

Policy Hub – Circularity for Apparel and Footwear: Response to the Consultation on the Initiative to Ban Products Made with Forced Labour

Amsterdam, June 2022

1. INTRODUCTION

Forced labour in any form is intolerable and based on repression and violation of human rights. Thus, the Policy Hub welcomes the EU Commission’s intention to address, and end forced labour. The apparel and footwear sector is aware of the challenges and risks related to forced labour in our supply chains and some companies have zero-tolerance policies through a mandatory adherence by direct suppliers to a code of conduct. The latter is based on international agreements and conventions, including ILO and UN Global Compact, OECD guidance etc. In parallel, companies conduct checks and assessment of new factories, unannounced visits according to a risk-based approach, workers’ interviews and through a confidential whistleblowing system. However, while supportive of EU’s ambition to eradicate forced labour, we would like to share the following key concerns that must be tackled to ensure an effective and implementable policy.

2. CONCERNS & RECOMMENDATIONS

- **A holistic and thought-through approach to legislation must be taken:** forced labour is a concern that exists in many countries. Moreover, forced labour is often related to other underlying root causes such as poverty and migration. We are concerned that replacing a proper impact assessment with a fast-track process with very short deadline for a complex topic like this, will not be adequate to design an implementable and scalable policy tool that addresses the actual concern.
- **Developing solutions together with the industry is critical:** prior to drafting the Proposal on combatting forced labour ban, the EU Commission (EC) ought to have an ongoing dialogue with the textile industry to explore what is most effective to tracing and tackling forced labour. There are areas, where the industry has no chance of conducting a thorough due diligence as the problems are systemic, and difficult to address by the individual company. Thus, the EC should understand what is realistic to ask of businesses, and when it is better to address the issue at the political state-to-state level. It should learn about the experiences and best practices from companies, who have succeeded in implementing transparency/traceability measures – to provide the effective measures to tackle forced labour. We fear that without such dialogue the Proposal will be designed in such a way that it will not be possible for companies to implement it nor to comply.
- **Support and acknowledge industry-led initiatives:** The upcoming Commission proposal should reference international guidelines such as the OECD Due Diligence Guidance for Responsible business conduct Responsible Supply Chains in the Garment and Footwear Sector as they are already widely acknowledged by civil society and used by the business community. Reference could also be made to the importance of capitalising on existing multi-stakeholder initiatives focused on labour rights violations in supply chains.
- **A product-level approach may not be the most appropriate route to tackle forced labour:** We see limitations in addressing forced labour on a product level as the nature of issue is not linked to the attributes of a product as such. Forced labour is already part of the current EU Corporate Sustainability Due Diligence Directive (CSDDD) and addressing human rights risks at entity/supplier level is more suitable.

