

# **The Council on Ethics' response to the Norwegian government's consultation on the European Commission's proposed regulation prohibiting products made with forced labour**

Response submitted to the Norwegian Ministry of Trade, Industry and Fisheries on 19 September 2023

We refer to the consultation paper, published by the Norwegian Ministry of Trade, Industry and Fisheries on 25 August this year, concerning the European Commission's proposed regulation prohibiting products made with forced labour.

The Council on Ethics supports an explicit ban throughout the EU and EEA area on the marketing, sale or export of products which have been wholly or partly produced by means of forced labour. Enforcing this legislation may be challenging, but that is not in itself an argument against such a prohibition.

The proposal supports other legislation that requires companies to take responsibility for grossly unethical practices in their supply chains. The proposal provides a further incentive for companies to uncover where there may be a risk of forced labour and take steps to reduce it. This could therefore lead to greater attention being paid to the risk of forced labour.

This proposal is closely linked to the EU's Corporate Sustainability Due Diligence Directive (CSDDD), which has not yet come into effect. The government body tasked with investigating suspected forced labour must take account of the steps companies have taken to uncover and address the risk of norm violations, see point 25 in the Ministry's consultation paper. Although guides do exist for how this should be done, there is no single right answer that describes what the correct reaction is in each individual case. In other words, there is considerable discretionary leeway when assessing whether a company has implemented a due diligence assessment in accordance with the CSDDD and therefore should not be prioritised for further investigation pursuant to the forced labour regulation.

While companies must be selected for further investigation on the basis of the risk of forced labour linked to the manufacture of the company's products, the burden of proof lies with the authorities. In other words, the authorities must prove that forced labour has actually been involved in the manufacture of any products for which a confiscation order is sought, see point 26 of the consultation paper. It will be easier for the

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enforcement bodies to submit evidence of forced labour in countries where the authorities attempt to uncover and penalise such conditions than in countries whose authorities do not pursue suspicions of forced labour.

The legislation rests on international standards. The extent to which working conditions are deemed to constitute forced labour under ILO Convention No. 29 is nevertheless not unambiguously defined. The ILO has drawn up a set of indicators for forced labour, but it is not clearly defined if all of these indicators, or only one of them, must be present before working conditions may be characterised as forced labour. Here, too, there will be considerable room for the exercise of discretionary judgement.

When the existence of forced labour has been finally determined, the penalty is the confiscation of the product concerned, see point 30 of the consultation paper. The Council on Ethics wishes to point out that working conditions which may fall within the definition of forced labour have been uncovered in several business sectors in Europe, and not merely in connection with the type of products that pass through customs on their way from one country to another. In the construction and shipbuilding industries, for example, it has been revealed that parts of a building or ship may be produced with forced labour, while the bulk is manufactured under lawful working conditions. How the regulation should be applied to such products needs to be clarified.

Based on the Council's experience, investigating the existence of forced labour will be challenging, both for the companies and the government agencies tasked with enforcing the regulation. With respect to forced labour pursuant to ILO Convention No. 105, the situation is already such that the states in which forced labour occurs most frequently also restrict the right to conduct investigations. In such states, it is possible to determine that there is a high risk of forced labour, but only rarely possible to identify exactly which products have forced labour as an "input factor".

This challenge may be further exacerbated when the alleged forced labour could result in specific sanctions against individual companies that may perform assignments on behalf of the government or operate with the government's blessing. In the Council's view, it would be good if the regulation leads to a more systematic effort by European and national authorities to map the extent of global forced labour. The Council would nevertheless like to point out that the regulation itself could make such efforts more difficult. Journalists, civil society organisations and consultants already incur a considerable risk when they attempt to obtain reliable information about forced labour in certain authoritarian countries. Because the regulation links such information gathering directly to enforcement agencies and the imposition of punitive measures in Europe, this could become even more hazardous.

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Much of the forced labour taking place in companies' supply chains occurs in the agricultural sector. Tracing forced labour to specific products is particularly challenging here. A company may, for example, purchase cotton or textiles from a country in which forced labour is widespread, but where cotton is also produced without recourse to forced labour. Even if the company specifies in its contracts that the cotton used in its products must not have been produced with forced labour, it is difficult to verify this is actually the case in practice. In reality, the enforcement body cannot rely on the tools outlined in the CSDDD being effective, nor can it prove decisively whether a supply chain contains forced labour.

In other words, there is considerable room for discretionary judgement in the practising of the CSDDD and the regulation on which comments are currently being sought. Furthermore, investigating forced labour, as well as norm violations associated with companies' operations more generally, is exceptionally resource intensive. The Council would also like to point out that disagreement may arise between different states' enforcement bodies, given the subjective nature of the assessments. The proposal does not seem to contain any mechanisms through which such disagreements may be resolved.

In the Council's opinion, it is important that the individual enforcement bodies have sufficient resources, see point 19 of the consultation paper. Furthermore, extensive collaboration between the states' enforcement bodies is needed to ensure that the regulation is practised in a uniform manner and to increase the legislation's impact, see points 39, 42 and 44 of the consultation paper. In light of the uncertainty surrounding how the regulation is to be practised, the Council considers that it would be advantageous to gain experience from the work relating to the CSDDD before the final regulation is adopted.