On the need to consider the existence of appropriate due diligence in investigations on import bans under EUFLR

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I. Executive summary

The EUFLR is part of a global trend towards forced labour bans and reinforces corporate responsibility by building a framework that guides companies in addressing forced labour in their supply chains. It can meaningfully contribute to addressing forced labour risks in global supply chains and improving conditions for vulnerable workers worldwide. However, **if interpreted in an unrealistic and overly strict way, it also creates risks for the same people it aims to protect, as well as for companies and EU trade with the rest of the world**. Faced with the risk of bans, companies might abruptly terminate business relationships that they perceive to carry forced labour risks. This could prompt suppliers to conceal problems rather than engage with them and trigger irresponsible disengagement that ultimately harms rightsholders (in detail, see II.).

This legal opinion explains why **Art. 3, read in conjunction with Art. 17 ff. EUFLR, should be interpreted as requiring bans only** where the authorities' investigations show that identified forced labour is accompanied by a failure to take appropriate and effective due diligence measures. The European Commission's Guidance addresses this issue only by stating that authorities "may" refrain from imposing bans following the identification of forced labour where companies demonstrate effective due diligence measures. At the same time, it states that the EUFLR imposes an obligation of results - namely, that products involving forced labour may not be made available on the market. This position is accompanied by extensive guidance on the due diligence obligations companies should implement to avoid bans. A proportionate interpretation of the discretion available when

authorities assess whether there are substantiated concerns of forced labour under Art. 14 ff. EUFLR can resolve this tension. That discretion, which must by law take account of existing due diligence measures (Art. 17 (1) and (5)), should be exercised in a way that gives meaningful consideration to effective engagement and remediation as alternatives to disengagement. **Accordingly, companies that demonstrate appropriate measures during the preliminary investigations, even if those measures have not yet been completed, should avoid bans**. Bans would be imposed only where companies cannot show that they are able to address the impacts effectively and within a reasonable period (in detail, see III).

It **should be clarified explicitly that demonstrating effective due diligence measures during the preliminary investigation can prevent bans** even if those measures have not yet completely eliminated forced labour.[1] The Guidance should also clarify that this applies where a company can credibly show that because its capacity was limited, it initially focused on other products presenting higher risks (in detail, see IV).

II. Challenges arising from interpreting the EUFLR as a pure obligation of results

If companies were required to keep all their supply chains free from forced labour at all times in order to continue exporting from, importing into and trading within the EU, this would create significant challenges from both human rights (1.) and business and trade (2.) perspectives.

1. Human Rights Challenges

All established human rights due diligence standards, starting with the UN Guiding Principles and the OECD Guidelines for Multinational Enterprises, but also including the EU Conflict Minerals Regulation, the French Duty of Vigilance Law, the EU Batteries Regulation, the Norwegian Transparency Act, the German Supply Chain Act and the EU Corporate Sustainability Due Diligence Directive, share a core obligation: They require companies to **analyse adverse impacts in their operations and supply chains, prioritise them[2] and**

[1] See, for example, the proposal from Murphy that advocates for introducing grace periods to allow imports to continue where importers declare problems and commit to prompt remediation: ***Murphy***, An International Blueprint for Forced Labor Import Bans, p. 10, available at: https://www.hks.harvard.edu/centers/carr-ryan/publications/international-blueprint-forced-labor-import-bans.

[2] On prioritisation, see UNGP 24, Art. 8 and 9 CSDDD and Sec. 5 (2) LkSG. See also the OECD-Guidelines for Multinational Enterprises (2023), parr. 20 and OECD Due Diligence Guidance (2018), p. 17 and p. 66 ff. The OECD Guidelines also define the process of HRDD to be met in the Transparency Act (see there, Art. 4), in the EU Conflict Minerals Regulation (see there, Art. 5) and in the EU Batteries Regulation (see there, Annex X (4)). As Art. 18 EU Taxonomy refers to the UNGP and OECD standards, these are also to be met when documenting conformity of economic activities under the EU Taxonomy.