- **Lack of the capacity to trace forced labour needs to be considered:** some of today's global supply chains are very complex due to the commoditised nature of certain raw materials, which poses a challenge to achieving absolute visibility in the supply chain. While traceability mechanisms exist, these are still under development and have not yet been implemented at scale. Therefore:
 - Compliance with the upcoming transparency and traceability measures as part of the product ban call for public investments and resources. As such we need to find the solutions together in public-private partnerships as the lack of traceability is a market failure. The Commission and Member States ought to work with the industry by investing in technology and promoting sector-wide solutions for traceability and supporting the development and scaling of the traceability solutions already in use in the industry both through investment and legislation.
 - The EU should promote traceability standards in industry to enable better visibility in global supply chains. This would not tackle forced labour in itself but would allow actors to know where products are made to make informed, targeted interventions.
 - Moreover, there is a risk of undisclosed suppliers: the key challenges related to forced labour lie outside of the sphere of influence of a company, e.g., beyond its direct control or as a result of undisclosed contractors by suppliers.
- **Ensuring that the process is clear and transparent:** The Commission should develop a transparent process for identifying products made with forced labour:
 - The process should include a non-delegable duty for the EU authorities to investigate accusations or suspicions of forced labour.
 - There should be ample opportunities for companies to have a say before a final decision has been made to withdraw a product from the market. The company should have the right to be heard, and to present evidence.
 - Enforcement should be limited to products that the Commission/EU Member States can prove with substantial evidence were produced with forced labour and that the targeted parties are unable to rebut with substantial evidence. The Commission/EU Member States should not rely on presumptions of forced labour. However, if it does, its pre-enforcement process should include a scope inquiry as well as an opportunity to rebut any applicable presumptions.
 - As the implementation will most likely be up to the EU Member State, there must be tools to ensure harmonisation and equitable implementation across the EU. Coordination and guidance from the European Commission will be key.
- **Monitoring and enforcement must be ensured:** when implementing an instrument to combat forced labour, it is paramount that the enforcement strategy is clear, consistent, and aligned between Member States. If certain entities or practices in the supply chain are targeted, it should be made transparent and clearly highlighted, so companies can navigate around them.
 - Liability and accountability: As the same company may supply to a number of different suppliers, it is not clear how such a ban could be enforced in practice.
- **Avoiding the implementation approach taken by US:** There are significant limitations and challenges of the U.S. Withhold Release Order (WRO), which imposes evidence requirements that go beyond what is possible for companies to document in practice. In the US example, companies have the burden of proof to show that forced labour didn't happen, which is much harder than proving that something did happen. This is difficult to do in retrospective without having a proper understanding of the required evidence. Thus, it is critical that any

suggested ban on product level is clear and feasible in expectations. To see our full feedback on the US approach – please see Annex 1.

- **Working with third-country governments to address challenges:** The textile sector is one of the most globalised industries and as such any issues are complex and require a spectrum of interventions. We recognise our responsibility to implement due diligence processes throughout our own operations and supply chains to prevent, mitigate and remediate the violation of human rights, but we also recognise the important role which multi-stakeholder initiatives can play in tackling these complex issues. Thus:
 - We support the leading role of the EU in working with third-country governments to enforce actions against forced labour, including child labour in their territories. The example of the work led by the EC with South Korea is an illustrative one, showing the success of the EU’s current approach.
 - In order to avoid overlaps, EU should focus on tackling the issue at its roots and support companies by strengthening dialogue with non-EU countries to eradicate state-sponsored forced labour.
 - EU should also incentivise trading partners to eradicate forced labour through trade tools, e.g., the EU’s Free Trade Agreements, and European Union Trade and Sustainable Development chapters.
 - The EU should take a leading role in assessing high, medium, and low risk regions and suppliers to support companies in identifying the level of risks of Human Rights violation including forced labour.
- **Adopting a non-discriminatory approach:** it is vital that any action taken by governments is aimed at addressing the actual concern, which is forced labour. For any action to be effective and future proof, restrictions need to be designed in a non-discriminatory, country-agnostic, and proportionate manner.

3. PRINCIPLES TO CONSIDER

The forced labour product ban, at minimum should be:

- **Consistent** and built upon existing and future EU legislation, international conventions and agreements. The EU proposal on CSDDD includes among other forced and child labour as key Human Rights to identify, prevent, mitigate and to have a remediation mechanism, which should be considered. This implies that any ban should be put in place as a last resort mechanism and allow sufficient time to companies to act when discovering forced or child labour before any ban is put in place.
- **Risk- based** approach should be preferred as it partly stands in the proposal for CSDDD. The EU can support it by conducting assessment of high, medium, and low-risk regions defined. Such risk- based approach is aligned with the OECD guidance on due diligence, where proportionality and leverage of companies is taken into account.
- **Proportional and fair:** prior to seizing the imported goods, the company should be allowed sufficient time to provide evidence. It takes minimum 3 to 6 months, and in some instances 6-12 months for a company to modify its supply chain – this should be considered.

