

Trade-related policy options of a ban on forced labour products



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IN-DEPTH ANALYSIS

Trade-related policy options of a ban on forced labour products

ABSTRACT

This in-depth analysis explores how EU trade policy tools can effectively tackle the import and circulation of forced labour products in the European single market in order to help implement the Commission's decent work worldwide initiative. The report compares the option of an EU import ban on forced labour goods to the option of prohibiting the marketing of such products, in light of the Commission's proposal for a Regulation on prohibiting products made with forced labour on the Union market published on 14 September 2022. The paper also analyses the likely economic and social impact of the proposed measures (in the EU and abroad), as well as the legal feasibility of these tools.

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List of abbreviations

CAHRAs	Conflict-affected and high-risk areas
CSDD	Proposal for a Directive on Corporate Sustainability Due Diligence
CSRD	Proposal for a Corporate Sustainability Reporting Directive
EBA	EU's Everything but Arms (EBA) scheme
EC	European Commission
EEAS	European External Action Service
EU	European Union
EP	European Parliament
EPAs	Economic Partnership Agreements
FDI	Foreign Direct Investment
FTAs	Free Trade Agreements
FLETF	U.S. Forced Labour Enforcement Task Force
GATT	General Agreement on Tariffs and Trade
GPSD	General Product Safety Directive
GSP	Generalized Scheme of Preferences
G7	Informal grouping of seven of the world's advanced economies
G20	Group of Twenty major advanced and emerging economies
IC	Indigenous Communities
ILAB	Labour's Bureau of International Affairs
ILO	International Labour Organisation
IOM	International Organisation for Migration
IPAs	Investment Protection Agreements

OECD	Organisation for Economic Co-operation and Development
OHCHR	UN High Commissioner for Human Rights
METI	Japanese Ministry of Economy, Trade and Industry
MFN	Principle of Most-Favoured Nation Treatment
MRM	Marine Resource Management
NT	Principle of National Treatment
SME	Small and Medium Sized Enterprise
SUPD	Single-Use Plastics Directive
TAD	Tobacco Advertising Directive
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
TPD	Tobacco Products Directive
TSD	Trade and Sustainable Development
UN	United Nations
US	United States of America
CBP	U.S. Customs and Border Protection
UFLPA	Uyghur Forced Labour Prevention Act
UNICEF	United Nations Children's Fund
WTO	World Trade Organization
XUAR	Xinjiang Uyghur Autonomous Region

Executive summary

In a context where modern slavery and forced labour have been on the rise in recent years, the ILO estimates 49.6 million people were living in modern slavery in 2021 worldwide, of which 27.6 million people were in situations of forced labour, including at least 11.8 million women and girls. No region of the world is spared from forced labour but the Asia-Pacific region is host to by far the largest number of people in forced labour. The EU can set an example and potentially emerge as a model exporter in the design and deployment of an internationally applicable anti-forced labour instrument.

The **present in-depth analysis** aims to **explore and analyse EU trade policy tools in their ability to effectively tackle the import and circulation of forced labour products in the European single market** to help implement the European Commission's decent work worldwide initiative. In particular, it **assesses the feasibility of an EU import ban on forced labour goods and compares it with the option of a marketing prohibition tool of such goods**, also in view of the EC's proposal on prohibiting products made with forced labour on the Union market published on 14 September 2022.

EU trade policy tools restricting import/circulation of prohibited products already exist in various policy areas, e.g. human rights, animal welfare policy, consumer protection law, environmental policy. The main common points are usually that the group of components of products is specifically determined and the competences and responsible bodies for enforcement are defined. A weakness revealed in such examples, also relevant for forced labour products, is the difficulty to ensure credibility of data about products manufactured.

An important challenge specific to the forced labour products regards the detection by authorities that forced labour was used to manufacture the products. Forced labour is not a rigid category or does not concern a physical attribute of a product. Despite the existence of a widely accepted definition of forced labour laid down by ILO, revealing whether a product (or part of a product) was made with coerced work is arduous.

For this reason, a unique mechanism should be considered for tackling products made from forced labour. In particular, **a robust false practice reporting mechanism** must be envisaged to ensure the successful implementation of either anti-forced labour tool (import ban or marketing prohibition tool). Such reporting mechanism requires solid mechanisms of compliance, product traceability, notification and control, and could be executed by either the economic actors in the framework of due diligence obligations (corporate self-disclosure) and/or by an authority on EU level or by third parties (stakeholders). The present report concludes that a combination of the two solutions would be desirable to allow for the widest coverage of reporting on possible forced labour cases. In addition, the creation of a public database would ensure access to relevant information on the production/origin of the product, and the sharing of data between economic actors, competent authorities and local stakeholders. In addition, transparency measures such as **corporate sustainability due diligence obligations, as foreseen in the Proposals for a Directive on Corporate Sustainability Due Diligence and for a Corporate Sustainability Reporting Directive**, should **complement either trade tool**. Transparency measures have the potential to inform consumers and NGOs by increasing the accountability of firms in global supply chains if the design of the respective monitoring measures ensures that the disclosed information is comprehensive and allows for a comparison between the respective efforts.

In terms of how an anti-forced labour trade instrument could look like, it is important to recall that import prohibition and marketing prohibition follow different logics. While an import ban would prohibit imports of goods from certain origins into the Union market or requires specific certification that the producer has not engaged in forced labour, a marketing prohibition would regulate supply chain responsibilities in the EU to ensure ethical production processes. Recent legislations in place such as in the US with the Uyghur Forced Labour Prevention Act of 2021 show the growing support for import restrictions to address forced

labour and modern slavery issues. To ensure WTO compatibility, such an import prohibition should not discriminate against goods by geographical origin. A **complete ban on both import and export** of products made or transported by forced labour would prevent the risk of non-compatibility. An import ban would have a good chance of success if it is not targeted, if it has a clear link to a listed objective under Article XX of GATT, and if it is well-supported by evidence. The task to enforce import bans is often delegated to competent authorities in the Member States but a risk of fragmentation in the enforcement might arise if these authorities are not provided with sufficient means, or clear and uniform instructions.

Similarly to import bans, a marketing prohibition accompanied by an export ban should be consistent with the WTO rules of non-discrimination. The EC's proposal for a Regulation on prohibiting products made with forced labour on the Union market released on 14 September 2022 prohibits the placing and making available on the EU market of products made with forced labour, as well as an export ban from the EU of such products. Contrary to the UFLPA which establishes a rebuttable presumption that forced labour affects all goods made in XUAR, or in whole or in part by entities that enable the use of forced labour, the **EC's proposal makes the burden of proof fall on competent authorities in Member States. This is a key element that may hinder the successful implementation of a forced labour products prohibition due to enforcement difficulties.**

Whether it is an import ban or marketing ban or both combined, the chosen tool should be accompanied by a policy dialogue with non-EU, high-risk countries to ensure that these measures actually serve to level the playing field and do not undermine development efforts in concerned countries. This includes technical assistance, capacity building and raising awareness to promote decent work conditions. The EU's comprehensive approach to promote decent work worldwide is shown by its active contribution to set further labour standards through the ILO, the UN, the OECD, also within the G7 and G20 groups of nations. For example, an **existing initiative the EU could promote is Alliance 8.7**, a global partnership bringing together actors at all levels to accelerate progress on the elimination of child labour and the eradication of forced labour by optimising the effectiveness of development cooperation interventions, whose important role in facilitating cooperation and experience exchange on forced labour is recognised by the ILO. In the context of the forthcoming opening of the UN negotiations from 24 to 28 October regarding a binding instrument on business and human rights, the EU has a key role to play to advance the discussions. The EU could also take the lead in promoting a consistent application of anti-forced labour trade tools, or going even further, support a discussion for the implementation of a plurilateral anti-forced labour instrument, e.g. at OECD level, although no proposal exists yet.

1 Introduction

The issue of modern slavery has attracted increasing attention at global level through the work of the International Labour Organisation (ILO), the United Nations (UN), and the Organisation for Economic Co-operation and Development (OECD).

The international and EU normative frameworks recognise forced labour as a human rights violation and prohibit it under, *inter alia*, the ILO Conventions 29, 105 and the EU Charter of Fundamental Rights. At national level, the US has already banned imports on products made with forced labour and the Canada-United States-Mexico Free Trade Agreement ratified in July 2021 enacts a similar ban.

Notwithstanding these legislative efforts, modern slavery and forced labour have been on the rise in recent years¹. The ILO estimates 49.6 million people were living in modern slavery in 2021 worldwide, of which 27.6 million people were in situations of forced labour, including at least 11.8

¹ Modern slavery is an umbrella term that covers a set of specific legal concepts including forced labour (both privately-imposed and state-imposed forced labour), and forced marriage.

million women and girls. Among the 27.6 million people, 23,6 million are in situations of privately imposed forced labour whilst 3,9 million concern state-imposed forced labour. No region of the world is spared from forced labour but the Asia-Pacific region is host to by far the largest number of people in forced labour (ILO, 2022a). A recent report by the Office of the UN High Commissioner for Human Rights brings further attention to the issue and the need to address it, by finding that Chinese authorities have used forced labour among the Muslim-majority people of Xinjiang in the textile industry to produce face masks subsequently sold in Europe (UN, 2022).

Tackling forced labour is key in achieving the EU's wider objective of a global just transition, as underlined in President Ursula von der Leyen's State of the Union address in 2021. The EU's 2017 Consensus on Development and its recent new Global Strategy draws attention to the aim to achieve decent work for all and the UN's Sustainable Development Goals as one of the key ambitions. Furthermore, through the [EU Action Plan on human rights and democracy 2020-2024 adopted by the Council in 2020](#), the EU committed to promote a zero-tolerance policy on child labour and to eradicate forced labour, to support labour rights in EU trade relations, and to promote due diligence in global supply chains and ratification of the ILO Forced Labour Protocol (EEAS, 2020).

Yet, evidence that decent jobs are disappearing in a variety of industries and in large parts of the world is a major and growing concern (Anner, 2020; ILO, 2022). Consequently, in the EC's Communication from February 2022 on decent work worldwide², the EU reaffirms its intention to promote decent work across all sectors and policy areas addressing workers in domestic markets, in third countries and in global supply chains. In line with this comprehensive approach, **the EC first tabled a proposal for a Directive on Corporate Sustainability Due Diligence (CSDD) in February 2022³ followed by a proposal in September 2022 to prohibit products made with forced labour on the EU market⁴.** The latter **supplements existing trade policy tools used by the EU to combat modern slavery, including forced labour**, such as the inclusion of trade and sustainable development (TSD) chapters in trade agreements and the application of the generalized Scheme of Preferences (GSP, GSP+, EBA). The EU also has experience in supporting transparency in supply chains, using mandatory due diligence frameworks and introducing import restrictions.

In contrast to prior sector-based legislation addressing human rights abuses in supply chains such as for conflict minerals⁵ and batteries, the scope of the EC's proposal of September 2022 covers all products and industries. The new legislative instrument relies on a risk-based enforcement approach by national authorities of Member States, empowering them to investigate and identify products for which there is a suspicion of forced labour. Forced labour risks would be assessed based on submissions of information from civil society, a public database focusing on specific products and geographic areas and due diligence carried out by companies. Where the investigation finds that there is forced labour, national authorities would order the withdrawal of the products placed on the market and prohibit their subsequent sale and export.

The definition of forced labour according to the ILO in the 'Forced Labour Convention', 1930 (No. 29) will be applied in this paper as it is widely accepted and embedded in ILO conventions, ratified by over 170 States, including some of the EU's major trading partners such as China where the Convention, signed on 12 August 2022, will enter into force in August 2023. Based on the ILO definition, forced labour is a work

² European Commission, Communication on decent work worldwide for a global just transition and a sustainable recovery, 2022

³ European Commission, Proposal for a Directive on Corporate Sustainability Due Diligence, COM/2022/71 final, 2022.

⁴ European Commission, Proposal for a Regulation on prohibiting products made with forced labour on the Union market, COM(2022) 453, 2022.

⁵ Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas.

performed involuntarily and under the menace of any penalty. In this definition, work refers to all types of work occurring in any activity, industry, or sector. Furthermore, involuntariness means that a worker is deprived of making a free and informed consent to work and lacks the ability to leave the work at any chosen time. In the understanding of ILO, certain situations constitute exceptions to the forced labour definitions, such as compulsory military service (ILO, WEBa).

1.1 Purpose and structure of the report

This in-depth analysis examines how various EU trade policy tools available under WTO standards of international trade can support the implementation of the EC's decent work worldwide initiative and its overall ambition to promote more responsible and sustainable value chains⁶. For this purpose, and in view of the EC's proposal released on 14 September 2022, the report includes a comparative analysis of EU trade policy tools and their efficiency in addressing the issue of import/circulation of forced labour products in the internal market. In particular, the report focuses on a comparison between the option of applying an EU import ban on forced labour goods on the one hand, and a marketing prohibition of such products on the other. The combination of these two tools is also explored.

The report is structured as follows:

- **Section 1** provides an **overview of the EU's existing trade policy tools** restricting import/circulation of prohibited products.
- **Section 2** focuses on the shape and implementation of an **import ban tool vs. a marketing prohibition tool** as well as the possibilities for a **robust false practice reporting mechanism**.
- **Section 3** examines the **EC's proposal** for a Regulation on prohibiting products made with forced labour on the Union market released on 14 September 2022, and compares it with positions previously expressed by the EP.
- **Section 4** sets out a **feasibility assessment** by examining the social and economic impact and the legal scope of an import and marketing ban on forced labour products.
- **Section 5** of the report draws on this analysis to provide **conclusions** regarding the efficiency of trade policy and legislative tools to eradicate forced labour.

2 Overview of the EU's existing trade policy tools restricting import/circulation of prohibited products

This section provides an overview of the European Union (EU)'s existing trade policy tools restricting the import and/or circulation (marketing) of prohibited products. The first part of the section presents concrete examples of previously introduced EU import and marketing bans of prohibited products drawing on a variety of policy areas and implementation methods. The examples were chosen to demonstrate past practical experience in the field of import bans and marketing bans. The aim is to analyse whether similar approaches, either on their own or in combination, could help step up the fight against forced labour worldwide.

