AmCham EU
SPEAKING FOR AMERICAN BUSINESS IN EUROPE

Our position

Response to the Call for Feedback on the Commission Proposal for a Regulation on prohibiting products made with forced labour on the Union market

AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate US investment in Europe totalled more than €3.4 trillion in 2021, directly supports more than 4.9 million jobs in Europe, and generates billions of euros annually in income, trade and research and development.

American Chamber of Commerce to the European Union
Speaking for American business in Europe

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Executive summary

The EU's efforts to combat forced labour, debt bonded, indentured, child, slave or involuntary labour (including prison labour) and human trafficking are welcome. American Chamber of Commerce to the EU (AmCham EU) member companies are committed to ensuring that forced labour and human trafficking do not occur in their supply chains. Our member companies aim to work to the highest level of ethical, environmental and labour-related standards both within their own businesses and in their supply chains and strive to ensure that employees, partners and suppliers work together to eradicate forced labour and human trafficking. As a result, many member companies have already enacted internal human rights principles and policies to address the risks of forced labour fees, contracts and resignation terms, worker rights (eg no holding workers' original documents) and control systems such as monitoring recruitment or labour agents and interviewing foreign and migrant workers.

Introduction

Further to our input for the Call for Evidence, AmCham EU welcomes the Commission Proposal and appreciates that the legal instrument chosen is a regulation as opposed to a directive with the twin legal bases of Article 114 and Article 207 of the Treaty of the Functioning of the EU (TFEU). This is an attempt to create a level playing field at the EU level and curb the growing trend of internal market fragmentation, with numerous countries introducing laws that have different requirements. This trend is unworkable for business.

We appreciate that the Proposal builds on existing legislation and adopts a risk-based approach that is founded on the United Nations Guiding Principles on Business and Human Rights, core International Labour Organization (ILO) conventions and the Organisation for Economic Co-operation and Development Guidelines. The Forced Labour Instrument (FLI) is proposed as a complementary but separate legal instrument to the proposed directive on corporate sustainability due diligence (CS3D). One is a product ban, and the other addresses company behaviour. In an optimal scenario, if companies have robust due diligence practices in place there should not be a need to ban products placed onto the EU market, including imports and exports.

The EU should adopt a smart mix of well-crafted legislation that is not too prescriptive, efficient and straightforward for companies to comply with and can be enforced by national competent authorities and customs authorities. Accompanying measures will be critical to achieving the overall goal of

tackling forced labour. Collaborative partnerships and multi-stakeholder initiatives must be encouraged

The proposed FLI can be improved in the following ways:

1. **Ensure legislative coherence.** The Regulation must be consistent with the proposed CS3D by, for example, aligning definitions and risk assessment processes. Businesses could benefit from clear guidance from the Commission that gives as much certainty as possible regarding the link not only between the FLI and the CS3D but also with other existing EU due diligence laws (Regulation (EU) 2017/821 on responsible minerals and the new battery regulations).
2. **Extend timelines during information requests.** Thirty days is a more realistic timeframe to respond to a request for information instead of the 15 days proposed in Article 4. In Article 7, the timeline to comply with an order for product withdrawal should be extended from 30 working days to a reasonable period that is aligned with the Compliance and Enforcement Regulation However, timeline extensions ought to be an option throughout the preliminary and actual investigation in case the information requested is of a complicated nature and requires engagement with multiple partners
3. **Ensure fair and equitable treatment and due process in the investigations.** AmCham EU welcomes the ambition to create a procedure where allegations of forced labour are investigated thoroughly and where decisions are based on facts and evidence. Furthermore, we appreciate the recognition that collaboration with economic operators is crucial. However, the evidentiary threshold needs further clarification, especially its evolution throughout the different stages of the investigation. It is critical to also include elements needed for the initiation of an investigation in the preliminary investigation to ensure that a preliminary investigation is not started based on unsubstantiated or poorly substantiated claims. The proposed regulation does not specify how competent authorities will determine whether a concern is substantiated and whether a source is credible. The Commission should further clarify how competent authorities will 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. Competent authorities should have a prioritisation mechanism for triaging or risk-rating allegations based on source. Moreover, the competent authority's ability to make decisions on 'facts available' is worrisome. While we understand the instrument must not prevent cooperation, this notion may lead competent authorities to make decisions based on unsubstantiated claims or false

information.

