

CSDDD and Forced Labour Regulation

Common Goals, Reinforcing Approaches

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This briefing is the fifth in a series on the Corporate Sustainability Due Diligence Directive (CSDDD), where BLOMSTEIN addresses the key aspects that (in)directly affect businesses both within and outside the EU, explores its interplay with the existing legislation in Germany (LkSG) and examines interactions with other recently adopted EU legislation (e.g., EUDR and CSRD) which partially set overlapping obligations.

In today's briefing we explore the main points of convergence and differences between the CSDDD and the upcoming Forced Labour Regulation. We will particularly focus on how these acts complement each other in the pursuit of ensuring corporate responsibility to eradicate forced labour within their value chains.

EU Forced Labour Regulation

On 23 April 2024, the European Parliament has given its final approval to a new regulation enabling the European Union (EU) to prohibit the sale, import and export of goods made using forced labour (the Forced Labour Regulation). The Regulation is not yet adopted, but it is expected to be formally approved by the EU Council in the next months.

Forced labour is defined by reference to the International Labour Organization (ILO) Convention on Forced Labour, meaning all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily, which also includes forced child labour.

Forced labour includes, among other practices, the use of irregular, delayed, deferred or non-payment of wages as a means to bind employees to employment, as well as forcing workers to work illegal overtime hours under the threat of penalty. On the other hand, some instances of compulsory labour do not fall under this definition, such as compulsory military service, standard civic duties in a self-governing country, work required as a consequence of a court conviction, or work in cases of emergency (e.g., war, calamity).

The new Regulation complements the CSDDD (see our first briefing [here](#)), and reinforces the EU's commitment to preventing companies in or trading with the EU from un(intentionally) sustaining forced labour. Both acts extend corporate responsibility across the entire supply chain, which stems from the observation that forced labour primarily occurs in the private sector and that the lack of adequate accountability instruments for downstream buyers (e.g., manufacturers, wholesalers, retailers) could finance violations

and ultimately contribute to the persistence of such practices by suppliers further up the value chain.

Companies Affected: Turnover vs Relevant products

Although the Forced Labour Regulation and the CSDDD use different criteria to determine their scope, certain companies are directly or indirectly covered by both acts. While the CSDDD adopts a company size approach (turnover-based/number of employees), the Forced Labour Regulation applies to all companies supplying products which could potentially be made with forced labour. In practice, the Forced Labour Regulation has a much broader scope of application.

For EU companies:

1. CSDDD: applies (i) directly to companies with > 1,000 employees and a worldwide turnover of > EUR 450 million, and (ii) indirectly to companies that are part of the value chain of the directly liable companies (e.g., suppliers and direct distributors).
2. Forced Labour Regulation: applies directly to any company, regardless of size, that sell within the EU any product that is potentially made with forced labour.

For non-EU companies:

1. CSDDD: applies (i) directly to companies with an EU turnover > EUR 450 million, and (ii) indirectly to companies that are part of the value chain of directly liable companies (e.g., suppliers and direct distributors).
2. Forced Labour Regulation: applies indirectly to the producers and to any company exporting to the EU products which can potentially be made with forced labour.

In summary, non-EU suppliers who meet the CSDDD turnover threshold are directly liable under the directive and, also, indirectly affected by the Forced Labour Regulation, while having its products circulating in the EU. The main difference is that under the CSDDD in-scope suppliers are directly liable for the due diligence obligations set forth in the Directive. On the other hand, under the Regulation, only businesses placing or making the products available in the EU market are directly liable.

Suppliers that do not meet the CSDDD thresholds are still indirectly affected by both the CSDDD and the Regulation. Relevant EU buyers, such as manufacturers, traders, and retailers, will likely impose stricter compliance requirements on their suppliers in order to reduce their risk exposure to forced labour.

Due Diligence System

Both acts will require companies to establish an appropriate due diligence system to identify and address actual and potential risks of forced labour, considering the businesses context (e.g., country, sector, business partners), with a particular focus on the specificities of the upstream tiers of the supply chain.