For the purposes of better understanding the notions of an import ban and a marketing ban, short definitions of both concepts are presented below:

- **Import ban:** a type of quantitative restriction, which prohibits imports of goods (or services) from certain origins into the Union market or requires certification that the producer has not engaged in forced labour in this context (WTO, 2022).

⁶ See for example in: European Communication, Communication on Trade Policy Review – An Open, Sustainable and Assertive Trade Policy, COM(2021) 66 final.

- **Marketing ban:** a type of quantitative restriction, which prohibits the promotion of buying and selling (including advertising) of certain products (or services) previously identified within the Union market (Investopedia, 2022).

Unlike an import ban, which is a trade instrument that finds its legal basis in the EU's Common Commercial Policy, a marketing ban instrument follows an internal market logic. Although it is not a trade instrument as such, it can nevertheless lead to a quantitative restriction sanctioned under WTO rules.

Marketing prohibitions as well as import prohibitions more commonly **concern goods**, while the favoured approach to **address traded services linked to forced labour** (e.g. in construction, mining, manufacturing, prostitution, etc.) **appears to lie in due diligence obligations on companies** as shown in EEAS Guidance on Due Diligence for EU Businesses to address the risk of forced labour in their operation and supply chains from 12 July 2021. In addition, the CSDD proposal aims to tackle the use of forced labour in the global value chains both in the production of goods and in the provision of services by companies.

2.1 Import and marketing bans used in other policy areas

Currently there is no EU import or marketing ban in place specifically for forced labour products, but a change is in sight: on 14 September 2022, the EC published its proposal on prohibiting products made with forced labour on the Union market, targeting the eradication of forced labour.

Before analysing the merits of this proposal in section 0, this chapter presents an overview of past experiences with similar tools in other policy areas, including:

1. Human rights policy
2. Animal welfare policy
3. Consumer policy
4. Environmental policy

The reason for selecting these policy areas is that through these, one can see the extent of import bans and marketing bans as a trade policy tool in various policy fields. Furthermore, these examples include elements that can serve beneficial for a planned import ban or marketing ban on forced labour products when applied.

2.1.1 Import bans to support human rights policy: the example of conflict minerals and metals

The Regulation on Conflict Minerals and the Council Regulation implementing the Kimberley Process (KP)⁷ certification scheme for the international trade in rough diamonds establish a set of legal measures to protect fundamental freedoms of persons subject to potential human rights abuses. The legal basis for both Regulations is Article 207 (Common Commercial Policy) of the Treaty on the Functioning of the European Union (TFEU):

- **The goal of the Council Regulation is to protect miners from abuse and to guarantee peace in regions providing minerals as well as to prevent the financing of armed groups through trade in minerals.** The Council Regulation implements the Kimberley Process (KP) by introducing an import ban: it prohibits the import of rough diamonds to the EU, unless certain conditions are met. The conditions include a certificate validated by the competent authority and a specific storage obligation. The container and the supporting documents are then verified by the competent EU authority. Moreover, the Regulation contains a rule which allows organisations

⁷ The Kimberley Process (KP) is a multilateral trade regime established in 2003 with the goal of preventing the flow of conflict diamonds. The core of this regime is the Kimberley Process Certification Scheme (KPCS) under which states implement safeguards on shipments of rough diamonds and certify them as 'conflict free'. The KP unites 85 countries (including all EU Member States) and is underpinned by a UN mandate.

representing traders in rough diamonds to apply to the EC for a listing of diamond organisations implementing the system of warranties and industry self-regulation to implement the KP Certification Scheme.

- **Similarly, since 2021, the Regulation on Conflict Minerals bans certain conflict minerals and metals – tin, tungsten, tantalum, and gold – from being imported into the EU, as well as restricts global and EU smelters and refiners from using conflict minerals.** The Regulation creates supply chain due diligence obligations for importers of such minerals, consisting of a five-step framework based on the Due Diligence⁸ Guidance for Responsible Supply Chains from Conflict-Affected and High-Risk Areas⁹ of the OECD. This means that the company that imports the aforementioned minerals and metals must design an internal system and related processes which enable providing adequate information (management system obligations, risk management obligations, third party audit obligations, and disclosure obligations). Compliance with the obligations is examined by Member State authorities through ex-post checks. The due diligence obligations of the Minerals Regulation entered into force in January 2021 and the first evaluation (followed by a potential revision) will be carried out in 2023. Therefore, drawing conclusions on the effectiveness of the Minerals Regulation is not yet feasible.

2.1.2 Import and marketing bans in animal welfare policy: seal products, cat and dog fur products and cosmetic products based on animal testing

The Regulation on seal products and the Regulation on cat and dog fur, which both have as their legal bases Article 207 TFEU (Common Commercial Policy) and Article 114 TFEU (internal market), pursue two different but closely linked objectives: to ban the import of these products and to prohibit trade with these goods within the internal market. In addition, the Cosmetics Regulation introduces a marketing ban for products related to animal testing based on Article 114 TFEU.

Furthermore, all these Regulations also stem from Article 13 TFEU which implies that the EU legislator needs to consider animal welfare requirements when it takes measures for further harmonisation of the internal market.

- **In 2009, the EU passed the Regulation prohibiting the import and the placing on the market of seal products** (both for products produced in the EU and for imported products), except for two categories (one is the group of seal products stemming from hunts by Inuit or other indigenous communities, while the other covers products for the personal use of travellers brought in occasionally). Even products under this exemption must meet specific conditions (need to be accompanied by a specific document and need a QR code label) (European Commission (WEB), 2022).
- **Additionally, a marketing ban and import ban were introduced for cat and dog fur products for ethical reasons, as these animals are considered pet animals in Europe.** The Regulation

⁸ 'Due diligence is an on-going, proactive and reactive process through which companies can ensure that they respect human rights and do not contribute to conflict. Due diligence can also help companies ensure they observe international law and comply with domestic laws, including those governing the illicit trade in minerals and United Nations sanctions. Risk-based due diligence refers to the steps companies should take to identify and address actual or potential risks in order to prevent or mitigate adverse impacts associated with their activities or sourcing decisions.' Available at: [OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas: Third Edition | OECD iLibrary \(oecd-ilibrary.org\)](https://oecd-ilibrary.org/publications/4b3b3b3b)

⁹ 'Conflict-affected and high-risk areas are identified by the presence of armed conflict, widespread violence or other risks of harm to people. Armed conflict may take a variety of forms, such as a conflict of international or non-international character, which may involve two or more States, or may consist of wars of liberation, or insurgencies, civil wars, etc. High-risk areas may include areas of political instability or repression, institutional weakness, insecurity, collapse of civil infrastructure and widespread violence. Such areas are often characterised by widespread human rights abuses and violations of national or international law.' Available at: [OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas: Third Edition | OECD iLibrary \(oecd-ilibrary.org\)](https://oecd-ilibrary.org/publications/4b3b3b3b)

from 2007 lays down that Member States need to inform the EC of analytical methods by which they can identify the species of origin of fur (e.g. DNA testing) of dog and cats, in order to phase out such products from the internal market. Penalties (e.g. destruction of affected goods) for the infringement of the Regulation are laid down by Member States. According to a 2013 report by the EC, main stakeholders praised the regulation for its positive impact (European Commission 2013a). The regulation includes exceptions for such products for educational or taxidermy purposes.

- **Finally, the Cosmetics Regulation prohibits to place on the EU market finished cosmetics products and ingredients which were tested on animals.** According to the Regulation, cosmetic products can only be placed on the internal market if a responsible person was designated in the EU to ensure compliance with relevant obligations set out in the regulation for each cosmetic product. In case of imported cosmetic products, the responsible person is the importer (who can designate a person established in the EU). If the responsible person considers that a cosmetic product is not in conformity with the Regulation, they should immediately take the corrective measures to bring the product into conformity or withdraw or recall it. The Regulation also sets out an identification mechanism within the supply chain for product traceability. This means that responsible persons (importers) must identify the distributors to whom they supply the cosmetic product at the request of the authority.

2.1.3 Marketing bans in consumer protection policy: product safety and tobacco advertising

Contrary to the planned intervention in trade of goods related to forced labour or the already existing measures in the area of animal welfare, provisions in the sphere of consumer policy aim to protect end users from various negative effects, but do not interfere directly in the supply chains.

- **In consumer law, the General Product Safety Directive (GPSD) includes rules on an import ban and marketing ban concerning products that do not meet all the safety requirements under European or national law.** The legal basis of this Directive is Article 114 TFEU (internal market) with due regard to Article 169 (consumer protection). The goal of the GPSD is to ensure product safety and the proper functioning of the internal market. Compared to previous past examples, the GPSD introduces a general ban on non-safe products within the internal market (i.e. it does not cover only specific types of products). The Directive provides that an adequate mechanism is necessary in case products present a serious risk for the health and safety of consumers, which entails decisions applicable throughout the EU and addressed to Member States, including the decision on banning the export or import of such products and the obligation of a risk assessment of products before placing them on the market.
- **Both the Tobacco Products Directive (TPD) and the Tobacco Advertising Directive (TAD) are another example of a marketing ban in consumer law, but specifically targeted to tobacco products.** The legal basis of the TPD is Article 114(3) TFEU (health, safety, environmental protection, and consumer protection) while the TAD is based upon Articles 53, 62 and 114 of TFEU. The TPD encompasses both marketing restrictions (for example by imposing mandatory health warnings) and prohibitions (by banning specific ingredients such as characterising flavours and on slim packaging). The TAD bans cross-border tobacco advertising in all media other than television as the promotion of such products could have a detrimental effect on the health of EU citizens.

2.1.4 Marketing bans in environmental policy: single-use plastics

Finally, in environmental policy, the Single-Use Plastics Directive (SUPD), passed in June 2019, establishes a marketing prohibition. The legal bases of the SUPD are Articles 191 and 192 TFEU (environmental policy). The SUPD bans the placing on the market of certain single-use plastic products

(e.g. single use plastic plates) and of products made from oxo-degradable plastic. Based on the report of Seas at Risk, the transposition of the Directive was still in progress or had not even started in several Member States. What is more, the lack of enforcement and greenwashing practices have also posed a problem as several banned single-use plastic items were still in circulation in the internal market (Copello et al., 2022).

In Annex 1: Summary table of the key features, strengths and weaknesses of existing EU import and marketing bans, a table is provided for a better overview of the core elements of the above-mentioned examples, also describing their strengths and weaknesses.

2.2 Strengths and weaknesses of current approaches to market/import bans in other areas of EU law

Under this sub-chapter, potential strengths and weaknesses of previously mentioned examples are rolled out, which provides ideas for potential best practices on a planned forced labour import ban and marketing ban. It is important to underline that the points below, regarding the enforcement of an import ban or a marketing ban appear separately in different examples.

The examples analysed in this section show points of **strength** that would apply if a planned prohibition of forced labour goods was implemented:

- Firstly, past **use of labelling regimes** (e.g. CE marking) have lowered the presence of non-safe products in the internal market and could also ensure that goods verified to be forced labour free can circulate safely in the internal market.
- Secondly, an **indicative list and guidance on what and how to assess whether a good falls under a certain prohibition** by the EC allowed an easier detection of banned products, as it clarified what products to look at and which aspects to consider before deciding on their prohibition. This point of strength is supported by the TAD, which has a record of effectively banning the advertisement of tobacco products across the EU. At the same time, the SUPD serves as a counterexample, as banned single-use plastic products are still in circulation in the internal market.
- Thirdly, **product information files** include relevant data on goods, which pave the way to filtering out and tracking products under prohibition.
- Fourthly, past examples show that creating the condition for economic operators to **designate a responsible person** allows greater traceability and can have a deterring effect on violating the import or marketing ban.
- Fifthly, **due diligence obligations** ensure that companies detect, and report forced labour, thereby supporting the enforcement on prohibited goods.

Nevertheless, past solutions also bear **weaknesses** if applied for a forced labour ban:

- Firstly, in the area of human rights policy, a weakness of the Minerals Regulation could be captured in a wider sense: it did not include provisions to counterbalance the **risk of worsening living conditions** of people living in conflict areas or high-risk areas.
- Secondly, **ensuring credibility of data** in product information files can also be difficult, especially if such data is related to the procedure of assessing how a good (or part of it) was manufactured – as in the case of forced labour products.
- Thirdly, a weakness of past solutions was that they could cause **a diversion of banned products to the black market**, which could also happen in case of products typically made by forced labour.

- Fourthly, the lack of **cooperation with third country authorities** also weakens the effectiveness of the enforcement of an import or marketing ban, and this is even less feasible in case of forced labour products due to the topics politically sensitive nature.
- Fifthly, a **circle of responsible persons that is too narrow** can undermine the traceability and enforceability of banned products.

3 Shape and implementation of import ban versus marketing prohibition

The aim of this chapter is to compare the option of an EU import ban on forced labour goods to the option of a marketing prohibition of such products. The chapter starts by analysing the suitability of the reporting mechanism required for the effective implementation of either tool before looking at the features of each tool in more detail.

3.1 Reporting framework: Analysing possibilities of a robust false practice reporting mechanism

To begin with, the EC prepared legislative proposals for public-private sector cooperation and for corporate self-disclosure closely related to its forced labour ban proposal, which support its endeavour to combine forced labour ban with a robust, risk-based enforcement framework. The **first related initiative is the CSDD**, which includes due diligence obligations for large companies over a certain threshold and for companies in certain sensitive sectors in their operations and supply chains, to identify and prevent adverse impacts on human rights, including forced labour and child labour. To support this goal, the EC plans to include rules on an appropriate governance and management system. According to the EC Communication, this would create a bridge towards mandatory horizontal due diligence legislation.

The **second related initiative is the CSRD**, which incorporates detailed reporting requirements in global supply chains, also for the elimination of forced labour and child labour. The EC proposal recommends the creation of sustainability reporting standards. These reporting standards would specify the information that undertakings should report (the standards would be incorporated in delegated acts), which would include specifying information on social factors, including on forced labour.