then work towards continuous improvement, with responsible disengagement as a last resort.[3] They do not, however, require companies to guarantee that their operations and supply chains are completely free of adverse impacts. This reflects a carefully balanced form of pragmatic idealism. Corporate operations and supply chains are recognised as carrying significant human rights risks, which is why companies are required to change. At the same time, the reality of human rights in complex global supply chains means that this change will not happen overnight. If the EUFLR established a regime that effectively required an **obligation of result of no forced labour from the outset, companies implementing established HRDD standards recognised internationally and required by EU law would face not only a lack of coherence, but also contradictory incentives.** As rightly pointed out by BUJ, interpreting the EUFLR as an obligation of result would create strong incentives towards premature disengagement[4] – directly contravening obligations concerning effective remedy and responsible disengagement.

Requiring an outcome of no adverse impacts would not only be unrealistic; it could also make addressing adverse impacts more difficult. Companies that must show that there is no forced labour in their supply chains or risk losing their imported goods might seek equivalent assurances from their suppliers. For example, companies might require suppliers to provide **contractual guarantees that the entire supply chain** of the product sold is free from forced labour, together with supporting evidence, and provide for immediate termination and potentially indemnification in the event of breach. Suppliers would often be unable to provide such guarantees with sufficient confidence, unless they had extremely simple supply chains. This would, in turn, **disincentivise trust-based collaboration with suppliers**. The EU has long recognised this problem in the context of forced labour. In 2021, the EEAS stated in its Guidance on Forced Labour[5] that **suppliers should not face reprisals for reporting risks or instances of forced labour,** and instead recommended clear escalation protocols that provide for exit only as a last resort, after attempts to improve the situation have failed or where there is no reasonable prospect of change. Continuing this logic, the European Commission's Guidance on the EUFLR recommends that companies consider disengagement only as a last resort: "When ***all the efforts*** to change the situation – including by exercising or increasing leverage – ***have been unsuccessful*** and the risk of forced labour persists, the company needs to disengage from the business relationship".[6]

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[3] On responsible disengagement as a last resort, see Commentary to UNGP 19 and UNGP Interpretive Guide (2012), p. 51, Art. 10 (6) and 11 (7) of the CSDDD and Sec. 7 (3) LkSG. See also OECD Guidelines for Multinational Enterprises (2023), parr. 25, OECD Due Diligence Guidance (2018), p. 30 f. and 80 f.

[4] BUJ goes even further, stating it "would effectively mandating immediate disengagement without any remediation obligation", Comments on the Open Public Consultation on the Corporate Sustainability Due Diligence Directive (CS3D) Guidelines (2026), p. 3.

[5] ***EEAS***, Guidance on due diligence for EU Businesses to address the risk of forced labour in their operations in supply chains (2021), p. 4 f. and 6 f.

[6] ***European Commission***, Guidelines on the application of Regulation (EU) 2024/3015 on prohibiting products made with forced labour on the Union market, C (2026) 4386 final, p. 62 f.

Conversely, requiring perfection could create incentives for companies to disengage strategically from entire regions perceived as presenting heightened risks.[7]

It is also widely recognised that **disengagement may create significant risks to human rights in itself**, which is why established human rights due diligence standards as well as the EUFLR and its guidance call for ***responsible*** disengagement. This is a form of disengagement that takes adverse impacts created by the termination itself into account when considering whether it is necessary and includes mitigating measures. The potential adverse impacts are varied: at the very least, rightsholders might lose the additional protection that the leverage of a buying company that cares for human rights offers to improve their situation. Existing measures could also be undermined.[8] The disengagement could also lead to **workers losing their jobs**[9] and livelihoods or being affected in other ways[10] if the supplier runs into economic problems because of the lost business.

