level playing field

By choosing a regulation, the Commission has selected the right legislative instrument to attain the objective of an equal framework in the EU in a comprehensive and workable manner. Only the directly effective form of a regulation can set a uniform standard for all economic operators in the single market. Accordingly, non-European companies are also covered. It avoids not only overenthusiastic implementation by individual Member States the so-called gold-plating but also a European patchwork of rules that regularly poses difficulties for companies operating Europe-wide. The already mentioned CSRD and CS3D (both directives) run the risk of fragmenting the single market because of potentially divergent transposition in the Member States.

Far-reaching decisions but no surveillance or rectification instance

The decision on prohibiting products is too one-dimensional and hence is open to substantive errors and offers insufficient legal certainty. The mechanism which enables one single authority to take consequential decisions such as market withdrawal and disposal of certain products must be matched by a further official surveillance instance as well as the possibility of a judicial review. Simple reference to a further authority ("customs authorities" – article 2 (o); article 15) is inadequate for this purpose. Companies and interested parties need to be able to have official decisions thoroughly reviewed by a tribunal and without the need to present new facts. In addition, robust evidence requirements need to be introduced for decisions reached within authorities. Also important is that the legislative procedure going forward does not result in any shift of the burden of proof on to companies, since this would lead to a large increase in bureaucracy and costs. In its current form, the Regulation is unlikely to meet the requirements of constitutionality.

Too little support for companies – States should bear responsibility for execution

Criticism is prompted by the fact that the practical implementation of a circulation and export prohibition – namely withdrawal and disposal of the products in question across the entire single market – is expected to lie exclusively with the relevant companies (article 6.4). Bearing in mind the size of the single market and the potential distribution breadth of individual products, this obligation can rapidly overwhelm small and medium-sized enterprises in particular. The Regulation leaves the question of what should happen with upstream or downstream products unanswered. Accordingly, responsibility for the implementation of measures should lie with the Member States. If companies themselves are not or only inadequately capable of withdrawing or disposing of products, they suffer unduly far-reaching consequences. With the resultant threat of the requisite action being taken by the authorities at the expense of the company plus additional sanctions, small and medium-sized enterprises in particular will be burdened twice over and disproportionately (article 6.5; article 30).

Conversely, the Commission's decision to issue corresponding "guidelines" whose addressees should also be the affected companies is positive (article 23). But this is a matter of practical implementation. Insofar as guidance on what due diligence obligations are to be met as well as on risk factors and reliable information sources were to be drawn up, this would be a helpful support for all interested parties. But it is of decisive importance here that the content of the guidelines does not create any new obligations for companies and genuinely contributes to legal clarity in order to constitute a real aid. Companies can only continue to deploy actively and responsibly with sufficient predictability.

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