More generally, based on past examples, the creation of an effective reporting framework is established on the basis of two pillars. The **first pillar** of the framework lays on a **solid system of corporate due diligence practices** (including corporate self-disclosure), The **second pillar** consists of elements which underpin the reporting framework and ensure the enforcement of the prohibition:

- Clearly defined goods under prohibition (or at least creating an indicative list)
- Enforcement regulation, which includes, *inter alia*:
 - o Competences on EU and on Member State level
 - o Analytical methods to detect prohibited goods
- Designation of a responsible person within the internal market to bear liability for violations of the prohibition

These two pillars complement each other and thus a prohibition on goods can only work effectively with both pillars in place. At the same time, due to the difficulties of detecting products made by forced labour, the given tools might not be sufficient. Therefore, creating further procedures for better enforcement are necessary, such as establishing an enhanced **false practice reporting mechanism executed by either economic operators in the framework of due diligence obligations (corporate self-disclosure)**

and/or by an authority on EU level or by third parties (stakeholders), thereby ensuring a higher level of detection of forced labour practices.

It is important to underline that a false practice reporting mechanism **requires solid mechanisms of compliance, product traceability, notification as well as control**. At the same time, the main challenge of the shape and implementation of a reporting framework of products falling under an import ban or a marketing ban is **acquiring credible information on the way the product was created and ensuring that economic operators remain honest in their reporting (taking into consideration OECD standards from 2018 on privacy and confidentiality)**. In other words, even if such mechanisms are in place, their purpose is only fulfilled if the roots of a product can be screened for forced labour at an early phase. One should keep in mind that theoretically a product can be partially affected (OECD, 2018) by forced labour (e.g. the end product has certain items which were made by forced labour while other parts not), which not only makes data collection even more challenging, but creates a dilemma if end products only slightly affected by forced labour (i.e. a small component of the product) should also be banned or not.

This sub-chapter explores options for a feasible structure of a false practice reporting mechanism, as outlined in the EC Communication on decent work worldwide. As part of the enforcement framework, public-private sector cooperation and corporate self-disclosure based on OECD standards are also examined where required.

3.1.1 Opportunities for public-private sector cooperation and shared best practices for corporate self-disclosure

Under this sub-section, the opportunities of a false practice reporting mechanism based on public-private cooperation is discussed, to display the first option at hand.

An important step towards an effective and well-functioning reporting mechanism as part of the public-private sector cooperation, is gaining access to information (OECD, 2018) on how the product was created. Most credible data on this can be acquired on the ground within the country of origin/production of the product.

The primary option could be an “honest cooperation” between local NGOs, Member States, EU representations and economic operators importing into the EU internal market. An honest cooperation would entail the sharing of collected data by economic operators with competent EU authorities and local stakeholders. This cooperation could be supported by – as per the EC proposal – an indicative, verifiable and regularly updated public database of forced labour risks in certain geographical areas or related to specific products. This database would store and continually collect relevant data and thus help in the monitoring of forced labour and would also enable creating statistics on coerced work (De Cock, 2007).

In particular, as past experience shows, NGOs would be capable of identifying forced labour in the supply chain and thus give insight into potential risks (Gualandris et al., 2015). However, it should be noted that a difficulty might arise due to the lack of willingness of economic operators or the intervention of third country authorities to allow third party audits (and thus provide data), despite the needs of stakeholders for a wide spectrum of information and responsiveness (Gualandris et al., 2015).

A. Corporate self-disclosure framework

In their activities, economic operators should exercise **due diligence**, which ‘is an on-going, proactive and reactive process through which companies can ensure that they respect human rights and do not contribute to conflict’¹⁰. Moreover, a risk-based due diligence refers to the steps companies should take to

¹⁰ OECD, Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, 2016, p. 8

identify and address actual or potential risks in order to prevent or mitigate adverse impacts associated with their activities or sourcing decisions (OECD, 2016).

Companies could aim to collaborate with stakeholders in carrying out their due diligence (e.g. involving a trade union in implementation) (OECD, 2018). This would include, as mentioned in the EC Communication, and incorporated in the CSRD, reporting obligations to forced labour, with respect to global supply chains as well. To that end, companies should take appropriate measures, as defined in the CSDD as a 'measure that is capable of achieving the objectives of due diligence, commensurate with the degree of severity and the likelihood of the adverse impact, and reasonably available to the company, taking into account the circumstances of the specific case, including characteristics of the economic sector and of the specific business relationship and the company's influence thereof, and the need to ensure prioritisation of action' (CSDD Article 3 (q)).

An important part of an apt due diligence approach of companies is a **corporate self-disclosure framework for responsible business conduct**. The corporate self-disclosure framework described by OECD (OECD, 2018) entails that companies involved in the supply chain have the responsibility to provide information on the nature of their products and on potential violations of human rights related to their production, including forced labour. Corporate self-disclosure regarding forced labour could build on the OECD principles and standards and also follow the model of the Conflict Minerals Regulation (Article 7). In the framework of this obligation, the economic operator would have to report on its due diligence obligations. This would mean that the importer (and distributor) would report on their supply chain due diligence policies and practices, as widely as possible. The report would be public and accessible online.

Reported information could include the following data:

- flagged risks experienced in the supply chain;
- records of meetings with stakeholders;
- information on board members, management, and employees;
- ties to public administration (e.g. state interest in the company);
- results of third-party audits.

Above that, self-reporting should also provide information on details related to the product, including where parts go through supply chains with higher risks as listed by the OECD Due Diligence Guidance (e.g. location where the product was processed) (OECD, 2018). Furthermore, companies would be obliged to allow independent third-party audits, which would involve scrutiny on activities, processes and systems used to implement supply chain due diligence (including management system obligations and risk management obligations) (OECD, 2018).

This corporate self-disclosure framework system would be built on the one hand, on the information assembled from third countries, and on the other hand from a due diligence system of importer and distributor economic operators. Economic operators could work on creating **fitting information channels** with public authorities and civil society through a scoping exercise to identify areas of their business (including supply chains) where issues related to forced labour might arise.

The identification should cover the relevant sector risks (e.g. the product and its supply chain), product risks (e.g. certain components) geographic risks (e.g. situation on rule of law) and company-specific risk factors (e.g. instances of corruption) (OECD, 2018). This way, the economic operator can identify significant labour risks related to their products and map business relationships linked to the production of their products 'in order to prioritise individual suppliers operating in higher-risk geographies for further assessment'¹¹.

¹¹ OECD, Due Diligence Guidance for Responsible Business Conduct, 2018, page 62.

B. Assurances in case of non-compliance: US model or NGO cooperation

Assurances might be necessary in case economic operators (importers or distributors) either intentionally or not, fail to comply with fulfilling the obligation of self-disclosure. To be able to step up against forced labour more effectively, setting up a public and **online third-party disclosure instrument (false practice reporting mechanism), executed by third parties**, is a possibility, which would give additional assurances beyond corporate self-disclosure. As it was touched upon before, accessing credible information on forced labour practices is vital, and such information can mostly be gained locally, with the help of actors on the ground (stakeholders).

The first option to do that could be **based on the US model and could be managed by the EU customs and border protection. The US forced labour public online disclosure process (reporting false practice) starts with a receipt of an allegation or is launched by the authority (self-initiation).** After evaluating the situation, findings and/or a withhold release order is issued preventing merchandise produced using in whole or in part forced labour from being imported into the US. If a petition is submitted, it must hold various information, including for example the reasons why the presenter of the petition reasonably believes that the good coming to the US was made with forced labour, as well as to have a detailed description or sample of the good and facts obtainable as to the circumstances of production (eg. information of forced labour in the country of origin, which could be found in the State Department's annual Trafficking in Persons Report (The Human Trafficking Legal Center, 2020). It should be noted that the US system allows a wide-range of evidence (e.g. if a direct victim testimony is not possible, photos obtained from social media raising red flags about production can be provided).

The second option would be involving NGOs, civil society and/or trade unions (hereafter: stakeholders) (OECD, 2018) **to manage the online disclosure instrument.** Stakeholders could collect information on the ground within the country of origin or production, by conducting inspections (if possible), conducting interviews with locals as well as monitoring the news. This work of stakeholders could be underpinned by Member States or EEAS representations, who could share their resources and information with third parties.

Connected to that, stakeholders in third countries, as well as Member States' and EEA representations could apply an early warning system and function as single-entry points for natural persons (especially for persons subject to forced labour and their relatives) or entities in third countries wishing to report issues of forced labour. Single-entry points could be open to anyone wishing to provide information on forced labour, given the person or entity is in possession of credible proof (e.g. testimony). **A difficulty with single-entry points is the difficulty or danger for persons or entities to acquire or hand over evidence and the potential diplomatic tensions that may arise as a result.** A further problem with this solution is the capability of stakeholders to receive access to information on forced labour (due to various risks such as corruption or intimidation). It is also questionable, whether in certain third countries, NGOs can properly function due to low rule of law standards. As the Human Trafficking Legal Center pointed out, potential harms could be limited by certain security measures, such as using secure messaging platforms or by encrypted communication channels (The Human Trafficking Legal Center, 2020).

Contemplating the options at hand, a combination of the two solutions would be most desirable. This would allow for the widest coverage of reporting on possible forced labour cases, as natural persons or entities would have the option to report on several online channels: through online platforms operated by stakeholders and through an EU authority operated online platform.

C. Supporting tools: NGO or private databases

Due to the nature of the manufacturing of products with forced labour, options for identifying failure or violation of self-reporting is limited. An important tool that could be applied is audits carried

out by stakeholders, possibly with the support of authorities (e.g. providing an NGO with a licence to conduct an audit on the premises of the economic operator). Another form of identification could be a voluntary questionnaire to be sent out and filled out by employees of the economic operator, respecting privacy and data protection rules.

In addition, some organisations collect data on trade which could support a fraudulent practice reporting mechanism to identify forced labour in supply chains.

- Firstly, within the framework of the Special Action Programme to combat Force Labour¹², ILO aims to maintain an integrated global database on forced labour. The objective of the database is to assemble information (e.g. reports) on forced labour published across the globe (De Cock, 2007).
- Secondly, Panjiva, an intelligence platform, whose aim is to bring transparency through global trade by global coverage combined with machine learning technologies and data visualizations. As part of their activities, Panjiva collects data related to the source of new products (which encompasses finding pieces of data concerning the shipment of the good, the manufacturing company and the country of origin (Panjiva (WEB))).
- Thirdly, ImportGenius also collects real-time shipment records for all imports and exports for 18 countries. ImportGenius acquires information from the record of the US Department of Homeland Security, other government agencies, NGOs and through partnerships with private data services. (ImportGenius (WEB)).
- Fourthly, Kompass is also an organisation that collects data in the field of international trade, including for the distribution and supply chain. (Kompass (WEB)) In the directory of Kompass, it is easy to find products or service suppliers (the search engine allows searching by sector and by country).
- Fifthly, the UN's Delta 8.7 website gathers data related to forced labour, including various data, such as national prevalence data on forms of forced labour (Delta 8.7 (WEB)). The website set up country data dashboards.

3.2 Shape and implementation of an import ban tool

As an initial point, when considering the options for an import ban tool or a marketing prohibition tool of products made with forced labour or both combined, it is important to emphasise that **any ban on forced labour poses a significant detection challenge for authorities** because, unlike e.g. the use of a particular ingredient, it is not a physical attribute of the product. Despite the existence of a widely accepted definition of forced labour laid down by ILO, revealing whether a product (or part of a product) was made with coerced work is arduous as 'forced labour is not a rigid category, but rather is a porous and fluid one' (LeBaron, 2021).

Nevertheless, **trade restrictions such as import prohibitions are considered well-suited to remedy the phenomenon of forced labour and child labour but they are an indirect tool to tackle the problem that should be part of a whole strategy to fix the root cause of the issue** (European Commission, 2013b). A joint report from the ILO, the OECD, the International Organization for Migration (IOM) and the United Nations Children's Fund (UNICEF) from 2019 presenting research findings and conclusions on child labour, forced labour and human trafficking linked to global supply chains confirms the relevance of the imposition of import restrictions on goods manufactured using child labour, forced labour or human trafficking as 'an important means to eliminate the competitive advantage created by these fundamental labour rights violations and to incentivize companies to better assess and address these risks'. It also cautions that import restrictions should be accompanied by a policy dialogue with concerned countries to

¹² [Special Action Programme to Combat Forced Labour \(ilo.org\)](https://www.ilo.org/public/english/proc/spa.htm)

ensure that these measures actually serve to level the playing field and do not undermine development efforts in concerned countries (ILO, OECD, IOM, UNICEF, 2019).

Since 2010, the EP has repeatedly called upon the EC to table a proposal for a regulation banning the import of goods produced using modern slavery and forced labour into the EU. In its recent [resolution of 9 June 2022 on a new trade instrument to ban products made by forced labour](#), the EP urged for a new WTO-compatible trade instrument banning the import and export of products made or transported by forced labour and which should be complemented with measures for intra-EU trade, while stressing that any future EU framework needs to be proportionate, non-discriminatory, and effective, respecting the commitment to an open and rules-based trading system.

In parallel, recent legislations in place in the US with the Uyghur Forced Labour Prevention Act of 2021 or in Canada's Custom Tariff Act that prohibits the import of goods produced wholly or in part by forced labour demonstrate the growing support for import restrictions to address forced labour and modern slavery issues (European Parliament, 2022b). In the US, section 307 of the Tariff Act (19 U.S.C. § 1307) bans the importation of goods linked to forced labour including child labour since 1930. As statistics from the US show in the last nine months, 9 findings and 55 withhold release orders have been issued from 10 different countries, including China (US Customs and Border Protection, WEBa). An additional step was taken with Uyghur Forced Labour Prevention Act (UFLPA), which went into effect last 21 June 2022, banning imports from the Xinjiang Uyghur Autonomous Region (XUAR) in the north-west of China into the US. This means that goods from this region are in general regarded as made by forced labour, which makes the identification easier, as the ban is attached to a specific region.