An example of this is the case of Withold Release Order (WRO) in the case of Malaysian rubber gloves which reportedly led to the unintended consequence of many workers' employment being terminated.[11] Another relevant example of this has been the issuing of a withhold release order (WRO) in the case of the Indian textile company Natchi Apparel under Sec 1307 of the US Trade Act.[12] The US authorities had identified forced labour at the company and swiftly issued a WRO, despite Natchi cooperating in an ambitious, worker-led measure, the Dindigul Agreement, to address the situation. Civil society and trade unions were at the time of WRO establishing these measures with the company.[13] The workers called for the WRO to be lifted and the risk the risks did not materialise as this was quickly

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[7] See, for example, ***ILO***, The Potential of Import Bans to Address Forced Labour, p. 4 f. for the case of Malaysia in the context of US forced labour import bans.

[8] See, with reference to the Dingidul Agreement, ***Lofti/Walker***, Beyond Paper Compliance: Why Supply Chains Struggle to Confront Forced Labour, p. 3. ***Lofti/Walker*** consequently call on governments to "carefully design enforcement tools such as import bans in consultation with workers to avoid undermining worker-led initiatives". Their paper is available at: https://www.restructurelab.org/policy-briefs/beyond-paper-compliance-bcf9y.

[9] See also ***ILO***, The Potential of Import Bans to Address Forced Labour, p. 4 and 6, citing a Malaysian example and highlighting the risk of job losses in the context of import bans. The ILO is consequently calling for more research on how import bans may affect workers and enterprises. This risk is also mentioned in ***Kotecha*** „How Import Bans Affect Access to Remedy for Individuals Affected by Forced Labour.", Modern Slavery, Volume 9, Issue 1 (2024), 96-130 on p. 113 with references to two cases in India and Brazil. Also see Effectiveness of forced labour import bans in addressing modern slavery in global supply chains, ***Gonzalez de Aguinaga***, Bingham Centre for the Rule of Law (2025), p. 48.

[10] ***Fudge/LeBaron***, Do Import Bans Against Products Made with Forced Labour Help the Workers Who Made the Banned Products?, p. 4, available at: https://gflc.ca/wp-content/uploads/2024/11/ReStructureLab_ImpactOfImportBansOnWorkers_Dec24.pdf.

[11] See ***United States Government Accountability Office (GAO)***, Forced Labour CBP Should Improve Communication to Strengthen Trade Enforcement (2021), p. 31.

[12] ***Fudge/LeBaron***, Do Import Bans Against Products Made with Forced Labour Help the Workers Who Made the Banned Products?, p. 4 ff., available at: https://www.restructurelab.org/policy-briefs/import-bans.

[13] ***Kotecha*** „How Import Bans Affect Access to Remedy for Individuals Affected by Forced Labour.", Modern Slavery, Volume 9, Issue 1 (2024), 96-130 on p. 113.

done.[14] As a lesson of this experience, the expert organization Re:Structure Lab rightly recommends that import bans should consult with affected stakeholders before issuing an import ban to avoid creating additional harms.[15]

2. Business and trade challenges

Interpreting the EUFLR's obligations as obligations of result would also create significant risks for companies and their suppliers as well as for EU trade overall.

Forced labour risks affect the supply chains of many products. Data released by the provider Maplecroft indicate high forced labour risks for imports to the EU across several industries, estimating that approximately EUR 900 billion of the EU's **approximately EUR 2.7 trillion in imports (around 33%) would face high or very high forced labour risks**. The estimated risks are highest for apparel imports, at 95%, and electronics, at 91%.[16] Data collected by the NGO Walk Free recently indicated that over 20% of imports to Australia are exposed to modern-slavery risks.[17] These studies identify typical forced labour risks associated with certain products; further assessment is necessary to determine whether forced labour has actually occurred in particular products. They nevertheless underline both the urgency and the difficulty of addressing forced labour in global supply chains, given the complexity and depth of modern product supply chains and the fact that risks often occur further upstream, at the level of indirect suppliers.[18] Especially in complex deep supply chains, where companies source thousands of different products from tens or hundreds of thousands of suppliers, achieving completely risk-free supply chains will not be possible in the short or medium term, if at all. Addressing these risks in deep supply chains requires collective initiatives focused on particular high-risk areas, analysis of and action on root causes, and trust-building that encourages suppliers to disclose their supply chains and

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[14] Ibidem.

