

Advice

Forced Labour in the Fisheries and Aquaculture Market

Brussels, 30 November 2023

1. Background

On 14 September 2022, the European Commission published a proposal for a Regulation on prohibiting products made with forced labour on the Union market¹. The International Labour Organization (ILO)'s definition of forced labour was used: "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily".

The proposed instrument would be a prohibition of placing on the EU market of products made wholly or partially with the intervention of forced labour, and of exporting them. The proposal combines the prohibition with a risk-based enforcement. The competent authorities of the Member States will be responsible for enforcing the market ban. The risk indicators will be based on several sources of information. The aim is for the regulation to be non-discriminatory, applying equally to products made in the EU and in third countries, not targeting specific products, industries or countries.

The mechanism starts with the information received (e.g., submissions from civil society organisations, risk indicators, databases, or other sources), which leads to the preliminary phase. If there are substantiated concerns, an investigation will take place. If the investigation concludes that forced labour was used, a decision will be taken to prohibit the placing or making available on the EU market. The economic operator will have to withdraw the product from the market and dispose of the product.

¹ https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13480-Effectively-banning-products-produced-extracted-or-harvested-with-forced-labour_en

In terms of tools for implementation and support, there will be a database based on international sources and submissions to identify countries and products. There will be a network of competent authorities to exchange information and working methods. There will also be guidance for companies, especially for SMEs, and for the competent authorities.

Due to the significant importance of international trade in the market of fisheries and aquaculture products, the Market Advisory Council (MAC) commissioned an external study² to evaluate the implication of forced labour in the global market and how it potentially affects the EU market. The study also addresses several specific fisheries and aquaculture issues.

2. Recommendations

The MAC believes that there should be a framework for a more effective regulation capable of combating forced labour while recognising the efforts of businesses to maintain ethical supply chains free from any form of exploitation. Therefore, the MAC recommends that the European Commission and the Member States, in the context of the upcoming interinstitutional negotiations should:

- a) Engage with international and social partners, particularly advocating for the ratification of the International Labour Organization's Work in Fishing Convention (No 188) and strengthening bilateral and multilateral engagement;
- b) Considering that the complexity of forced labour requires reliable and up-to-date information, ensure the availability of up-to-date information – in this respect, the European Union should play a key role in constructing and maintaining comprehensive databases on social and environmental issues;
- c) Develop an evidence-based severity scale (non-suspicion-based), enabling all public and private stakeholders to graduate and better comprehend the nature of this exploitation – the severity scale would entail the setting of different types of forced labour to enable prioritisation of intervention and prevention measures;

² The study represents the views of the external consultants. It was submitted on 15 September 2023. It is available on the MAC's website: <https://marketac.eu/external-study-on-forced-labour/>.

- d) As building trust among all stakeholders is crucial for the implementation, ensure a transparent approach, consisting notably of openly communicating the methodologies developed and the outcome of the investigations, for example via the establishment of a transparent list of companies and, where relevant, fishing vessels, found to have violated the Forced Labour Regulation's provisions and the creation of a mechanism to demonstrate compliance;
- e) To improve the detection of forced labour and guarantee the compliance of supply chains, improve the links with the Corporate Sustainability Due Diligence Directive, for example by ensuring that results of investigations under the forced labour directive are available to companies to feed their due diligence processes.

2.1 Engaging with international and social partners

2.1.1 Pushing for the ratification of International Labour Organisation's Work in Fishing Convention (No. 188)

The ratification of the International Labour Organization's Convention No. 188 must be the minimal action each nation should undertake to tackle forced labour in fisheries. It represents the foundation of all legislative frameworks applied to the fisheries sector at the international and European levels. Nonetheless, the level of ratification of ILO C188 is very low, with several key fishing nations not part of the signatories. The situation is similar within the European Union, where only a few Member States have ratified the convention. Countries need to accelerate the ratification of the convention, which sets out guidelines for protecting workers in the fishing sector. Nonetheless, it is worth noting that, thanks to the social partner's agreement made by Europêche, Cogeca, and ETF, the ILO C188 has been transposed into Union law by Council Directive (EU) 2017/159. Given the prevalence of forced labour in the fishing and processing sector globally, the EU should encourage Member States and Third Countries for the ratification and implementation of the convention, making it a precondition for enforcing its forced labour proposal. This would help ensure a level-playing-field for all sectors in the fisheries sector while protecting the rights and well-being of workers in this vulnerable sector.