Despite the above, it seems that the option of an outright import ban has not been taken up by the EC, whose proposed instrument includes a more comprehensive mechanism (see sub-chapter 3). It is still worth considering the appropriateness of this trade policy tool for addressing social rights issues related to forced labour, as well as the way it could be implemented, including to ensure its compatibility with WTO rules.

As shown in the examples above, an import ban could be either broad or very specific. For instance, it could cover the import of any goods from a certain region, targets one or several sectors in which forced labour is known to be used, or even restrict imports linked to individuals or to specific companies. Alternatively, it could restrict the import of any goods produced in whole or in part with forced labour, wherever they are produced. Lastly, import bans could be issued on a case-by-case basis if sufficient evidence is gathered, following a risk-based approach. The question also arises as to the **threshold of evidence for introducing such a ban, and might be entitled to request the introduction of a ban or submit evidence.** In the case of the US with the example of the UFLPA, any person who believes there is a risk that merchandise produced with forced labour is being imported can report the matter to US CBP for investigation. The question of who can challenge an import ban is also a key determinant of the form such a ban would take. In cases where only the economic actor can appeal the ban, it may be difficult to contradict allegations of forced labour due to limited visibility of the supply chains. Alternatively, it could be the responsibility of the designated competent authorities in the Member States to detect products made from forced labour, either independently or by carrying out investigations in collaboration with external stakeholders such as civil society actors.

This notwithstanding, **there is a general consensus that the introduction of an import ban of forced labour products in the EU must be tailored to WTO rules.** In particular, one of the pillars of the GATT is the national treatment principle in Article III:4, which in simple terms prohibits discrimination between imported goods and 'like' domestic products. The option initially defended by the EP of a complete ban on import and export of products made or transported by forced labour would nevertheless circumvent the risk of non-compatibility with this principle. In such a case, a complete marketing and import ban would

make sure that domestic and imported products are subject to the same conditions and that these products are not treated less favourably than domestic products, thus ensuring compliance with the national treatment obligation under Article III:4 GATT (Hoffmeister, 2022). An example that has already been applied is the EU ban on cat and dog fur.

Even if the introduction of an import ban was not accompanied by an export ban and should discrimination be alleged by third party WTO members, the EU would still be able to invoke the exceptions of Article XX of the GATT. Indeed, although Article XI of the GATT provides for the general elimination of quantitative restrictions, a trade restriction, such as an import ban, is allowed in certain specific circumstances. Under WTO rules, an import ban could be justified by invoking one of the exceptions under Article XX of the GATT, such as Article XX(a) as it would constitute 'a measure necessary to protect public morals'. Other exceptions from Article XX of the GATT could be considered such as the invocation that this import ban would be a necessary measure to achieve the objective of human life or health (Article XX(b) GATT); the EU could even argue that products made by forced labour could equate to products of prison labour, justifying the invocation of this exception (Article XX(e) GATT) (Hoffmeister, 2022). These exceptions are further explained in the section 3.2 on Legal scope.

Nevertheless, the introduction of an import ban must also satisfy the requirements under the 'chapeau' Article XX GATT, meaning that such a measure cannot be discriminatory among WTO Members where the same conditions prevail or be a disguised restriction on international trade. In this sense, not targeting any geographical area or economic actor would be crucial to avoid arbitrariness or discrimination in the application of such an import restriction. For this reason, the Parliament in its resolution of 9 June 2022 precisely called for the new instrument envisaged by the EC not to discriminate against goods by geographical origin. Importantly, this prohibition would therefore need to be evidence-based and follow consultation with the affected parties.

From an enforcement perspective, past examples of EU import bans (as presented in the Annex 1: Summary table of the key features, strengths and weaknesses of existing EU import and marketing bans indicate the task to enforce the import bans is often delegated to competent authorities in the Member States. However, there is a **risk of fragmentation** in the enforcement of a potential import ban, if these authorities are not provided with sufficient means, or clear and uniform instructions.

Furthermore, when considering the impact of the introduction of an import prohibition, the **potential negative effects must be borne in mind.** Indeed, barriers to imports, like other barriers to entry, may discourage Foreign Indirect Investment (FDI) in the host country (OECD, 2006). For example, exporters may decide to sell to markets other than that of the country imposing this prohibition (European Commission, 2013b).

3.2.1 EU's international competitiveness and potential punitive trade measures against the EU

On the one hand, **the question rises regarding the extent to which the EU's international competitiveness can be safeguarded if such import ban on products made from forced labour was introduced.** It is claimed that in the long-term, quantitative restrictions such as import restrictions could harm the development of the affected industry, unless these restrictions are temporary or appropriate measures are taken to ensure that protected producers acquire sufficient competitiveness (METI, 2015). It is therefore desirable that an import ban is only a temporary measure and complements other measures to eradicate forced labour.

On the other hand, as highlighted by the EP in its resolution, the exploitation of forced labour by businesses and governments in their productions give them an **unfair competitive advantage on the market, thus mitigating forced labour risks would level up the playing field and increase competitiveness of**

economic actors free of any abuses. Indeed, the **objective** of an import ban would be to **create a major disincentive** for economic operators from using forced labour in their supply chains, and particularly to **level up the playing field** for companies operating in the internal market and abroad. In addition to increasing legal certainty for companies, **consumer trust** in the production of economic operations would also be enhanced. Thus, companies showing that they can ensure their products are made free of forced labour would benefit from a reputational advantage in terms of social sustainability. Nevertheless, the support of companies in this process, and in particular the approach and support tools provided to SMEs would be crucial to make sure their specific needs are taken into consideration.

As a last point, **punitive trade measures against the EU if the option of an import ban was pursued are difficult to predict but remain likely.** When looking at similar measures taken by the US, China, on its side, strongly opposes to the enforcement of the UFLPA considering it as a discriminatory and restrictive measure, and has vowed to impose countersanctions. Among the countermeasures adopted as a response to import bans, the Chinese government has imposed a wide range of sanctions on foreign individuals and entities. In 2021, China even adopted an 'Anti-Foreign Sanctions Laws' setting a very broad framework to resist foreign sanctions, and provided a legal basis for Chinese entities and individuals to retaliate against foreign sanctions. However, the rules set in this legislation may conflict with WTO rules since China is obliged to seek redress of a potential violation of WTO obligations with the WTO dispute settlement mechanism and shall not resort to retaliation on its own (Article 23 WTO Understanding on Dispute Settlement Rules and Procedures).

3.3 Shape and implementation of a marketing prohibition tool

It is important to recall how a marketing prohibition differs from an import ban. **Marketing prohibitions follow a different logic from import prohibitions as they regulate supply chain responsibilities in the EU to ensure ethical production processes** (Hoffmeister, 2022). Two notable examples have been described above, namely the EU bans on dog and cat fur products and on seal products. The option of introducing a marketing prohibition can be considered either in combination with an import ban, as has been the case in EU trade measures, or as an alternative to an import ban.

On the **enforcement of a marketing prohibition tool**, when looking at the TPD providing marketing restrictions and prohibitions, this task could be delegated to competent authorities of the Member States. However, there is a substantial risk that not all national authorities have **sufficient capacity and resources to ensure that only compliant products are placed on the market**, as revealed in the report on the application of the TPD (European Commission, 2021).

Alternatively to a marketing prohibition, it is possible to consider whether this tool could involve mandatory designation/labelling on goods to display their link to coerced labour, following the model of mandatory health hazard labelling on tobacco products sold in the EU. This seems realistically unfeasible in terms of enforcement, as the costs and implementation would be borne solely by the economic actors. This approach is also inappropriate as it aims to change consumer behaviour and increase awareness of health risks associated to these products, not to eradicate the cause of forced and child labour. To address the problem of forced labour, encouraging companies to adopt good practices regarding respect for human rights is more suitable. The creation of a **certified "abuse-free" product label at EU level**, as suggested by the Parliament in [2016](#), would be a more **viable alternative**, as a complement to the EC proposal. Indeed, it would both urge EU consumers to opt for ethical products, and give a visible competitive advantage to companies that have eradicated forced labour from their supply chains.

3.3.1 WTO compatibility of a labour-rights based marketing prohibition

The case of the EU Seal Regime which constituted a marketing prohibition in addition to an import ban is a good precedent to examine WTO compatibility. In this case, Norway and Canada claimed that

the exceptions provided for in this regime – namely regarding seal products derived from hunts conducted by Inuit or indigenous communities (IC exception) and hunts conducted for marine resource management purposes (MRM exception) – violated the non-discrimination obligations under Articles I:1 and III:4 of the GATT. In particular, the WTO Appellate Body agreed with the contention by Norway and Canada that these exceptions granted an “advantage” which should have been given to all WTO members. In reply to this, the EU abolished the exception for regular control measures for sustainable management needs and reduced the Inuit-exception in Regulation 2015/1775.

Analogously to the case of import bans described above, a marketing prohibition if accompanied by an export ban, should be consistent with the WTO rules of non-discrimination.

3.3.2 Impact of a forced labour marketing prohibition on foreign direct investment flows (FDI) in the EU and investment in third countries

When assessing the impact of a forced labour marketing prohibition on foreign direct investment flows (FDI)¹³, it is important to recall the different factors that influence the FDI location. While labour costs are an important factor, many other factors are considered by investors including availability of skills, education levels and productivity levels (OECD, 1996). Additionally, there is no strong evidence that weaker respect of labour standards is associated with lower labour costs (Kucera, 2001).

A few sectors are known to be significantly implicated in XUAR-linked forced labour, such as electronics manufacturing, textile and apparel manufacturing, rare earth mining, agricultural production, and plastics production textiles, electronics, mining, chemicals, and medical equipment¹⁴. The level of FDI restrictiveness varies in each sector, according to the OECD. The manufacturing sector is one of the least FDI restrictive sectors, as shown by the OECD FDI Regulatory Restrictiveness Index. While statutory barriers to FDI concern foreign equity limitations, screening or approval mechanisms, restrictions on the employment of foreigners as key personnel for example, other direct or indirect obstacles can have an impact on FDI, such as those related to corporate governance mechanisms and/or hidden institutional or behavioural obstacles that discriminate against foreign firms. **A marketing prohibition tool can indeed be seen as an indirect barrier to foreign investment in the EU in the sectors concerned, but its impact is indeed more difficult to ascertain and quantify than a total ban on certain goods entering the territory.**

In addition, it is important to consider the **context in which this prohibition would be introduced**. Indeed, this marketing prohibition would be introduced to combat products made from forced labour. More generally about **forced labour and FDI location**, it was suggested that connections between forced labour and the formal manufacturing sector as well as with FDI inflows appear tenuous (Kucera). Nevertheless, more recent studies demonstrate that **forced labour is negatively associated with FDI inflows**. This means that countries with a lower level of forced labour received more FDI per capita. However, it was confirmed that the **use of forced labour is positively associated with comparative advantage, especially in unskilled-labour-intensive goods** (Busse, M., and Braun, S.). Thus, rather than affecting the overall level of exports or imports, **forced labour is more likely to influence comparative advantage¹⁵**. An actual example of unskilled-labour-intensive is alleged to take place in XUAR in other Chinese provinces where UN experts claim that ‘Uyghur workers are forcibly employed in low-skilled, labour-intensive industries, such as agribusiness, textile and garment, automotive and technological sectors’ (UN, 2022).

¹³ Foreign direct investment (FDI) is a category of cross-border investment in which an investor resident in one economy establishes a lasting interest in and a significant degree of influence over an enterprise resident in another economy.

¹⁴ <https://www.csis.org/analysis/addressing-forced-labor-xinjiang-uyghur-autonomous-region-toward-shared-agenda>

¹⁵ Suggesting that these countries prosper first by taking advantage of their assets in order to concentrate on what they can produce best, and then by trading these products for products that other countries produce best.

The situation when it comes to child labour was assessed differently as child labour is an important determinant of FDI location. Child labour might affect FDI location both through labour costs and skill levels (Kucera, 2001). Improving the situation regarding child labour by ensuring its elimination or reduction in the market could in this case be associated with greater FDI inflows in the EU or in third countries.

Thus, following this approach, improving social standards related to forced labour issues through **the introduction of an EU marketing ban on products made with forced labour can generate more FDI flows in the EU and combat the competitive advantage enjoyed by economic operators using forced labour.**

4 The Commission's proposal on prohibiting products made with forced labour on the Union market

The EC proposal for a Regulation on prohibiting products made with forced labour on the Union market released on 14 September 2022 prohibits the placing and availability on the EU market of products made with forced labour, as well as an export ban from the EU of such products. Hence, the EC's proposal follows a more comprehensive approach, entailing a marketing ban for products made with forced labour in the internal market, but is not designed as an outright import ban. It is therefore worth analysing this proposed new tool, particularly in comparison with the positions previously expressed by the EP. Table 1, provided below, provides comparative details between the EP position and the EC proposal for an EU instrument to tackle forced labour. It is also appropriate to examine this proposal in the light of other third country examples, namely the US UFLPA.

- **Scope and legal basis:** Overall, in contrast to the US UFLPA, and contrary to the EP request for the introduction of an import ban, **the prohibition from the EC does not specifically target forced labour products from a particular region in the case of state sponsored forced labour, a particular site of production, a particular importer or company.** The import of forced labour products into the EU is not prohibited as such under this instrument, but only the placing and making available on the Union market. **In fact, the ban covers all products regardless of the sector or origin, meaning that both domestic or imported goods made with forced labour are targeted.** However, this prohibition would not apply to services using such forced labour, only to goods made from forced labour. When it comes to the definition of forced labour, the proposal specifies that forced labour shall be understood as forced or compulsory labour as defined in Article 2 of the Convention on Forced Labour, 1930 (No. 29) of the International Labour Organization, including forced child labour. **The broad application of this proposed Regulation is based on both Articles 114 (approximation of laws for the internal market) and 207 (Common Commercial Policy) TFEU.** In particular, the use of Article 114 TFEU as a legal basis is justified by the risk of distortion of competition in the internal market and unjustified barriers to the freedom of goods caused by divergent national legislations prohibiting the placing and making available of goods made with forced labour on their territory.