ANNEX I. Limitations and challenges of the U.S. Withhold Release Order (WRO)

This Annex is based on the position of the Federation of the European Sporting Goods Industry (FESI). The Policy Hub’s partner organisations’ members face the same challenges and support the views expressed in this position as per below.

While we acknowledge the efforts made by the U.S. authorities to develop a trade instrument to ban products made with forced labour, the implementation and execution of the WRO has presented significant challenges to both the U.S. Customs and Border Protection (CBP) and importers. Some of the shortcomings and our recommendations are as follows:

- **Lack of involvement with trusted traders in the process:** Collaboration between U.S. authorities and trusted traders has proven to be challenging. For the EU proposal to be a success, collaboration between authorities and economic operators must be at the core of the system. Customs-to-Business partnership is fundamental if we wish to efficiently prevent products made with forced labour from entering the EU market. The concept of Authorised Economic Operator (AEO) is a key pillar of the EU Union Customs Code (UCC). Traders who voluntarily meet a range of criteria work in close cooperation with customs authorities to assure the common objective of supply chain security. As such, they are entitled to enjoy benefits throughout the EU. A similar system could also be implemented in the Commission’s proposal.
- **One-way Communication Channel:** There is a general sense of frustration from the U.S. trader community that communication is largely onesided, leading to an overall lack of clarity. Most of the time, an announcement is made from CBP, after which companies spend the next few months seeking endless clarifications. Industry questions tend to be answered incompletely, preventing companies from efficiently and swiftly collecting the requested information. A constant dialogue throughout the process should be privileged by the EU as it is only by working together that one can achieve greater results. Furthermore, companies have repeatedly requested that CBP engagement with companies starts prior to a WRO being issued as it would better serve the goal of eliminating forced labour. This approach should be privileged by the EU as well.
- **Inefficient information sharing process:** One of the main shortcomings of the WRO system is that in most instances importers are unaware what CBP is finding or is looking for. Often, companies are left with no other choice but to search for information themselves from press releases or through industry surveys. If a shipment is being detained in the U.S., cargo owners must provide numerous documents to support the release of those goods. While this is already a complex exercise, the process has become near impossible as CBP does not provide cargo owners with the specific evidence they have on where forced labour has allegedly entered the product being detained and what specific information is required to secure its release. Instead, documentation requests are often overly broad and are not designed to target the problematic tier, resulting in the “data dump” that CBP has cited for the delay in reviewing submissions. Moreover, CBP is often unwilling to share what ILO forced labour indicator led to the detention, and what part of the shipment triggered the detention. This information ought to be communicated as soon as the WRO is issued. In addition, if evidence provided by cargo owner is to be rejected, a clear rationale must be provided to ensure that economic operators can swiftly bring the right documents. While we understand that some information might be sensitive, timely and efficient information sharing must be ensured in the EU proposal.

¹ Federation of the European Sporting Goods Industry, FESI Response to European Commission call for evidence on Effectively banning products produced, extracted or harvested with forced labour (June 2022).

- **Lack of Harmonisation:** In the U.S., the WRO procedure differs from detention to detention and from port to port which significantly reduces the overall predictability and efficiency of the scheme. As the Commission has already made clear that EU Member States authorities will play a critical role in the enforcement of this new instrument, we call on EU authorities to include in the wording of the upcoming proposal strong provisions ensuring coherent enforcement across Member States.

ABOUT POLICY HUB

[The Policy Hub-Circularity for Apparel and Footwear](#) unites the apparel and footwear industry to speak in one voice and propose policies that accelerate circular practices. Launched in 2019, the Policy Hub has five partner organisations: Sustainable Apparel Coalition (SAC), Global Fashion Agenda (GFA), Federation of the European Sporting Goods Industry (FESI), Textiles Exchange, and the ZDHC Foundation. In total, these organisations represent more than 700 apparel & footwear stakeholders including brands, retailers, manufacturers, and NGOs.