THE DANISH INSTITUTE FOR HUMAN RIGHTS

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FEEDBACK TO THE CALL FOR EVIDENCE FOR THE INITIATIVE "EFFECTIVELY BANNING PRODUCTS PRODUCED, EXTRACTED OR HARVESTED WITH FORCED LABOUR"

INTRODUCTION

The Danish Institute for Human Rights (DIHR) gives this feedback in response to the call for evidence for an initiative without an impact assessment for the initiative "Effectively Banning Products Produced, Extracted or Harvested with Forced Labour" (the Initiative).

The Initiative aims to effectively ban the placing on the EU market of products made wholly or in part by forced labour, covering both domestic and imported products. It is understood that the initiative would build on international standards and complement existing cross-cutting and sectoral EU initiatives, in particular those with due diligence and transparency obligations.

While DIHR welcomes the Commission's strong stance on the eradication of forced labour, when designing an initiative to address this pressing issue, the utmost care must be taken to ensure that any such measure places the needs of rightsholders at the centre and is coherent with other parallel regulatory developments. Consistent with the EU's commitment to decent work worldwide, it is critical that any initiative placing a ban on the import of goods produced using forced labour does not only seek to exclude goods produced using forced labour from the EU market, but also addresses the underlying issue of forced labour by placing affected rightsholders at the centre. The Initiative must not inadvertently exacerbate the adverse impacts on rightsholders by triggering immediate disengagement at the expense of encouraging companies to use leverage to ameliorate the situation of those working in conditions which amount to forced labour. Further, it is crucial that the Initiative includes provision for remedy and remediation for those in a situation of forced labour.

Given that the Initiative is being proposed without a full impact assessment, it is critical that the Commission is alive to the potential for misalignment with other initiatives in force and under development, and the need to ensure that they are mutually reinforcing. A recent publication from the DIHR *How do the pieces fit in the puzzle? Making sense of EU regulatory initiatives related to business and human rights*, considers various EU initiatives and highlights potential areas of misalignment. In particular, DIHR highlights the need for coherence and alignment of incentives in the proposed Corporate Sustainability Due Diligence Directive (CSDD).

There remain a number of points requiring attention which are set out below.

NEED FOR REGULATORY COHERENCE

The primary international standards on which the CSDD is founded, the UN Guiding Principles on Business and Human Rights (UNGPs) and the OECD Guidelines for Multinational enterprises (OECD Guidelines), each emphasise that in the case of adverse human rights impacts linked to their business relationships businesses should prioritise engagement with business partners, using available leverage to prevent, mitigate or cease adverse human rights impacts. Disengagement with a business relationship is expressed to be an option of last resort, either after failed attempts at mitigation or where steps taken to mitigate an impact are not feasible because of the severity of the impact.

Adopting an approach which prioritises engagement rather than triggering immediate disengagement on discovering an adverse human rights impact creates the potential for a company to positively exercise leverage to improve respect for human rights for affected rightsholders.

The recitals to the CSDD are clear in their intention that companies should prioritize engagement with business relationships in the value chain instead of terminating the business relationship, with disengagement is a last resort option. Further, they make plain that prevention, mitigation and cessation of adverse human rights impacts must take into account the interests of rightsholders who are adversely affected by business activities (see in particular paragraphs 32, 36 and 41 of the recitals). Indeed, while acknowledging the EU's zero tolerance policy on child labour,

the recitals note that "Terminating a business relationship in which child labour was found could expose the child to even more severe human rights impacts. This should therefore be taken into account when deciding what appropriate action to take" (at [32]).

A recent briefing from the Modern Slavery Policy and Evidence Centre assessing the evidence on the effectiveness of forced labour bans found that "The drivers of forced labour in supply chains are complex and any single regulatory intervention, such as an import ban, is unlikely on its own to be effective at reducing forced labour in a sustainable way, meaning import bans should be carefully considered alongside other regulatory and non-regulatory levers."

The Commission must take care to ensure that the forced labour ban adopts a rightsholder focused approach which reinforces rather than undermines the incentives to actively address adverse human rights impacts through the process of human rights due diligence (HRDD) as outlined in the CSDD. Aiming for alignment with the approach in the UNGPs and OECD Guidelines can be one means of ensuring a rightsholder focused approach that is consistent with the approach taken in other regulatory measures such as the CSDD.

EFFECTIVENESS IN REDUCING FORCED LABOUR

The Commission anticipates that the Initiative will have a "positive impact on the workers concerned" as "working conditions would likely improve, as the use of forced labour would decrease if the related products cannot be placed on the EU market". It is far from certain that this impact will be realised if the Commission designs a measure that is focused on the restriction of imports rather than on the underlying issue of forced labour and the conditions of workers.

A recent briefing from the Modern Slavery Policy and Evidence Centre assessing the evidence on the effectiveness of forced labour bans found that "There is limited evidence on the effectiveness of import bans at reducing forced labour taking place in supply chains, with little robust research on this topic".

In designing the Initiative, the Commission must take a rightsholder focused approach. This requires taking care that the imposition of a ban on the import of goods produced using forced labour does not undermine the incentives for companies to engage with their business partners to address underlying human rights issues, including forced labour, and inadvertently create or amplify adverse human rights impacts.

REMEDY AND REMEDIATION

As is noted in a recent briefing note on forced labour bans commissioned by Anna Cavazzini MEP, by placing restrictions on market access force labour can provide incentives to address incidences of forced labour.

An often cited example comes from the issuing of Withhold Release Orders (WROs) against Top Glove, and other Malaysian manufacturers of latex gloves, under section 307 of the US Tariff Act which provides that "[a]ll goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part in any foreign country by convict labor or/and forced labor … shall not be entitled to entry at any of the ports of the United States, and the importation thereof is hereby prohibited".

However, as analysis from the Corporate Accountability Lab has noted

> *"Although the WRO issued against Top Glove's subsidiaries demonstrates that Section 307 can be used as a rights-promoting tool … a WRO is a blunt tool that simply stops the goods at the border. … a WRO, if issued without accompanying efforts that push companies to make changes that benefit their workers, can have devastating consequences for workers and local economies. For instance, instead of dealing with the underlying forced labor issues, companies may shut down and lay off their workers, leaving workers in a worse situation -- in some cases stranded in foreign countries with no work and no way to pay off debts or return home. Depending on the breadth of the WRO, it can also lead to real economic consequences for local economies, especially in the case of a country-wide WRO. These unintended consequences mean that, if not applied carefully, there can be a big*

risk inherent in using a protectionist statute that is meant to protect US companies, not workers."

While there is some reporting which suggests that the issuing of WROs against various Malaysian glove manufacturers contributed to the improvement of conditions for workers and reimbursement of recruitment fees, it is unclear whether this could have been achieved in the absence of additional pressure from investigative journalists and civil society actors.

Accordingly, the Commission should ensure that the Initiative includes express requirements for corrective actions including remediation to be provided to affected workers. To do so would be consistent with the European Parliament's resolution of 9 June 2022, which "calls on the Commission to ensure that the new EU instrument requires the responsible companies to provide remediation to the affected workers prior to import restrictions being lifted; calls for the monitoring of remediation and corrective actions to be undertaken in cooperation with relevant stakeholders, including civil society organisations and trade unions".