Unlike the CSDD which intends to exempt SMEs, the proposed Regulation at stake does not directly exempt such companies from the scope of the proposal since their exclusion could affect the effectiveness of the proposal and create uncertainty. It rather focuses on products suspected of having been made with forced labour and opts for an approach based on support tools to SMEs through guidelines to be issued by the EC to take into account the size and economic resources of these economic operators.

- **Implementation of the prohibition:** The implementation of the UFLPA and of the mechanism envisaged in the EC's proposal differ significantly, especially regarding the reporting and

enforcement mechanisms. A critical difference from the example of the UFLPA above and the EP's request, concerns the **burden of establishing that forced labour has been used** at any stage of production, manufacture, harvest, or extraction of a product, which according to the EC's proposal, will **fall on national competent authorities**. Such competent authorities will be designated by Member States to implement and enforce the Regulation. **In comparison, the UFLPA implements a rebuttable presumption that forced labour affects all goods made in XUAR, or in whole or in part by entities that enable the use of forced labour, which is for importers to rebut by clear and convincing evidence.** The Forced Labour Enforcement Task Force (FLETF) released its enforcement strategy for the UFLPA where it provides the list of known users of forced labour in XUAR as well as companies known for being involved in the use of works from this region or for exporting related forced labour products. The enforcement of the UFLPA is tasked to the U.S. Customs and Border Protection (CBP) who will be in charge of the seizure and forfeiture of imported goods violating the ban. Thus, the US mechanism requires importers to closely review their supply chains and scrutinise their list of suppliers against the UFLPA Entities List if they want to access the US market. This is a significant restriction and importer guidance has been issued to assist the trade community in the implementation of the UFLPA rebuttable presumption.

- **Investigations foreseen in the EC's proposal:** In turn, the **investigative process foreseen in the EC's proposal is more detailed and will be carried out in two phases**. The preliminary phase of investigations is built on a risk-based approach where national authorities will assess the likelihood that economic operators violated the forced labour ban, based on a range of available evidence, including a list of forced-labour risk indicators to be issued by the EC in future guidelines. **In a second phase, if competent authorities determine that there is a substantiated concern of a violation of the forced labour ban, they will launch an investigation on the products concerned.** Therefore, many steps must be taken and evidence gathered before competent authorities can establish a violation of the ban and the adoption of a marketing prohibition of the products concerned. Economic actors will then be required to withdraw the relevant products from the EU market.
- **Database:** To further support the national authorities, a **database of forced labour risk areas or products will be created by the EC to provide regularly updated information of forced labour risks in specific geographic areas, regarding specific products**. Although the proposal does not directly target specific products or regions, this database could be an **opportunity to refine the products that can be targeted and potentially subject to prohibitions**. Before initiating an investigation, national authorities shall also request from economic actors' information on actions taken to identify, prevent, mitigate, or bring to an end risks of forced labour. This database, relying on external expertise, which will be made available at the latest 24 months after the entry into force of the Regulation, will also serve as a **reliable evidence base for the competent authorities**. A similar example is the non-exhaustive list of conflict-affected and high-risk areas (CAHRAs) under the Conflict Minerals Regulation (CAHRAs, WEB).
- **Complaints/submission of information:** While the EP and the civil society called for a formalised complaint mechanism/procedure to allow civil society or trade unions to submit complaints for investigation, this option was not pursued by the EC. However, the proposed Regulation allows any natural or legal or any association not having legal personality to submit information to competent authorities on the economic operators or products concerned by the allegation of violations of the forced labour ban.
- **Decisions:** **All decisions from competent authorities will then be made publicly available on a dedicated website and economic operators shall have the affected products destroyed or rendered inoperable**, in accordance with the EU legislation on waste management, and will bear

the costs of disposal. Regarding products made with forced labour already circulating in the EU single market, if the competent authorities establish that a product was made with forced labour, the company in question will be asked to withdraw it from the market.

- **Sanctions for non-compliance:** According to the EC's proposal, Member States shall lay down **penalties** – that shall be effective, proportionate and dissuasive – applicable to non-compliance with decisions taken by competent authorities.
- **Remediation for affected workers:** Furthermore, the issue of companies providing remedies to affected workers before import restrictions are lifted, which was supported by the EP, was **not tackled in the EC's proposal**. Nevertheless, liability rules for companies failing to comply with due diligence obligations, as foreseen in the CSDD, would remain relevant. Yet, the U.S. Tariff Act has demonstrated that it is possible for enforcement agencies to assist in the remediation of affected workers as shown in the case of Malaysia's Top Glove or Natchi Apparel. Indeed, after a one-year import ban imposed for alleged forced labour, the US lifted import restrictions after Top Glove's actions including issuing more than USD 30 million in remediation payments to workers and improving labour and living conditions at the company's facilities (CBP, 2021).
- **Cooperation: Member States' customs authorities will oversee enforcement at EU external borders and a 'Union Network against Forced Labour Products'** will also be established for structured cooperation and coordination between the national competent authorities and the EC. From an international perspective, to facilitate enforcement, the proposition provides for **cooperation and information exchange** with authorities of third countries, international organisations, civil society representatives and business organisations (through existing dialogue structures, or on an ad hoc basis), and the development of **accompanying measures** to support the efforts of companies and partner countries efforts and locally available capacities in tackling forced labour.

Table 1. Comparison table between the EP position and the EC proposal for an EU instrument to tackle forced labour

	Previous EP position (Resolution of 9 June 2022)	EC proposal for a Regulation (14 September 2022)
Scope	Banning the import and export of products made or transported by forced labour from a particular site of production, a particular importer or company, those from a particular region (in the case of state-sponsored forced labour).	Bans all products made with forced labour regardless of the sector, the origin, whether they are domestic or imported goods, to be placed or made available on the Union market, and to export such products (Art. 3).
Complaint mechanism	Formalised and secure complaints procedure such as through the Single Entry Point.	No formal complaint mechanism but any person , (natural or legal person, or any association not having legal personality) should be allowed to submit information to the competent authorities. ((32))
Burden of proof	Public authorities should be able to detain goods at EU borders when they consider that there is sufficient evidence that these goods were made or transported with forced labour until the economic operator can prove the goods were not made with forced labour.	Competent authorities should bear the burden of establishing that forced labour has been used at any stage of production, manufacture, harvest or extraction of a product, including working or processing related to the product. ((26))

Investigations	The Commission and national authorities must launch investigations on the basis of information provided by stakeholders, NGOs or affected workers .	Competent authorities should initiative investigations when, based on their assessment of all available information, they establish that there is a substantiated concern of a violation of the prohibition (Art. 5).
Publicity of decisions	Creation of a public list of sanctioned entities, regions and products.	All decisions from competent authorities shall be made publicly available on a dedicated website (Art. 6).
Remediation for affected workers	The instrument should require companies to provide remediation to the affected workers prior to import restrictions being lifted.	X
Public database	X	Creation of a public database of forced labour risk areas or products based on external expertise, to be made available at the latest 24 months after the entry into force of the Regulation (Art. 11).
Cooperation	X	Establishment of a Union Network Against Forced Labour Products for structured coordination and cooperation between the competent authorities (Art. 24).
International cooperation	Policy dialogue with non-EU countries, technical assistance, capacity building and awareness raising.	Provides for cooperation and information exchange with authorities of third countries, international organisations, civil society representatives and business organisations (through existing dialogue structures, or on an ad hoc basis), and the development of accompanying measures to support the efforts of companies and partner countries efforts and locally available capacities in tackling forced labour (Art. 26).

5 Feasibility assessment

This chapter analyses the feasibility and effectiveness of an import and marketing ban on the EC's commitments of promoting of decent work worldwide in line with the [ILO Global Call to Action](#). The chapter analyses the likely economic and social impact of the proposed measures (in the EU and abroad), including the gender dimension, as well as the legal feasibility of these tools, possibilities for monitoring their impact and implications for EU trade agreements.

5.1 Social and economic impact

The discussion about forced labour occurs in a period that is marked by economic and social turmoil.

While economies are recovering from COVID-19 in 2022 – the EC's commitments are in line with the ILO's Global Call to Action – countries are also struggling with the economic effects of the Russian invasion in Ukraine and the looming recession that this is likely to bring about.

The COVID-19-pandemic has exacerbated some of the root causes of child labour and forced labour

– i.e. among others poverty, social marginalization, and the lack of quality education opportunities. As a result, prior progress in decent work has severely been impeded, and pre-existing weaknesses in decent employment are lowering expectations for a long-lasting recovery in many places (ILO, 2022). Particularly the employment and its conditions for women were disproportionately negatively affected by the pandemic (ILO, 2022).

The analysis of forced labour is confronted with multiple challenges. Given that it is illegal, some governments and corporations are reluctant to allow research, which is why reliable, systemic evidence is thin. Hence, the extent to which forced labour occurs is unknown, even though forced labour seems to be

a widespread phenomenon. Evaluating the effectiveness of public and private governance initiatives against forced labour is therefore demanding (LeBaron, 2021; Crane, 2013).

This has implications for the assessment of EU policies against forced labour. The evaluation of policy measures hinges on the availability of an undisputed definition and subsequently the quantification of forced labour, which is often not feasible. Scarce data and the lack of an undisputed definition led to multiple studies on the effectiveness of policy measures in third countries. Even though the evidence is patchy, there are some results that emerge from the literature (see for instance European Parliament, 2022b; Feasley, 2016; LeBaron, 2021).

5.1.1 Effectiveness in third countries

A key challenge is to identify relevant products and regions, and subsequently monitor their production process. In diamond trade, an attempt to regulate the value chain of imports of diamonds is the Kimberley Process Certification Scheme (KPCS), which was established in 2003 by the UN General Assembly Resolution 55/56 to prevent conflict diamonds from entering the mainstream rough [diamond](#) market. The process was established ‘to ensure that diamond purchases were not financing violence by rebel movements and their allies seeking to undermine legitimate governments’ (Hoffmeister, 2022). The Certification Scheme requires participating countries to establish national legislation and import and export controls, commitments to transparent practices and statistics, trade with other participants in the scheme only and to certify shipments as conflict free with respective certifications. A weakness of the scheme is the self-certification of Member States, which led to widespread criticism by NGOs about the effectiveness of the scheme¹⁶. This points at a common issue of self-regulatory- regimes, for which mandatory, impartial monitoring by an independent institution can be a remedy (LeBaron, 2021). This case study of banned conflict diamonds illustrates the issues involved, which also affect the marketing ban.

5.1.2 Impact on government procurement practices among EU Member States

The implementation of import bans not only have an impact on companies and consumers in the EU, but also implications for the government procurement practices among EU member states. Especially in the COVID-19 pandemic, the public procurement of medical goods has revealed labour issues in international value chains, which were exacerbated due to the increased demand (Hughes et al, 2022). This led to calls to further deepen the secondary objectives of public procurement processes. The primary aims are the achievement of efficient procurement, non-discrimination between tenderers and an open competition. It is plausible that primary and secondary objectives of public procurement pose a trade-off (Martin-Ortega and O’Brien, 2017).

Given the hierarchy of objectives, primary objectives are rather served than secondary, which is why products produced with forced labour are still imported as long as their international trade is not banned. Moreover, in the COVID-19 pandemic, it has become obvious that the current production capacities are tilted in favour of some producers for some products, thereby weakening the negotiating power of Western procurement agencies, even though public procurement takes is the main source of demand. From a policy perspective, the purchasing power of governments should not only be leveraged in ways that allow addressing labour issues but make value chains more resilient (Hughes, et al., 2022).

Quantifying the impact on public procurement is currently impossible due to data availability. There is scant evidence on the labour standards along public procurement value chains, which is why a general assessment cannot be made.

¹⁶ See https://en.wikipedia.org/wiki/Kimberley_Process_Certification_Scheme (accessed on 17 August 2022).

5.1.3 Costs and funding options associated with trade tools

The use of forced labour in the production process is closely related to its funding. The new regulations in the West against forced labour fit into a recent trend that blends strictly trade-related objectives (e.g., access to goods and services on international markets) with non-trade-related objectives (e.g., related to the production process). Literature on the effectiveness of such practises is still scarce. However, trade agreements typically rely on ILO standards, which – against the background of the current discussion – have not been fully implemented (see also LeBaron, 2021).

The **costs of implementation of the current proposal by the EC are yet unclear**, and strongly depend on the type and quantity of products affected, the country in which due diligence procedures will be filed and the effectiveness of the proposed procedures in practice. Hence, **the economic costs will include multiple components**. These, for instance, concern the product withdrawal costs once a ban is implemented. Economic operators are required to withdraw the product. This implies one-off costs to the operator that leads to a subsequent reduction of the overall product variety affecting consumers.

Another aspect concerns the implementation of the ban. The supervision of imports itself will add to the portfolio of customs and border controls. Moreover, higher **economic costs may emerge from legal uncertainty**, which **might arise if there are conflicting positions across Member States** related to whether a product is banned or not.

Whether a European import (or marketing **ban**) **stops the financing of forced labour** in third countries is likely to be **product or industry-specific**, for instance, due to product specific value chains. The use of forced labour may be **harder to prove in certain production processes** than in others. Especially if producers in third countries themselves rely on local value chains that use forced labour. In **third countries** where **supervision is difficult**, a ban of specific products produced downstream is likely to induce lower incentives of upstream producers to stop financing in third countries than a direct import ban. The effectiveness may also depend on who engages in forced labour. For instance, firms susceptible to Western consumer sentiment may be more likely to stop funding the production processes which also use forced labour than firms that do not. Eventually, the **effectiveness** of bans is also **shaped by the elasticity of substitution**. For instance, it is conceivable that an import ban by the EU on products from a given producer country induces bypass effects. The country would stop trade with the EU, but consumers in third countries may, at least partly, compensate for the foregone trade. In this scenario, the financing of forced labour would continue. Forced labour taking place in the public sector may differ, because market dynamics are likely to be lacking. For instance, forced labour occurring in state-run prison camps in a third country is unlikely to come to an end due to an import or marketing ban in the EU. Both financing and the activity itself are expected to continue.

