

## The European Commission puts supply chains under the spotlight

Supply chain risks are drawing attention across the globe. Recent geo-political and economic shocks such as Covid-19, Russia's invasion of Ukraine, the U.S.-China trade war and connected inflation are driving this focus.

The European Commission (the **Commission**) has published two significant proposals in this area:

- a proposal for a regulation prohibiting products made with forced labour
- a proposal for a regulation establishing a Single Market emergency instrument (the **SMEI**).

These developments could impact businesses operating both within and outside of the EU. We discuss each proposal in turn below.

### Forced labour ban

The United Nations [Sustainable Development Goals](#) include a commitment to eradicate forced labour, to end child labour in all its forms by 2025, and to end modern slavery by 2030.

Despite these targets, the [International Labour Organisation](#) estimates that the number of people in forced labour grew by 2.7 million between 2016 and 2021.

The Commission's proposal was first announced on 15 September 2021 in President von der Leyen's [State of the Union speech](#). It has been the subject of considerable [political controversy](#) ever since.

### The UK and U.S. law position

The Commission's proposal bears some similarities to U.S. federal law. In the U.S., forced labour and related offenses, such as human trafficking, are prohibited. U.S. law also seeks to prevent the import of any goods into the U.S. that were produced using forced labour. Section 307 of the Tariff Act forbids entry into the U.S. of any goods, wares, articles, or merchandise mined, produced, or manufactured wholly or in part by convict labour, forced labour or indentured labour under penal sanctions.

The U.S. has recently increased its focus on forced labour imports involving certain sectors and regions. In late 2021, following extensive bipartisan focus on the issue of alleged

forced labour and other human rights abuses in the Xinjiang region of China, the Uyghur Forced Labor Prevention Act (**UFLPA**) was signed into law. The UFLPA establishes a rebuttable presumption that any goods of any kind mined, produced, or manufactured, wholly or in part, in Xinjiang are prohibited. There is a high standard for rebutting this presumption and difficulty auditing supply chains in Xinjiang. Thus, the UFLPA effectively amounts to a complete ban on imports to the U.S. from Xinjiang. The UFLPA has particularly affected the solar and cotton sectors. Many businesses are redeveloping supply chains into the U.S. to avoid Xinjiang.

The Commission's proposal comes at a time when the UK is also proposing to enhance its modern slavery-related laws. See [our article on upcoming changes to UK business compliance law](#).

### Scope of the proposed forced labour ban

The Commission's proposal bans products made with "forced labour" from being placed on or made available to the EU market, or exported from the EU market. The definition of "forced labour", by reference to the [ILO Convention on Forced Labour, 1930 \(No. 29\)](#) is as follows: "all work or service which is extracted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily". This definition is a broad one.

The proposed ban will apply to products where forced labour has been used at any stage in the production, harvest, or extraction. It will apply to all products of any type, including their components.

The proposal applies to both products made within the EU and products made outside of the EU. This approach appears to ensure compliance with World Trade Organisation (WTO) rules on non-discrimination.

Obligations to ensure compliance, like other product safety legislation, rests with economic operators, being the persons placing or making products available on the market. There is no distinction made between high risk and non-high risk sectors. Likewise, there is no distinction made between non-EU and EU companies.

Therefore, economic operators will have to undertake due diligence on their supply chains in relation to the risks of forced labour.

### **Enforcement of the ban**

The Commission's proposal puts the responsibility for enforcement on the EU Member States.

Member States will have to appoint one or more competent authorities to carry out the obligations under the regulation. Competent authorities will follow a risk-based approach in determining whether it is necessary to investigate a potential breach of the regulation. Competent authorities may be alerted to issues by third parties including non-government organisations, companies and Member State citizens. Competent authorities must inform the complainant of the outcome of an investigation as soon as possible.

If an investigation goes ahead, competent authorities can demand that companies provide information and access for officers to carry out checks and inspections. This will extend to countries outside of the EU, provided such companies consent and the relevant government has been officially notified and raises no objection. This is of a particular importance to companies operating outside of the EU but importing goods into the Single Market.

If an investigation finds that the forced labour ban has been violated, a decision will be adopted prohibiting the product being placed on the market or exported. Products already made available on the market will be withdrawn and disposed of. If competent authorities find proof of forced labour, companies will be given "a reasonable time", of no less than 30 working days, to comply with the competent authority's order. Member State responsibility also extends to detection. EU customs authorities will be responsible for identifying and stopping products subject to a competent authority's decision.

Competent authorities must inform the competent authorities of other Member States of their decision without delay. Decisions in one Member State must be enforced and recognised in other Member States. The Commission's proposal states that a Union Network Against Forced Labour Products will be established. This will be comprised of representatives from each Member States' competent authority, from the Commission, and, where appropriate, customs experts. This body will facilitate coordination and cooperation between competent authorities and the Commission.

### **Review of decisions**

The burden of proof to establish the existence of forced labour practices lies with the competent authorities. Economic operators will have the opportunity to make submissions in their defence. If a decision finds forced labour practices are present and economic operators can later show that they have eliminated forced labour from their supply chains, the competent authorities will need to withdraw their decision.