[15] In detail, see ***Fudge/LeBaron***, Do Import Bans Against Products Made with Forced Labour Help the Workers Who Made the Banned Products?, p. 6f., available at: https://www.restructurelab.org/policy-briefs/import-bans.

[16] https://www.maplecroft.com/solutions/supply-chain-risk/insights/forced-labour/?utm_source=amplify%20linkedin&utm_medium=social&utm_campaign=sm-scrol1-o&utm_content=o, full report available on the webpage.

[17] https://www.walkfree.org/news/2026/australia-spends-billions-on-imports-at-risk-of-forced-labour-driving-calls-for-urgent-law-reform/.

[18] ***Hurt et al***. report that while 8,5 % of EU companies are likely to face significant child or forced labour risk in tier 1, for tier 2 this rises to 82,4 % and for tier 3 to 99,1 %, see Hurt et al., Supply Chain Due Diligence Risk Assessment for the EU: A Network Approach to estimate expected e!ectiveness of the planned EU directive, p. 2 and 10 f., available at: https://arxiv.org/abs/2311.15971.

associated risks. Changing conditions in such deep supply chains requires significant effort and time and can realistically be achieved only through a risk-based approach.

Given the prevalence of forced labour risks across many products, companies may **lack the capacity to achieve zero forced labour** in all of them from the outset.[19] Suppliers may often be reluctant to disclose their supply chains. Overcoming such reluctance is not always possible and requires time-intensive trust-building – which would be more difficult if suppliers knew that they would face risks of exclusion upon discovery of any adverse impact. In certain contexts, this difficulty is exacerbated by local laws that can be interpreted as limiting information requests.[20] Considering the existence of appropriate due diligence measures to overcome such challenges in a risk-based manner while recognizing complexities would enable authorities to resolve each individual case fairly.

Without such clarifications, companies may reasonably anticipate that product bans could be imposed despite ongoing remediation efforts, thereby creating significant legal and commercial uncertainty. **This may create incentives for companies to use their market power to shift these economic risks to suppliers and to adopt cut-and-run approaches where forced labour occurs.**[21]

Companies might therefore require suppliers to guarantee compliance by avoiding all indicators of forced labour, which the European Commission uses to assess whether a situation represents forced labour,[22] under the threat of immediate termination and indemnification for non-compliance.[23] Forced labour indicators cover a wide range of exploitative situations, some of which can readily occur in a multitude of supply chains. For example, they encompass excessive overtime, debt bondage arising from recruitment fees

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[19] ***GAO,*** Forced Labour CBP Should Improve Communication to Strengthen Trade Enforcement (2021), p. 30 f. also points out this complexity in the US experience, stating that the enforcement authority can often not trace supply chains because of there complexity and that it is especially hard to identify forced labour in deeper tiers.

[20] See for example the Chinese State Council's Provisions on Industrial and Supply Chain Security, Decree 834 (2026), Art. 13 on information gathering.

[21] ***Lofti/Walker*** describe: "When forced labour is discovered, companies often sever ties with suppliers ("cut and run") rather than engage in corrective action. This leaves survivors unemployed and unprotected (...)", Lofti/Walker, Beyond Paper Compliance: Why Supply Chains Struggle to Confront Forced Labour, p. 5, available at: https://www.restructurelab.org/policy-briefs/beyond-paper-compliance-bcf9y. This risk is also emphasized by ***United States Government Accountability Office (GAO)***, Forced Labour CBP Should Improve Communication to Strengthen Trade Enforcement (2021), p. 32, citing corporate representatives that claim that enforcement "may discourage the private sector's remediation or reporting of forced labour. The representatives commented that CBP's Section 307 enforcement may lead companies to take a "cut- and-run" approach to forced labor—that is, to cut ties with foreign suppliers instead of encouraging them to remediate unacceptable labor practices.