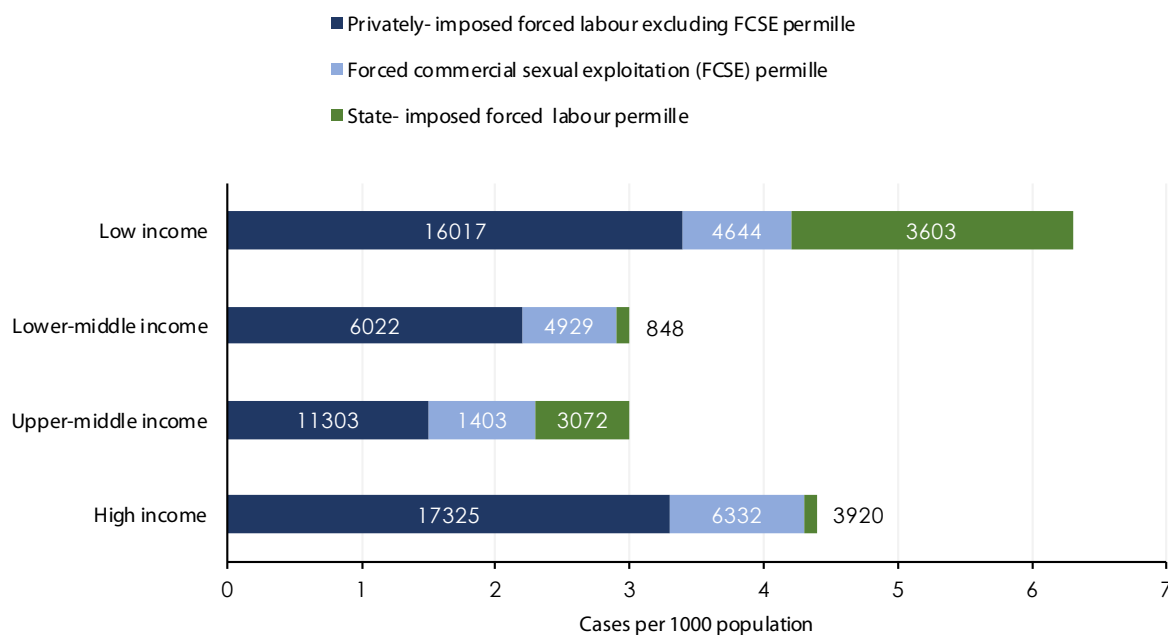
5.1.4 Country and industry factors

Country and industry factors also constitute an identification issue. In an international trade context, forced labour occurs in an environment of poor working conditions, where minor abuse and exploitation of workers is often endemic (LeBaron, 2021). Such **contextual factors** may refer to both **sector and country conditions**. Particularly, the characteristics of global supply chains shape the likelihood of observing decent work practices, as well as the implementation of corresponding structures to strengthen labour standards. The 2021 Global Estimates of Forced Labour (ILO, Walk Free and IOM) suggest that **more than 27.6 million people are in forced labour**. Figure 1 shows that forced labour occurs predominantly in the private sector. 63 % of forced labour relates to forced labour exploitation by private agents or companies and 23 % relates to forced commercial sexual exploitation.

Forced labour affects all regions and is particularly dominant in low income countries. However, forced labour is a concern across all income level. For instance, Murphy et al. (2021) report the exploitation of

immigrant workers in the Irish fishing industry or Giovagnoni and Nikkel (2021) report forced labour in low wage industries in the US.

Figure 1. Prevalence of adults in forced labour by income group

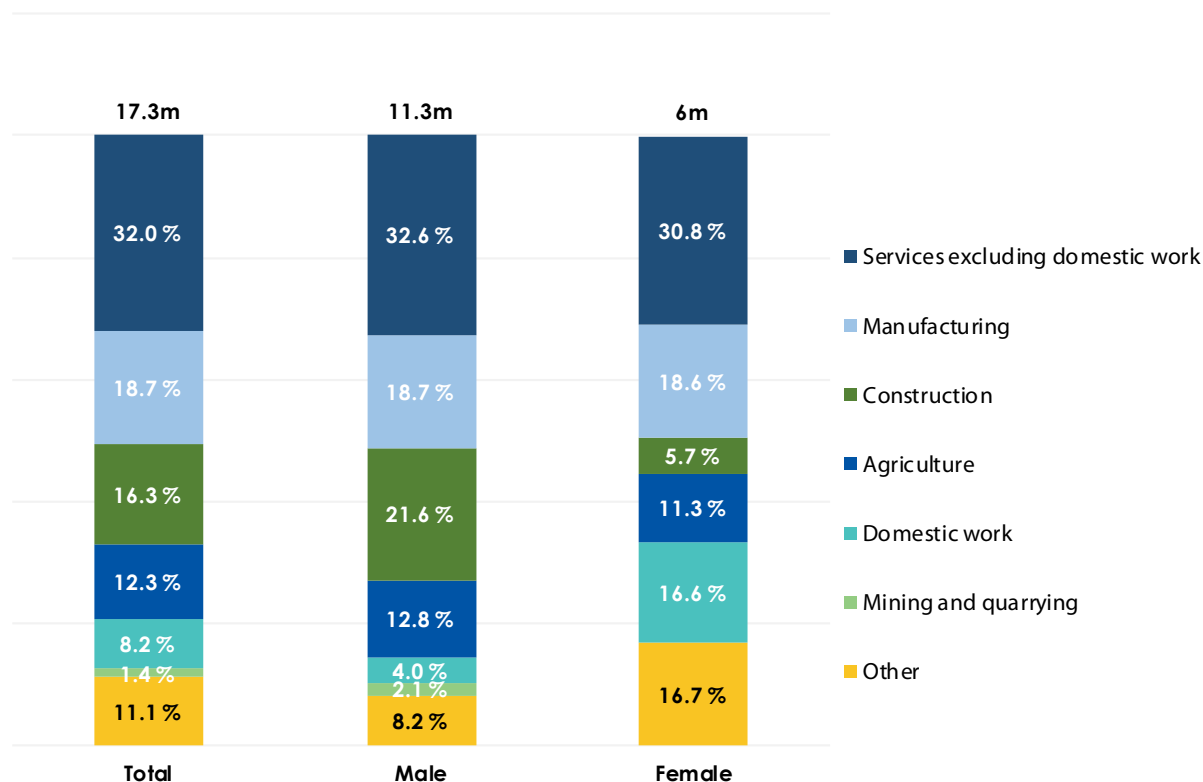


Source: ILO, *Walk Free* and IOM – *Global Estimates of Modern Slavery* (2022)

Note: The number in the bars indicate the total numbers of adults (in thousands) in the respective forced labour category.

Forced labour has been found to be particularly significant in the production of illegal products like drugs, in industries that are inherently dangerous (e.g., mining), in seasonal industries (e.g., agriculture) or in private environments (e.g., domestic work). Figure 2 shows that the service sector, including trade, transport, hospitality and non-market social and other services, accounts for nearly one third of total estimated forced labour. Consequently, this demonstrates a high correlation of country specific factors related to economic development and forced labour.

In addition, country specific factors such as the overall economic development and therefore available wealth and poverty, the quality of institutions (e.g., levels of corruption, labour market regulations), or the level of conflict contribute to the acceptance of forced labour (Feasley, 2016).

Figure 2. Distribution of adults in forced labour exploitation by branch of economic activity and sex

Source: ILO, *Walk Free* and IOM – *Global Estimates of Modern Slavery* (2022)

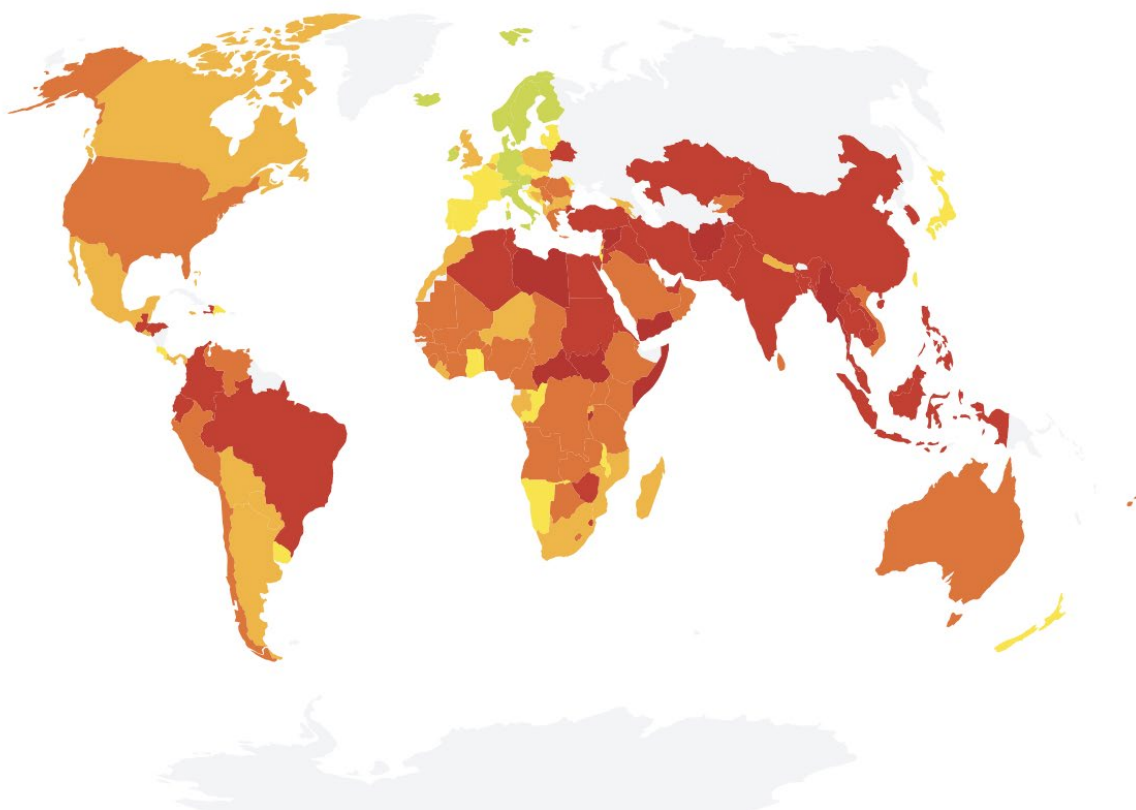
Note: Total numbers of adults (in millions) in forced labour on top. Forced commercial sexual exploitation of adults, the commercial sexual exploitation of children and state-imposed force labour are excluded. "Others" includes begging and involvement in illicit activities.

Figure 3 shows a map of **violations of human rights across the world** according to the Global Rights Index of the International Trade Union Confederation. While these data correlate with patchy forced labour information at a more aggregate (country group) level, it remains a proxy that is chosen because other datasets (see chapter 2.1.2.) do not allow a country level breakdown. This map exemplifies the complexity of identifying high-risk products to be banned from the EU market. Cases of violations of decent work can be found in various countries and regions globally, with highest violation of human rights in Asia and the Pacific region and the Arab States.

The Labour's Bureau of International Affairs (ILAB) provides biennial a List of Goods Produced by Child or Forced Labor to ensure that US federal agencies do not procure products made by child or forced labour.

Figure 4 illustrates that forced labour occurs across sectors, but is highly concentrated in the production of less sophisticated products like in the brick industry, the textile and apparel sector (particularly in the cotton and garment production) and in the agricultural sector. China stands out with the violation of decent work, 17 different products produced with forced labour are on the ILAB list, including the production of cotton, electronics, garment, and gloves. Most of these violations are reported in the Xinjiang Uyghur Autonomous Region with several reported cases of violation of human rights and decent working conditions, particularly involving Uyghurs and other ethnic minorities. Notwithstanding international voices and actions, the Chinese government provides subsidies to companies in Xinjiang or employing Uyghur workers (Lehr, 2019).

Figure 3. Map of human rights violation in 2022

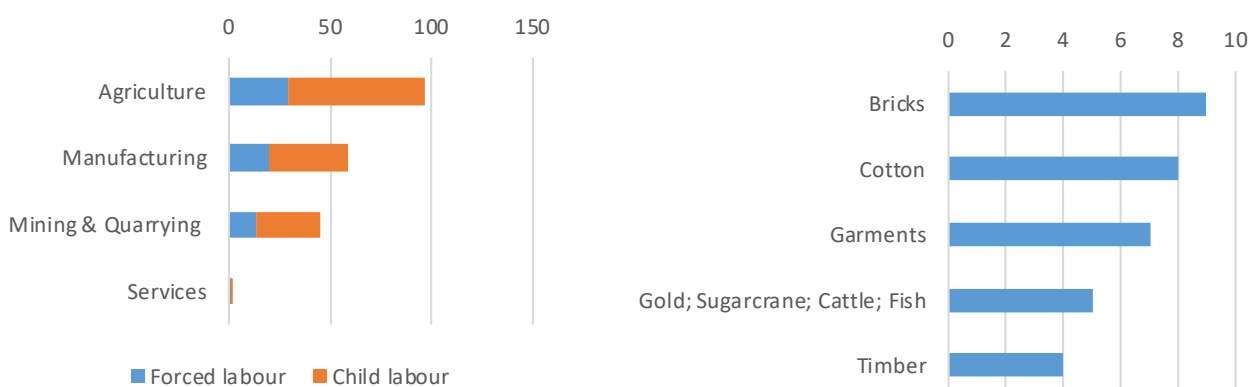


Source: <https://www.globalrightsindex.org/en/2022/countries>

Note: The scale ranges from green – Sporadic violations of rights – to dark red – No guarantee of rights due to breakdown of the rule of law.

Figure 4. Number of goods produced globally violating decent work in 2020

Panel (a): sectoral disaggregation by child and forced labour Panel (b): goods with most forced labour by number of countries



Source: ILAB 2020 List of Goods produced by child labour or forced labour.

Note: Forced and child labour in the service sector refer to cases of pornography. The number of total products affected by forced labour is 119.

In addition, there is a **strong gender and age element to forced labour**. An estimated three quarters of the people affected by modern slavery and human trafficking are women and children, with women accounting for approximately half of the estimate. This is particularly prevalent in domestic work,

agriculture, and construction. These estimates are provided by the ILO and Walk Free. Instruments addressing gender inequality typically focus on data collection and analytical work rendering inequality and regional and international differences visible (European Parliament, 2022b).