2.1.2 Strengthening bilateral and multilateral engagement

As the European Commission considers the proposal to ban forced labour in products across the Union, it is crucial to recognise that the issue of forced labour transcends national borders and requires robust international collaboration.

The European Commission should actively engage at the international level with existing international organisations such as the International Labour Organization, the Food and Agriculture Organization, and the World Trade Organization, to encourage other countries and trade blocks to follow the same legislative route, combining a strengthening of due diligence and the ban of goods tainted with forced labour.

The European Commission should actively integrate the issue of forced labour in the bilateral discussions with third countries. The Commission should establish mechanisms to facilitate formal engagement to address root causes of systemic of forced labour through capacity building, the development of specific action plans. The proposal could be strengthened in this regard, building on examples like the EU IUU Regulation which enables enhanced cooperation between the European Commission and third countries through its “carding system”.

2.2 Ensuring the availability of up-to-date information

2.2.1 Establish a dedicated organisation for the maintenance and management of comprehensive databases on both social and environmental issues

One of the key challenges for effectively enforcing the regulation is the coordination among Member States. The draft regulation seems to imply a decentralised approach with a mechanism for National Authorities to take the lead on specific sectors or good categories. Establishing a dedicated organisation to coordinate national authorities’ interventions would, however, limit duplications and potential blind spots.

This organisation would play a crucial role in enabling national authorities to create a shared information platform, adhering to international standards upon which they can base their investigations. The organisation should promote international collaboration and information sharing by establishing cooperative mechanisms with global organisations and initiatives,

such as the International Labour Organization, the Food and Agriculture Organization, and other relevant entities. International collaboration would facilitate the establishment of common standards and protocols for data collection, analysis, and sharing regarding forced labour and environmental concerns. This would ensure the harmonisation of collected data and facilitate international comparisons, enhancing the effectiveness of measures taken to combat forced labour.

2.2.2 Developing more nuanced approaches to risk assessment, considering the nature of forced labour

The hidden nature of forced labour is challenging for developing comprehensive databases to detect forced labour hotspots. Forced labour is present in one form or another in all regions of the globe, and current databases are often built on confirmed cases of forced labour. As a result, a region may appear free of forced labour simply because there is a lack of means to detect the issue. The complexity and variability of forced labour mean that different regions may face distinct forms of forced labour, making it difficult to generalise across different contexts. Developing more nuanced approaches to risk assessment is critical to better capture the full spectrum of forced labour and its complexities, although paramount that the risk-assessment remains evidenced-based. This will require engaging with various stakeholders, including affected communities, civil society organisations, social partners, business associations, and international organisations, to develop a more comprehensive understanding of the drivers and manifestations of forced labour in different regions worldwide.

2.3 Developing a severity scale

The current databases tend to treat all types of labour crimes related to forced labour equally, without considering a scale of severity. As a result, it may be challenging to identify and address the most severe cases of forced labour, thus avoiding the stigmatisation of specific actors or sectors by comparing lesser offences (or crimes) to those resembling slavery that affect different actors or sectors. To address these challenges, the European Union should propose, in consultation with stakeholders, social partners and NGOs, its severity scale for

forced labour. The Delphi scorecard partially answers this process but can only be applied during the investigation of specific cases or the implementation of due diligence processes. It is however inapplicable in a national-level risk analysis.

This scale would enable, for national authorities, a more nuanced and context-specific assessments of hotspots at the international level and help them differentiate between cases of forced labour with different levels of severity, enabling better prioritisation of interventions and prevention measures. The proposed severity scale should be developed in consultation with stakeholders from different countries and cultures to ensure a shared understanding of the issue and build consensus around a common set of definitions. This would help ensure that the scale reflects the nuances and complexities of forced labour in different regions and industries and that it is not biased towards any perspective. In addition, the EU should encourage the development of localised databases and risk assessment tools that consider the specificities of the regions and sectors in which they operate. This would help ensure that the risk assessments enable effective implementation of preventive measures against forced labour.