Unlike the CSDDD, the Forced Labour Regulation does not impose additional due diligence obligations. However, companies are encouraged to implement thorough due diligence processes to reduce the risk of investigation and potential withdrawal of their products from the market. Also, during the preliminary stage of an investigation, the company's due diligence procedures will serve as basis for the authority's assessment.

To support implementation of the Forced Labour Regulation, the Commission is expected to publish due diligence guidelines, which will to some extent build upon the guidance released in 2021 with the European External Action Service. Among various recommendations, the 2021 guidance suggests that companies adopt clear policies and management systems to raise awareness within suppliers and staff and assure that they will not face reprisals nor are discouraged from reporting concerns of forced labour. Furthermore, the 2021 guidance outlines indicators for risk, which relate to:

- Country factors (e.g., legal regimes outlawing peaceful strike action).
- Migration and informality factors (e.g., prevalence of employment of irregular migrant workers, workers in on-site accommodation, informally employed workers, absence of written employment contracts, presence of children and adolescents in the workplace).
- Debt risk factors (e.g., credit-arrangement and debt schemes for workers, restrictions on the ability of workers to freely dispose of their wages).

Non-compliance: Ban vs Active Engagement

The enforcement systems established by these acts take markedly different approaches. The Forced Labour Regulation establishes a framework that unequivocally blocks non-compliant products from the EU market. In contrast, the CSDDD emphasizes active engagement between directly liable companies and their (in)direct business partners to address critical issues appropriately. The CSDDD explicitly mentions the possibility of providing targeted and proportionate support, such as capacity-building, training, and financial assistance, and leveraging existing commercial relationships to encourage business partners to comply with standards.

Unlike the Regulation, the CSDDD considers terminating the contractual relationship with a non-compliant supplier as a last resort after failed attempts at preventing or mitigating severe impacts. The Directive, in its preambles, underscores the importance of

maintaining business relationships with partners to achieve the Directive's objectives. There is nothing comparable in the Regulation.

In fact the Forced Labour Regulation takes a very similar approach to the EUDR (see our briefing for an overview [here](#)), which also mandates the ban of specific products that are not compliant with deforestation-free and human rights requirements, including the prohibition of forced labour.

How Will it Work in Practice

National authorities are mandated to carry out investigations on a risk-based approach, considering (1) scale and severity of potential violation, (2) quantity and volume of suspicious goods in the market, and (3) share of the part suspected to have been made with forced labour in the final product. To support these efforts, the Commission will create a database with indicative and evidence-based information on forced labour risks in specific geographic areas or with respect to specific products or product groups.

It will be the responsibility of the competent authorities to prove that forced labour has been used at any stage of the production, manufacture, harvesting, or extraction of a product. However, in the preliminary investigation, authorities shall request information from the company under scrutiny and from other product suppliers about their due diligence processes, which will be key to assessing whether there is a substantiated concern.

If the competent authorities find a violation, they will determine the ban of the products from the Union market, by either preventing its placement or determining its withdrawal. Only in the case the economic operator fails to comply with the ban decision, penalties for non-compliance will be applied. This is somewhat different from the CSDDD approach, where companies will be held accountable (subject to civil liability and administrative fines) when they intentionally or negligently fail to comply with the due diligence requirements, and this leads to an adverse impact.

Key Takeaways

By integrating comprehensive due diligence requirements and strict prohibition measures, the CSDDD and the upcoming Forced Labour Regulation together create a robust framework that promotes corporate responsibility regarding forced labour. Implementing due diligence, whether voluntarily or as mandated by the CSDDD, is crucial to comply with the Forced Labour Regulation. This diligence helps companies avoid the risk of product bans in the EU market due to associations with forced labour.

BLOMSTEIN will continue to closely monitor and assess the developments and practical application of the CSDDD. If you have any questions on the topic and the Forced Labour

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Regulation, Dr. Roland Stein, Bruno Galvão and Carolina Vidal will be happy to assist you.

Stay tuned: In our next CSDDD briefing - to be published around 04 July - we will explore the interaction with the upcoming Green Claims Directive.