4. **Harmonise investigations across Member States.** AmCham EU calls for further harmonisation across Member States for the conduct of investigations. The mere fact that Member States are conducting the investigations is a risk to a harmonised implementation of the regulation. In particular, we question how the competent authorities would carry out inspections and investigations in third countries. We see both resource and knowledge constraints, as well as Member States' differing relationships with third countries, as potential obstacles to the proper functioning of investigations, thereby putting at risk the legal certainty. Moreover, companies may be caught in the middle depending on the relationships between Member States and the countries in which investigations take place.
5. **Harmonise of the procedures for submitting information.** AmCham EU fully supports the Member States' need to cooperate and to share concerns with the economic operator in question. Only through effective communication and cooperation can concerns be addressed or misunderstandings be resolved. However, we are concerned with the provision in Article 5.2(c), stating that the Member State does not need to share the reason for initiating an investigation if doing so would 'jeopardise the outcome of the investigation.' This not only suggests that the outcome of the investigation is already determined at initiation, but also opens up the possibility for Member States to limit the instances when they share the reason. The legislation's ultimate aim is to stop and prevent forced labour, not to withdraw products already on the market. The future regulation should provide concise examples of documentation companies may submit as evidence in response to an investigation so that they can plan to make this type of data available and hold all cases to the same scrutinyThat being said, the burden of proof should remain with the competent authority, not the economic operator.
6. **Clearly identify products suspended by customs authorities.** One potential risk of the proposal is the possibility for customs authorities to control products, as outlined in Article 15. While we support the intention for customs authorities to act only when a final decision has been communicated to the customs authorities, the decision needs to include a set of specific details and information that will clearly distinguish one product from another. Relying on overly general product descriptions or only HS codes may lead to unintentional overzealous action by customs authorities, ultimately putting legitimate trade at risk. This risk is multiplied considering the controls performed by 27 separate customs authorities. In this regard, the

implementing act referred to in Article 16 is a critical element of this proposal. that the Commission should clarify the type and source of information to be provided to customs authorities.

7. **Consider more sustainable alternatives to product disposal.** In Article 6, non-compliant products should be allowed to be recycled or donated instead of being disposed of, in line with the EU's goals for environmental protection and securing the supply of critical raw materials. The aim ought to prevent financial gain from the sale of the product. The Commission should not encourage the destruction of unsold consumer products, in line with its proposal for Ecodesign for Sustainable Products Regulation (2022/0095). Competent authorities should ensure that the company can recycle such products fully in line with national and EU law (eg the Waste from Electrical and Electronic Equipment) and/or do so themselves. The existing definition of destruction is limiting and incoherent given it includes recycling operations which are designed to encourage the circular economy value of materials by reprocessing them and making them available for use in other products. According to the Waste Framework Directive (WFD), recycling includes: 'any recovery operation by which waste materials are reprocessed into products, materials, or substances whether for the original or other purposes.' It includes the reprocessing of organic material but does not include energy recovery and the reprocessing into materials that are to be used as fuels or for backfilling operations. Within the WFD's waste hierarchy, recycling precedes the recovery and disposal options, that can more easily be understood as involving destruction via waste incineration or via decomposition in a landfill. Therefore, recycling should be added to the exemptions from the definition of 'destruction'. Moreover, refurbishment operations should also not be considered destruction, as the product is not sent to waste.
8. **Recognize industry schemes.** The legal text should recognise relevant industry schemes based on international frameworks that help companies – including small and medium-sized enterprises – comply with the rules and drive continuous improvement. A legal precedent was set in Regulation (EU) 2017/821 on responsible minerals, and it was agreed by the Commission, Parliament and Council. Moreover, collaborative partnerships and multi-stakeholder initiatives should be incentivised.
9. **Provide sectoral guidance.** Strong guidelines from the Commission, as suggested in Article 23, will be key to this instrument's success. Guidelines ought to rely on the ILO's interpretations and guidance to ensure a harmonised application of the EU's instrument, as companies

operate global value chains under a myriad of different legal jurisdictions. 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 take into account individual industries' efforts to address forced labour and human trafficking, often undertaken over several decades. 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.