Developing a scale of severity for forced labour in consultation with stakeholders and encouraging the development of localised risk assessment tools is essential to address the limitations of current risk assessment methods and to promote more effective interventions and prevention measures against forced labour.

From an operational perspective, it will also be necessary for national authorities to prioritise their actions, as available resources are de facto limited. Agreeing on a severity scale would in this case provide guidance on the prioritisation implemented in each Member State.

2.3.1 Minority statement of EJF, Oceana, and WWF

EJF, Oceana, and WWF acknowledge that the Forced Labour Regulation defines forced labour in line with ILO Conventions (notably C29), and the importance that this definition is not undermined by a proposed severity scale. All forms of exploitation that meet this definition

must be recognised and addressed. Similarly, all operators who engage in forced labour practices should be prosecuted accordingly, regardless of severity.

Furthermore, EIJ, Oceana, and WWF have concerns that the proposed severity scale could undermine the risk-based approach to enforcement outlined in the Commission's proposal and could therefore reduce clarity for competent authorities in how they implement their responsibilities under the Regulation.

In the Commission's proposal, competent authorities during their investigation into whether Article 3 was violated are directed "to focus on the economic operators involved in the steps of the value chain as close as possible to where the risk of forced labour is likely to occur and take into account the size and economic resources of the economic operators, the quantity of products concerned, as well as the scale of suspected forced labour." This risk-based approach is complemented by the database of forced labour risks areas or products (Article 11) which will be used as a tool to assist competent authorities in implementing the Regulation.

Meanwhile, this advice suggests the severity scale would "address the limitation of current risk-assessment methods", provide "guidance on the prioritisation implemented in each Member State" and would "enable better prioritisation of interventions and prevention measures".

If a severity scale is used to prioritise competent authorities' response to forced labour, this would direct them to cases of forced labour where the exploitation is most severe, and not necessarily where the risk of forced labour is highest. With the database of forced labour risks and an additional severity scale, overburdened competent authorities could potentially be directed to prioritise different criteria. Introducing a severity scale could therefore reduce clarity in how competent authorities implement the Regulation and undermine the risk-based approach underpinned by the forced labour risk database.

2.4 Ensuring a transparent approach

2.4.1 Enhancing transparency and stakeholder engagement in the regulation

Transparency plays a vital role in building trust, ensuring accountability, and fostering broad support for the regulation. The European Commission should commit to a transparent approach by disclosing relevant information, research, and data that inform the regulation's development. This includes providing accessible communication channels, such as dedicated websites and regular progress reports, to disseminate updates and engage stakeholders effectively.

Moreover, the Commission should actively seek input from all relevant parties, focusing on engaging private actors who play a central role in supply chains. Involving businesses, industry associations, social partners, and supply chain stakeholders through public consultations, working groups, and public-private partnerships will leverage their expertise and resources. This collaborative approach would ensure the regulation aligns with business realities, encourage innovative solutions, and promote ownership among key stakeholders.

Multi-stakeholder dialogue is essential in addressing the complex challenges associated with forced labour in supply chains. The Commission should facilitate platforms for meaningful engagement, bringing together public authorities, social partners, private actors, civil society organisations, and other stakeholders. These dialogues create opportunities for open discussions, knowledge sharing, and the development of comprehensive strategies that can effectively combat forced labour.

In addition to engagement, robust monitoring mechanisms should be established to track the implementation and impact of the regulation. Regular assessments, data collection, and reporting on compliance are essential to ensure accountability and identify areas for improvement. The Commission should also conduct periodic reviews of the regulation to assess its effectiveness and adapt it to evolving risks and realities. Engaging stakeholders in these review processes is crucial to gathering their perspectives and insights, ensuring continuous refinement and alignment with the changing landscape.

2.4.2 Ensuring transparency in investigations

Transparency is an essential feature of the investigative process to effectively enforce the proposed regulation and address instances of forced labour in goods sold in the EU internal market.