5.1.5 Potential changes in European consumption patterns

A ban of imports produced with forced labour would, by definition, stop the consumption of such products and would therefore be a highly effective policy measure to change consumption patterns within the EU. To the knowledge of the authors there are no case studies about the effects of marketing bans in a trade context in the EU. This section therefore draws on evidence on the consumption of related goods:

- Sin goods
- Ethical products

“Sin goods” include tobacco or alcohol, *i.e.*, goods whose consumption has adverse health effects and therefore create a burden for the general public (Cremer et al, 2012). **“Ethical products”** are products where consumers buy intangibility, justice and perhaps conscience. For instance, this may occur through product labelling, which, for instance, is prominently used in the case of **“fair trade”** products (Bezençon and Bili, 2010).

These two approaches have different policy implications. Policy makers seek to reduce the consumption of sin goods, for instance through taxes or marketing bans. Ethical products, on the other hand, are deemed as socially desirable and therefore proactively marketed.

The bulk of evidence concludes that **marketing bans are an effective policy tool in reducing consumption**. For instance, a review of evidence on alcohol consumption in the United Kingdom supports the consumption and cost-effectiveness of policies that address affordability and marketing across multiple research designs and measured outcomes. Interventions can be both general or individually directed (*e.g.*, delivered to at-risk consumers) (Burton et al, 2017). Comparable results of marketing bans have been shown for tobacco (Henriksen, 2012).

An alternative that is closely related to a marketing ban is raising consumer awareness. Here, forced labour is interpreted against an **“ethical product”** background typically involving production labels guaranteeing that the product was not produced with forced labour. Cognisant of changing consumer preferences, some firms have begun to self-label their products claiming that these adhere by self-imposed standards. Such initiatives are mostly market based, *i.e.*, corporations proactively seek to eliminate forced labour from their supply chain. The effectiveness of these initiatives has been criticised since the standards differ from company to company and lack public scrutiny. Evidence about the effectiveness of such labels is mixed and differs across countries and products (Martin-Ortega and O’Brien, 2017; Feasley, 2016).

Whether **ethical labels are an effective tool in changing consumption behaviour eventually draws on consumption functions**. **Consumption** is shaped not only by **product quality and price**, but also by **consumer preferences**. There is a vast literature about **“ethical consumption”**, *i.e.*, the consumption of goods and services that are regarded as morally advantageous. While there is widespread consent that ethical behaviour is desirable – especially with respect to environmentally sustainable products, this preference does not always translate into consumption behaviours. On average, ethically produced goods therefore only remain a small proportion of total sales over the years (Dos-Santos, Baptista, and Nobre, 2021).

The consumption choice is made by two countervailing effects. On the one hand, consumers opt for the **best price-quality ratio**. On the other hand, **subjective norms impact on consumers’ intention to purchase ethical products**, which again can be shaped by social pressure from one individual’s reference group (Liu et al., 2021), and can be an entry point for awareness campaigns. Nevertheless, there is a gap between the intention to purchase ethical products, on the one hand, and the actual purchase of the

product, on the other hand. While the intention to buy ethical products becomes stronger if consumers are confident about their judgement – which is the objective of awareness campaigns – the consumption behaviour itself only changes to a small extent (Alsaad, 2021).

The literature finds that **both import bans and marketing bans are effective tools** (Hoffmeister, 2022; LeBaron, 2021). Both policy instruments do not ban consumption but affect it, probably differently. Both instruments require in their implementation knowledge about the product that is affected, its origin and the use of forced labour in its production process. These are substantial informational requirements. If all required information is at hand, import bans are by definition, a more effective instrument than marketing bans. Marketing bans allow products produced with forced labour to enter the market, and their consumption depends on consumers' reactions. Hence, with a marketing ban, consumption, – probably at a lower level – continues. This implies that the **incentives for producers to maintain their reliance on forced labour are reduced to a lower extent than in an import ban situation, where the entry of affected products**. This implies that the **incentives for producers to maintain their reliance on forced labour are reduced to a lower extent than in an import ban situation, where the entry of affected products** into the EU, and therefore eventually their consumption, is foreclosed.

5.1.6 Approaches to confront modern slavery that is not state sponsored

There are different options to stop modern slavery, including non-state sponsored options. The recent discussion on forced labour was instigated by the reported exploitation of Uyghurs in factories in China in so-called “re-education camps” (Hoffmeister, 2022). In this case, the state, *i.e.*, the People's Republic of China, is accused of engaging in forced labour. **Policy makers in the EU can clearly target products that originate from Xinjiang, the affected Chinese province. However, in many cases forced labour occurs in the private sector and an identification scheme is not readily available.** Whether or not these are prosecuted locally depends on quality and capacities of the respective institutional environment.

Hence, some Western legal systems shift towards the reversal of the burden of proof and require companies to demonstrate their products were not produced with forced labour. In practice, import regimes may impose specific regulations on companies that may include corporate social responsibility reports. Also, companies may be required to entertain due diligence with respect to their suppliers' activities (Hoffmeister, 2022). This adds a public dimension to the hitherto market based accountability regimes (Feasley, 2016).

Yet, empirical evidence casts doubt over the effectiveness of corporate social responsibility standards as a buyer-centric governance mechanism. Multiple case studies have shown that in spite of ethical certification schemes and social auditing, forced labour still occurs. This may be due to regulatory loopholes, producers not being able to afford certification, and poorly supervised or verified standards (LeBaron, 2021; Bartley, 2018).

5.2 Legal scope

Non-discrimination is the cornerstone principle of the WTO, established under the General Agreement on Tariffs and Trade (GATT). It is first enshrined in the GATT by the principle of most-favoured nation (MFN) treatment in Article I, which provides that WTO Members cannot normally discriminate against their trading partners, meaning that any treatment and conditions more favourable than those granted to any third party would be equally extended to any other party to the Agreement. Second, the principle of national treatment (NT) is provided for in Article III of the GATT for goods, and it implies that imported and locally-produced goods should be treated equally. Article III:4 prohibits discriminatory non-tariff barriers, *i.e.* any policy measure other than tariffs that can impact trade flows, such as quotas, import licensing systems, sanitary regulations, prohibitions, etc.

Formal linkages between trade and human rights, such as labour and social standards, have not yet been established in the WTO agreements and in dispute settlement reports (Cottier and Oesch, 2011). However, Article XX of the GATT offers ten ‘general exceptions’ to the MFN treatment, according to which WTO members may be exempted from GATT rules.

Linked to the issue of forced labour, WTO Members may adopt measures necessary ‘to protect **public morals**’ (Article XX (a)), ‘to **protect human, animal or plant life or health**’ (Article XX (b))’, or related to ‘**products of prison labour**’ (Article XX (e)). Therefore, Article XX of GATT can be invoked to justify unequal treatment of domestic products and competing imports.

Two important limitations exist in the “chapeau” of Article XX: such measures cannot discriminate among WTO Members where the same conditions prevail or be a disguised restriction on international trade. In this respect, one of the most direct examples is the **EU Seal Regime** that prohibited the importation and placing on the market of seal products, excluding for seal products derived from hunts conducted by Inuit or indigenous communities (IC exception) and hunts conducted for marine resource management purposes (MRM exception). Following a complaint from Canada, the WTO Appellate Body found that while the measures were “necessary to protect public morals” within the meaning of Article XX(a), the EU’s invocation of this general exception failed because of the discriminatory treatment of seals from commercial hunting versus hunting by indigenous populations, in breach with the chapeau of Article XX.

Against this background, **to be a WTO-compatible trade instrument, the EU could invoke Article XX(a) or Article XX(b) to introduce an import ban on products made with forced labour**, including child labour, as a **measure necessary for achieving the objectives of protecting public morals, and/or human life or health**. In this case, the EU would bear the burden of proof in establishing the application of one of these exceptions.

When it comes to measures necessary to protect public morals and while its interpretation is evolving, its invocation could find strength in the evidence of international consensus through the ratification by a vast majority of WTO Members of the 1930 Forced Labour Convention and the ILO Declaration on Fundamental Principles and Rights at Work. China’s most recent ratifications in August 2022 of two ILO Conventions, namely the Forced Labour Convention and the Abolition of Forced Labour Convention further supports this argument (ILO, WEBc).

In addition, it could be argued that such a ban is aimed at protecting the health of workers in supply chains (Harris and Moon, 2015). The exceptions provided in Article XX of GATT nevertheless contain a necessity test to determine whether a measure is necessary to achieve the intended goal. One aspect that remains to be demonstrated is whether an import ban would be the least restrictive trade measure to achieve the goal of fighting forced labour (Zagel, 2005).

Hence, **to be valid, an import ban should also be compliant with the “chapeau” of Article XX**, which is rigorously scrutinised by the WTO Appellate Body, *i.e.* the **ban should not constitute an arbitrary and unjustifiable discrimination or a disguised restriction on international trade**. This assessment mainly **depends on the measure’s structure**, but in broad terms, it means that a ban could be considered non WTO-compliant if this prohibition was not applied equally to all countries with similar forced labour issues, or if it was applied without respect to due process and transparency requirements (Howse, 1999). Experts believe that such a measure has a good chance of success if it is not targeted (for example to some countries), if it has a clear link to a listed objective under Article XX of GATT, and if it is well-supported by evidence (Harris and Moon, 2015).

Beyond the compatibility of such a trade instrument to fight against forced labour products with WTO rules, lies the broader question of the **means available to promote and advocate a global level playing field on decent labour in international trade**. The EU’s comprehensive approach to promote decent work worldwide includes its active contribution to set further labour standards through the **ILO, the UN,**

the OECD, but also within the G7 and G20 groups of nations. In the context of the forthcoming opening of the UN negotiations from 24 to 28 October regarding a binding instrument on business and human rights, initiated in 2014, the EU has a key role to play to advance the discussions despite controversial points for countries such as the introduction of international due diligence obligations directly to companies (Business & Human Rights Resource Centre, WEB). Moreover, an **existing initiative to be promoted by the EU is Alliance 8.7.** It is a global partnership, of which the ILO is the Secretariat, bringing together actors at all levels (governmental and non-governmental) to accelerate progress on the elimination of child labour and the eradication of forced labour by optimising the effectiveness of development cooperation interventions (Alliance 8.7, WEB). **While the ILO recognises the important role the initiative plays in facilitating cooperation and experience exchange on forced labour, the EU could encourage more countries to engage with Alliance 8.7 to enhance international cooperation** (ILO, 2022a). Going even further, the EU could take the lead in promoting a **consistent application of anti-forced labour trade tools**, or going even further **supports a discussion for the implementation of a plurilateral anti-forced labour instrument**, e.g. at OECD level, although no proposal exists yet. The EU supports reform of the WTO and integrating the social dimension is a critical aspect of such reform. Building a **stronger connection between WTO and human rights law** could strengthen human rights enforcement through trade measures. As presented above, the outcome of determinations under Article XX GATT by the dispute settlement bodies remains unpredictable, which leads some experts to call for an alternative mechanism such as the introduction of a human rights clause, a new Article XX exception, whose prospects are nevertheless uncertain in the context of the WTO deadlock (Joseph, 2013).

5.3 Monitoring impact on conditions of forced labour

As mentioned in the previous section, the monitoring mechanisms to track the impact created inside and outside the EU on conditions of forced labour depend on three key issues:

- the effectiveness in third countries;
- funding;
- country and industry specific factors.

Import restrictions and marketing bans alone are not sufficient to effectively eliminate forced labour in third countries. Collaborative cross-border efforts are needed to change the underlying root causes of forced labour.

The monitoring process to track if products violating forced labour enter the EU is a task that requires, on one hand, detailed checks of goods entering the EU coming from high-risk areas and, on the other hand, a detailed public procurement monitoring as well as a detailed monitoring of private sector global value chain activities. **A common EU list similar to the ILAB list would facilitate the implementation of import bans on forced labour and contribute to the transparency needed to effectively promote awareness and responsible business conduct in the public and private sector.**

To monitor global value chains and thus also the flow of goods produced with forced labour, transparency measures that oblige companies operating within the jurisdiction of the country to disclose information on the production and supply chain of the goods for sale may be introduced. Such measures are for example due diligence tools. Further, Transparency and accountability measures are key to circumvent enforcement issues due to the divergence of consumption and production locations (Koekkoek et al. 2017). Experiences from the California Act, a state level legislation to ban the use of slave labour and human trafficking in global supply chains and a first of its kind, show a generally high compliance of companies with the required reporting, though the level of detailed reporting varies highly by company (Koekkoek et al., 2017). Thus, transparency measures have the potential to inform consumers and NGOs by increasing the accountability of firms in global supply chains if the design of the respective monitoring measures

ensures that the disclosed information is comprehensive and allows for a comparison between the respective efforts.

Once products drawing on forced labour have been identified, one can assume that an import or marketing ban stops such products from entering the EU. Goods imported prior to a ban remain available on the market. Another question concerns the fate of products produced with forced labour that are on the EU market. A practical solution would be to treat them as counterfeit goods.

5.4 Implications for EU trade agreements

On the impact on existing Free Trade Agreements (FTAs), Economic Partnership Agreements (EPAs), and Investment Protection Agreements (IPAs) between the EU and third countries, it is important to underline that **the adoption of Regulation on prohibiting products made with forced labour on the Union market would not imply that such pre-existing agreements would have to be *de facto* upgraded** as they are primary law in the EU. In addition, currently, labour rights provisions are already contained in 15 EU trade agreements, accounting for 40 % of the total of 38 trade agreements in force (ILO, 2017). Such trade agreements often contain an obligation to ratify ILO conventions, such as the ILO Forced Labour Convention, 1930 (No 39) and its Protocol. Such obligations have even encouraged progress, as the example of Vietnam shows (European Parliament, 2022c). The adoption of such an instrument, however, allow the EU to negotiate even more ambitious labour provisions in ongoing or future trade agreements, e.g. focused on forced labour.