10. **Prevent disengagement.** The legal framework should not encourage disengagement too early without having attempted to identify and mitigate risks, and there should be a possibility to re-engage. The regulation should allow companies to address the challenges without penalties, which would encourage 'cut-and-run' behaviour. Improving working conditions along global value chains and stopping forced labour should always be this instrument's primary aim.
11. **Establish a well-founded database.** The establishment of a database as set out in Article 11 is welcome. It should rely to the greatest extent possible on well-founded reports from respected international organisations like the ILO. The Commission should clarify the link to existing databases as well as how data would be updated in real time based on rapidly evolving geopolitical circumstances. It is also unclear how companies would interact with the database. Lists of countries and sub-regions could incentivise companies to disengage as a knee-jerk short-term reaction, which might disrupt vulnerable communities that depend on economic operators for their livelihood. In the medium and long term, it is often better for companies to remain in a region to help identify and mitigate risks. Similarly, the database that lists specific products or geographical regions of risk should not lead to the reversal of the burden of proof in establishing a violation of the ban. The wording of Article 11.3 could be misread as implying that in practice, products or regions mentioned in the database would presuppose a violation. In order for companies to have sufficient time to utilise the database's resources and make necessary supply chain adjustments, the Commission should make the database

available at the same time as the regulation comes into force and well before it takes effect after the transition.

12. **Ensure harmonised enforcement and avoid forum shopping.** A harmonised approach to enforcement, such as guidance on evidentiary standards in identifying forced labour, would that ensure companies don't face overzealous regulation in certain countries. There should also be a harmonised approach to penalties. Cooperation between Member States should result in avoidance of the selective or preferred use of certain jurisdictions over others (forum shopping).
13. **Ensure phased-in entry into effect.** Companies need time to implement the systems and processes that will allow them to comply with the new regulation. According to the proposal, the Commission would have up to 18 months to issue guidelines on due diligence requirements, risk indicators of forced labour etc. The Commission also proposes that the regulation applies 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 at least 24 months between the publication of Commission's guidelines and the application of new rules to allow companies to put in place compliance systems.

14. **Other points requiring additional clarity:**
    - How competent authorities can substantiate allegations from third parties.
    - A list of information sources relevant for the regulation's implementation.
    - The inclusion of an information sharing agreement such as the Compliance Enforcement Regulation and CS3D.
    - There should be a narrow scope for investigations given the same product can have different supply chains.
    - What will happen to complex goods containing a wide range of parts and components? A simple ban could disrupt whole supply chains and affect a wide range of finished manufactured goods that have not yet reached the end users. Could this be taken into account in the investigations and in allowing proportionate measures?
    - Are there exceptions to items being held at customs for health/safety, humanitarian needs, critical infrastructure, etc. (as is the case with other EU trade laws) while an

investigation is ongoing?

- If the outcome of the investigation is 'no substantiated concern,' would the company in question be compensated while the product is withheld from the market?

- In the case that interim measures are introduced into the legal framework, if the outcome of the investigation is 'no substantiated concern,' would the company in question be compensated while the product is withheld from the market?

- The word 'importer; is defined in Article 2(l) even though it is not used anywhere else in the draft. The Commission should clarify its relevance and the role of the customs authorities.

- Article 1.2 refers to ' end users,' but it is unclear what this term means, particularly with respect to input materials. For example, would the end user be the EU producer further processing those materials or the further downstream users of the processed product?

- Article 2(d) defines 'making available on the Union market' as also offering products online when the offer ' is targeted at users in the Union.' The Regulation should clarify what ' targeted at users in the Union' means, as the concept is vague and could be overly broad in scope.

Conclusion

AmCham EU welcomes the opportunity to put forward these suggestions to improve the Proposal. We look forward to discussing these ideas further with the European institutions and all relevant stakeholders to make the new rules as effective as possible both for companies and enforcement authorities.