To achieve this, the European Commission should establish clear guidelines for conducting investigations into suspected cases of forced labour. These guidelines should outline the steps, methodologies, and criteria to follow during the investigation process. This is especially important if the process of enforcement remains decentralised at the Member States's level. These guidelines should emphasise the importance of transparency without compromising the necessary confidentiality of ongoing investigations. Additionally, authorities conducting these investigations should be open to receiving substantiated concerns from individuals, social partners, and non-governmental organisations (NGOs) who may have reason to believe that forced labour is taking place, on the basis of objective circumstances, as provided by other legislative proposals like the Corporate Sustainability Due Diligence. By encouraging the input of external stakeholders, the investigative process would become more comprehensive and diverse, ensuring a thorough examination of potential labour exploitation.

Transparency should be ensured at least by publishing the investigation's results. The European Commission should adopt a standardised approach to releasing investigation reports or summaries, making them publicly available. This would allow for greater accountability and allow stakeholders, including the public, to be informed about the findings and actions taken following these investigations.

2.5 Improving the links with the Corporate Sustainability Due Diligence Directive

2.5.1 Establishing a transparent list of companies found to have violated the EU's Forced Labour Regulation's provisions

To ensure effective due diligence measures and enable businesses to take credible action against forced labour, it can be recommended to establish and maintain a transparent list of

companies and, where relevant, fishing vessels found to have violated the Force Labour Regulation's provisions for engaging in practices classified as forced labour.

The European Commission should lead in establishing the list and collaborating with relevant stakeholders, including government agencies, non-governmental organisations (NGOs), and social partners . Such a collaborative approach would help maintain the accuracy and relevance of the list over time.

The Commission should ensure that identifying and evaluating companies for inclusion is transparent, accountable, and based on robust evidence. This would include documenting the methodology, data sources, and verification procedures to determine a company's association with forced labour.

The list should be regularly updated to reflect new information and emerging trends in forced labour practices. The Commission should establish ongoing monitoring and evaluation mechanisms, engaging with relevant stakeholders to gather inputs and feedback on identified companies.

The Commission should publish the list on an accessible and dedicated platform, providing detailed information about each listed company's involvement in forced labour practices.

The Commission should guide businesses in effectively utilising the list in their due diligence processes. This could include best practices, risk mitigation strategies, and resources for engaging with listed companies to encourage them to take corrective actions.

2.5.2 Establishing a transparent mechanism for companies to demonstrate compliance and exit the list of companies found to have violated the EU's Forced Labour Regulation's provisions

To promote accountability and incentivise companies to address forced labour concerns, the European Commission should establish a transparent mechanism that allows operators on the list of companies found to have violated the Force Labour Regulation's provisions for engaging in practices classified as forced labour to demonstrate compliance and exit the list.

The European Commission should develop clear guidelines and criteria for companies to follow to demonstrate their compliance with the regulations and effectively address forced labour within their operations and supply chains. These guidelines should provide specific actions and measures companies can undertake to rectify any identified issues and improve their practices. Transparency should be ensured in developing these guidelines, with input from relevant stakeholders, including labour organisations, social partners, human rights advocates, and industry experts.

Companies should be allowed to submit evidence and documentation to the Commission, demonstrating their compliance with the established criteria and efforts to address forced labour risks effectively. This evidence could include audits, certifications, and other relevant information that validate their commitment to ethical practices and the elimination of forced labour. The Commission should establish a clear process for reviewing and evaluating this evidence, ensuring it is done impartially and transparently.

Conclusions regarding a company's removal from the list should be publicly accessible to both public and private parties. The Commission should publish these conclusions on its official platforms, clearly outlining the rationale and evidence supporting the decision. This transparency would promote trust, allow other stakeholders to evaluate the effectiveness of the company's remediation efforts, and encourage continuous improvement in combating forced labour.

Moreover, the Commission should guide and support companies throughout the compliance verification and exit process. This could include offering resources, best practices, and expertise to help companies strengthen their due diligence systems, engage with stakeholders, and implement sustainable measures to prevent forced labour.