The degree of legalisation of these **non-trade objectives in trade agreements** and, with it, the precision with which non-trade objectives are formulated, the extent to which trading partners are legally bound by rules or obligations and the extent to which powers to implement and apply non-trade-objectives can be delegated to third parties increased in the last ten years. (Lechner, 2019; Borchert et al. 2020) In general, however, these non-trade objectives in trade agreements are **hard to enforce**. In 2018, the EU set an exemplary case by initiating a consultation with the government of the Republic of Korea regarding the breach of the commitment to sustainable development and labour standards as defined in the free trade agreement. Indeed, even though often not executed¹⁷, the commitments regarding labour standards in EU free trade agreement are legally binding and have to be implemented. Therefore, in 2021, the EU established an action plan together with South Korea to ensure the adjustment and implementation of labour laws and Conventions of the ILO¹⁸.

To strengthen enforcement of these non-trade objectives, the design of **sanctions** to be imposed in third countries in the case of non-compliance with TSD commitments such as decent labour standards in traded goods is scrutinised by the EU. The 15-point Action Plan on Trade and Sustainable Development recalls that sanctions are included in trade agreements as a means to compensate parties for quantifiable economic damage resulting from a failure to comply with commitments under the agreement. In the case of a breach of TSD standards, the EU could also claim compensation for such a breach but difficulties lie in quantifying the breach (Non paper of the Commission, 2018) Yet, such sanctions could for example take the form of a **staged tariff reduction linked to the effective implementation of TSD provisions**, including the **possibility of withdrawing specific tariff lines in the event of a breach of those provisions** (EESC, 2021; Non-paper from the Netherlands and France, 2020).

In future trade negotiations, specific issues related to forced labour need to be negotiated particularly with high risk partners. For example, current negotiations, e.g. negotiations with Mexico,

¹⁷ Non-trade objectives are often only poorly enforced. Primarily, the enforcement does not lie in the EU's own interest to suspend recently concluded trade agreements, and the option of suspension or termination of trade agreements as a tool to get trading partners to fulfil previously made commitments also excludes the provisions of interest. Thus, negative conditionality is limited. For a detailed discussion see Borchert et al., 2020.

¹⁸ <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2238> (accessed September 2nd, 2022).

Mercosur, or Indonesia, cover occupational safety and health, working conditions, labour inspections besides responsible business conduct along supply chains. Action needs to be taken to enable an efficient implementation of the non-trade-objectives. This needs to be done in close cooperation with the respective partner and enable the development of various tools to monitor the implementation. This includes the ratification of the fundamental ILO conventions for decent work and working conditions during the trade agreement negotiation process. Thus, **FTAs, EPAs and IPAs negotiations** should be **accompanied by economic diplomacy, bilateral and multilateral labour dialogues, technical assistance and capacity-building activities**. To achieve this, it is important to **rely on international cooperation with like-minded partners**, as illustrated for example in the Trilateral Joint Statement from the Trade and Labour Ministers of the US, Japan and the EU on the International Labour Organization's Global Forced Labour Estimates, which acknowledges that eradicating forced labour requires a **multifaceted and multi-stakeholder approach** that addresses the root causes of forced labour (2022). **Transatlantic cooperation** is also key to strengthen the promotion of internationally recognised labour rights in global supply chains, including eradicating forced labour and child labour (EU-U.S. Joint Statement of the Trade and Technology Council, 2022).

6 Conclusions

Forced labour is a complex phenomenon and neither an import ban nor a marketing ban might sufficiently eradicate forced labour at its roots. **The imposition of trade restrictions, such as an import prohibition, remains an indirect tool to tackle the problem of forced labour and child labour**, but is considered an **effective way to combat trade in forced labour products**. While this option alone will not eradicate the problem, it is a mean to eliminate the unfair competitive advantage enjoyed by businesses and governments exploiting forced labour, and to create a major disincentive for economic operators from using forced labour in their supply chains. Nevertheless, the support of companies in this process, and in particular the approach and support tools provided to SMEs would be crucial to ensure their specific needs are taken into consideration.

The following are the key findings of the analysis:

- This report emphasises that if the EU were to impose an import ban on forced labour products from a particular geographical area or on certain companies, **punitive measures would be likely**, as shown in the US import example and the **countersanctions** taken by China. In addition, the feasibility assessment undertaken demonstrates that **an import ban could be considered non WTO-compliant if this prohibition was not applied equally to all countries with similar forced labour issues**, or if it was applied without respect to due process and transparency requirements. Thus, not targeting any geographical area or economic actor would be crucial to avoid arbitrariness or discrimination in the application of an import restriction. As a result, it is argued that an import ban would have a good chance of success if it is not targeted, if it has a clear link to a listed objective under Article XX of GATT, and if it is well-supported by evidence.
- **Coupled or not with an import ban, the examples of EU marketing bans already in place in different EU policies, also indicate relevant models to follow for forced labour products.** These allow the traceability of products placed on the market through product information files or the use of labelling regimes which proved to lower the presence of non-safe products in the internal market. The report also shows that both import bans and marketing bans are effective tools to alter consumption behaviour. In both cases, consumption remains legal. The incentives for producers to maintain their reliance on forced labour are – on average – reduced to a lower extent with a marketing ban than with an import ban, where the entry of products into the EU is foreclosed. Alternatively to an import ban or a marketing ban, the creation of a certified “abuse-free” product label at EU level, as suggested by the EP, would be a viable alternative. As a

complement to an import ban or marketing ban, it would encourage EU consumers to opt for ethical products, and give a visible competitive advantage to some companies.

- **In addition, transparency measures as proposed in the CSDD and the CSRD as well as the implementation of a reporting mechanism, should complement either trade tool.** Transparency measures have the potential to inform consumers and NGOs by increasing the accountability of firms in global supply chains if the design of the respective monitoring measures ensures that the disclosed information is comprehensive and allows for a comparison between the respective efforts. The implementation of a robust false practice reporting mechanism should also be envisaged to ensure the successful implementation of either anti-forced labour tool. Such reporting mechanism requires solid mechanisms of compliance, product traceability, notification, and control. The present report concludes that a **framework combining both corporate self-disclosure and self-disclosure by an authority at EU level or by third parties** (stakeholders) would be **desirable** to capture as many forced labour cases as possible. In addition, the creation of a **public database** would ensure **access to relevant information on the production/origin of the product**, and the **sharing of data between economic actors, competent and local stakeholders**.
- A **monitoring process** to track if products violating forced labour enter the EU is a task that requires, on one hand, detailed checks of goods entering the EU coming from high-risk areas and, on the other hand, a detailed public procurement monitoring as well as a detailed monitoring of private sector global value chain activities. Hence, a common EU list similar to the ILAB list would facilitate the implementation of import bans on forced labour and contribute to the transparency needed to effectively promote awareness and responsible business conduct in the public and private sector.
- Whether it is an import ban or marketing ban or both combined, **the chosen tool should be accompanied by a policy dialogue with non-EU, high-risk countries**. Such dialogue should ensure that measures taken, such as anti-forced labour trade tools, actually serve to level the playing field and do not undermine development efforts in concerned countries. This also entails support through technical assistance, capacity building and raising awareness to promote decent work conditions. The EU's comprehensive approach to promote decent work worldwide is illustrated by its active contribution to set further labour standards through the ILO, the UN, the OECD, but also within the G7 and G20 groups of nations. For example, an **existing initiative the EU could promote is Alliance 8.7**, a global partnership bringing together actors at all levels to accelerate progress on the elimination of child labour and the eradication of forced labour by optimising the effectiveness of development cooperation interventions, whose important role in facilitating cooperation and experience exchange on forced labour is recognised by the ILO. In the context of the forthcoming opening of the UN negotiations from 24 to 28 October regarding a binding instrument on business and human rights, the **EU has a key role to play to advance the discussions**. In view of the other legislative initiatives undertaken by like-minded partners, the EU must take the lead in promoting a consistent application of anti-forced labour trade tools, or going even further supports a discussion for the implementation of a plurilateral anti-forced labour instrument, e.g. at OECD level, although no proposal exists yet.

Annex 1: Summary table of the key features, strengths and weaknesses of existing EU import and marketing bans

Example	Policy area	Import or marketing ban or both	Legal basis	Product of product group	Parties involved in monitoring and enforcement	Analytical methods	Due diligence obligations	Responsible person	Strengths and weaknesses
Ban on seal products	Animal welfare policy	Both	Articles 13, 114 and 207 TFEU	Products made of seal	Member State authorities (+ reporting to EC)	Implementing acts by EC: Technical guidance notes by the EC (indicative list of codes of the Combined Nomenclature which may cover seal products); 2) Attesting document issued by a body recognised by the EC 3) QR code	No provisions	No provisions	A) Strengths: 1) Competent authorities to issue a certificate are designated by EC, ensuring an easier traceability of such products. B) Weaknesses: 1) Responsible person missing, making liability more difficult. 2) Absence of due diligence obligation
Ban on cat and dog fur products	Animal welfare policy	Both	Articles 13, 114 and 207 TFEU	Products made of cat and/or dog fur	Member State authorities	1) Member States create these methods to identify the species of origin of fur; 2) The EC may also adopt measures establishes analytical methods	No provisions	No provisions	A) Strengths: 1) Analytical methods ensure the identification of dog and cat fur B) Weaknesses: 1) No responsible person designated, which makes the

									<p>identification of the liable person difficult</p> <p>2) No due diligence obligation laid down in the supply chain, making traceability more difficult.</p>
Ban on animal testing for cosmetics products	Animal welfare policy	Marketing ban	Articles 13 and 114 TFEU	Cosmetic products based on animal testing	EC + Member State authorities	<p>1) Labelling</p> <p>2) Sampling and analysis</p> <p>3) Requesting a list from responsible persons indicating the concentration of a certain substance in their product(s)</p>	<p>1) Product information file</p> <p>2) Electronic notification to EC before placing the product on the market</p>	Responsible person designated to comply with obligations	<p>A) Strengths:</p> <p>1) The product information file allows the scrutiny of products before placed on the market</p> <p>2) Electronic notification and labelling, ensuring better traceability</p> <p>B) Weaknesses:</p> <p>1) In certain cases, credible information in product information files are difficult to control.</p> <p>2) In general, a marketing ban could foster trade with the product in the black market</p>
General Product Safety	Consumer policy	Both	Article 114 TFEU with due regard to	Any product intended for consumers or likely to be	Member State authorities (+EC)	1) EC guidelines on product safety assessment	1) Voluntary national standards transposing European standards	<p>Yes:</p> <p>1) Producer</p> <p>2) Distributor</p>	<p>A) Strengths:</p> <p>1) The general ban allows for a wide scrutiny of products.</p>

			Article 169 TFEU	used by consumers			2) Provides consumers with relevant information on the product 3) Labelling 4) Sampling tests		2) The use of standards along with labelling containing info (and CE marking) allows a robust product assessment and traceability. 3) Responsibility lies with importer and distributors, which ensures liability. B) Weaknesses: 1) No detailed provisions on cooperation with third country authorities. 2) No provisions on minimum level of samples, which could reduce the efficiency of finding non-compliant products.
Ban on advertising tobacco products	Consumer policy	Marketing ban	Articles 47, 55 and 95 TFEU	Tobacco products	Member state authorities	No provisions	No provisions	No provisions	A) Strengths: The scope of products is easily identifiable and the Directive clearly regulates which actions (e.g. advertising) are prohibited. B) Weaknesses: 1) No provisions on analytical methods, due diligence

									<p>obligation and responsible persons</p> <p>2) In general, a marketing ban could foster trade with the product in the black market</p>
Ban on single use plastics	Environmental policy	Marketing ban	Articles 191 and 192 TFEU	Certain plastic products (listed in Annex B of the Directive)	Member State authorities (+reporting to EC)	<p>1) Guidelines by the EC in consultation with Member States on what is to be considered single-use plastic product</p> <p>2) Marking requirements, but not for products under Annex B)</p>	No provisions for single-use plastic products under Annex B	Extended producer responsibility scheme	<p>A) Strengths:</p> <p>The directive clearly lists the products that cannot be marketed, which are easily identifiable.</p> <p>B) Weakness:</p> <p>The directive includes a responsibility scheme for producers, but detailed due diligence provisions are missing</p>
Kimberley Process Scheme	Human rights policy	Both	Article 207 TFEU	Rough diamonds	Competent Community authority designated by a Member State (listed in Annex III)	<p>1) Certificate validated by the competent authority</p> <p>2) Rough diamond contained in a tamper-resistant and sealed container</p>	System of warranties and industry self-regulation for the purposes of implementing the KP Certification Scheme	Importer	<p>A) Strengths:</p> <p>1) Enables traceability and collecting information from supply chain (whether rules are followed or not)</p> <p>2) Designating the importer as responsible person ensures liability</p> <p>B) Weakness:</p> <p>Scope of responsible persons does not cover distributors</p>

Due diligence on conflict minerals	Human rights policy	Both	Article 207 TFEU	Tin, tantalum and tungsten, their ores and gold originating from conflict-affected or high-risk areas	Member State competent authorities (+ reporting to EC)	<p>1) List of the names and addresses of global responsible smelters and refiners adopted by the EC</p> <p>2) Ex-post check on Union importers</p> <p>3) Guidelines by the EC for the identification of these minerals (best practice)</p> <p>4) List of conflict-affected and high-risk areas by EC</p>	<p>Supply chain due diligence obligations:</p> <p>1) Management system obligations (e.g. supply chain traceability system)</p> <p>2) Risk management obligations (e.g. risk management plan)</p> <p>3) Third-party audit obligations</p> <p>4) Disclosure obligations (e.g. make third party audit report available to competent authority)</p>	<p>1) Global responsible smelters and refiners, (located inside or outside of the EU)</p>	<p>A) Strengths:</p> <p>Analytical methods, liability rules and due diligence obligation ensure a solid framework for phasing out certain types of conflict minerals, as they entail different levels of the supply chain</p> <p>B) Weaknesses:</p> <p>Such a ban could worsen living conditions in conflict areas or high-risk areas and could intensify an ongoing conflict</p>
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