The Commission's proposal recognises that this ban will likely be difficult for small-to-medium enterprises. SMEs are more likely to struggle to respond to information requests or carry out detailed due diligence. The proposed regulation will address this through risk-based enforcement and support tools. For example, the Commission will make publicly available a database of forced labour risk areas or products within 24 months of the regulation coming into force. Guidelines are expected to take the size and economic resources of economic operators into account on their due diligence requirements.

### **Proposal consultation and timeline**

The European Parliament and Council will now consider details of the Commission's proposal. There is also an [open public consultation period that will run until 24 November 2022](#). Once the text is final, it will come into force two years after the publication in the EU's official journal. For that reason, it is not expected to come into law until at least 2024.

The Commission has committed to provide a set of guidelines for companies within 18 months of the publication of the final regulation. The Commission has stated that these guidelines will set out forced labour due diligence requirements and information on risk indicators of forced labour.



# EU Single Market Emergency Instrument

During the early stages of the Covid-19 pandemic, the EU Single Market did not operate as intended. Countries began to close their borders and keep goods for their own use. This resulted in shortages of various goods in certain Member States.

The Commission wants to ensure such shortages do not occur again. The Commission describes the SMEI as a “guarantee” for the functioning of the Single Market and a tool to protect the Single Market in times of crisis.

It is proposed that the SMEI will contain four main measures. Each will have different potential impacts on businesses operating within the Single Market. We discuss each measure below.

## 1. Establishment of an advisory group

Permanent members will include one representative from each Member State with expertise in Single Market matters. Observers will represent other crisis relevant bodies. For example, the Health Security Committee and the European Semiconductor Board.

This group will advise the Commission on measures for preventing or addressing the impact of a crisis on the Single Market.

## 2. Contingency planning framework

The framework for contingency planning consists of two parts:

- arrangements for crisis protocols and crisis communication and training and emergency simulations
- an early warning system for any incidents that may disrupt the functioning of the Single Market and its supply chains of goods and services, or have the potential to.

It is important to note that the framework does not need an activation step.

## 3. Single Market “vigilance” framework

The Commission will have the power to declare “vigilance” when it detects a threat that, taking into consideration the opinion provided to it by the advisory group, it considers could escalate to an emergency. This would apply for a period of up to 12 months.

The Commission, in activating the vigilance mode, must:

- assess the potential impact of the crisis
- list the goods and services of strategic importance concerned
- set out the vigilance measures to be taken.

The vigilance measures include:

- a requirement on national competent authorities to monitor supply chains of goods and services of strategic importance identified by the Commission
- a requirement on Member States to set up and maintain an inventory of the most relevant economic operators that operate along relevant supply chains
- the ability for the Commission to identify goods of strategic importance for which it may be necessary to build strategic reserves and power to require the Member States to provide information including the current stocks in their territory, the potential for further purchases, and options for alternative supply
- the power for the Commission to require a Member State to build up strategic reserves by a set deadline in certain circumstances.

These measures could have direct and indirect impacts on businesses operating in the Member States.

## 4. Single Market “emergencies” framework

If the Commission determines that there is an emergency, it can propose to activate “emergency” mode. This requires Member State approval. The Commission does not need to have activated the vigilance mode to propose the activation of an “emergency” mode.

In determining what constitutes an emergency for this purpose, the Commission will consider factors such as:

- the geographic area affected
- the availability of substitute goods, inputs or services
- the size and importance of the disrupted sector.

Once an emergency is declared, the Commission will have sweeping powers over companies. This includes requiring the provision of information on production capacities and stocks, including outside the EU and including from upstream suppliers. The proposal provides that a penalty of up to EUR 200,000 can be levied for non-compliance.

The proposal also provides for companies to accept and prioritise orders for the production or supply of relevant goods. Such orders will take precedence over any performance obligations under private or public law. Companies are required to provide a justification where they fail to accept an invitation to prioritise production with the Commission having the ability to make such reasons public. The proposal provides that the Commission may impose a fine of up to 1% of total annual turnover for non-compliance with an obligation that has been accepted by a company to prioritise orders of crisis-relevant goods.

During emergency mode, restrictions will be imposed on the Member States. Restrictions will prohibit Member States from adopting intra-EU export bans, travel restrictions and other measures restricting the movement of goods, services and persons, which are related to the production of relevant goods.

## Resistance to the SMEI

Nine EU Member States – including Belgium, Denmark and the Netherlands – have [reportedly voiced their concerns](#) about, what they describe as, the “interventionist nature” of the Commission’s proposal. [Businesses have also reportedly highlighted concerns](#) related to the extensive powers that the proposal seeks to grant to the Commission.

## SMEI timeline

The legislative process in Brussels has only recently started. However, we expect the Commission to adopt the SMEI and bring this into force in 2023.

## Next steps for international businesses

International businesses should continue to monitor the development of these proposals during the legislative process.

This is particularly the case for businesses operating in sectors most impacted by the proposals, for example manufacturing.

Should you have any questions on how these proposals may impact your business, please contact [Matthew Townsend](#), [Gauthier Van Thuyne](#), [Jonathan Benson](#), [Gabby Minards](#), [Nick Ognibene](#) or your usual contact at Allen & Overy LLP.



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