[22] ***European Commission***, Guidelines on the application of Regulation (EU) 2024/3015 on prohibiting products made with forced labour on the Union market, C(2026) 4386 final, p. 11.

[23] Such an approach was even widespread under obligation-of-means HREDD standards, in detail: ***Dadush/Schönfelder/Braun***, Complying with Mandatory Human Rights Due Diligence Legislation Through Shared-Responsibility Contracting: The Example of Germany's Supply Chain Act (LkSG), available under: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4389817.

or abusive working and living conditions. **For suppliers, contractual obligations requiring them to have zero forced labour indicators in the supply chain would therefore mean promising something close to impossible**. To maintain their European business, many of them would nevertheless be under considerable pressure to agree on paper. In many cases, effectively being in breach of contract from day one, they would then be inclined to do everything they can to hide and mask potential breaches.[24] They would strive to obtain certificates and audit results certifying their perfect compliance, hiding problems or even engaging in corrupt practices to obtain such certificates.[25] This would hinder effective due diligence and undermine trust between the parties.

These disruptions would not only strain relationships between European companies and their suppliers but also between the EU and its trading partners. Companies might also be incentivised, where possible, to buy goods outside of the EU to prevent the application of a system requiring them to guarantee the absence of forced labour throughout the entire supply chain: for example, buying the equipment they need for operations in third countries outside the EU. Furthermore, where the import, export or sale of crucial parts from single-source suppliers is blocked, the operation of entire production lines can be put at risk.[26] A strong focus on proportionality in investigations and enforcement would help alleviate all these challenges.

III. Legal assessment of the question of obligations of results of no forced labour under the EUFLR

1. The question this legal opinion seeks to address

This legal opinion seeks to address the lack of clarity around the standard that companies are required to meet to avoid bans. It seeks to answer the following question:

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[24] ***GAO***, Forced Labour CBP Should Improve Communication to Strengthen Trade Enforcement (2021), p. 33 describes a similar risk in the engagement of CBP with controlled companies: "(…)private sector entities may be reluctant to share information with CBP about forced labor risks in their supply chains or efforts to address forced labor, fearing that CBP will issue a WRO against them if they do. As a result, CBP's approach to enforcing Section 307 may inadvertently discourage transparency because businesses have no "safe harbor" to communicate about forced labor, according to the representatives. (…)".

[25] ***Dadush/Schönfelder/Streibelt***, What does the EU CSDDD say about contracts, NYU JLB Vol. 21 Spring 2025 Number 2, on. p. 257, 267; available under https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4389817.

[26] For this reason, the OECD Guidance on Due Diligence (2018), p. 80 f. contains extremely balanced rules on termination for human rights reasons, stating that it should be a last resort, with detailed exceptions for single-source situations.

"Is the EUFLR's obligation to impose forced labour bans triggered by a) the occurrence of any forced labour along a company's supply chains alone or is it additionally necessary that b) the investigated company fails to show appropriate due diligence measures to address forced labour in the concrete case in the investigations?"

2. The answer given by the European Commission

At first sight, the answer given by the European Commission in the EUFLR Guidelines seems straightforward: It states that "the **Regulation imposes on economic operators an obligation of result**"[27] and adds that where companies "identify an actual forced labour impact in the operations or supply chains of a product, according to the Regulation they must not place it or make it available on the EU market, nor export it".[28]

However, the European Commission's "Guidance for economic operators on due diligence in relation to forced labour",[29] with recommendations for companies on how to address forced labour in their supply chains via due diligence measures, muddles the picture. This Guidance is fully aligned with the established understanding of human rights due diligence, including by **referring to the possibility for companies to prioritise risks where necessary and take measures appropriate to their circumstances, including their size;[30] providing multiple alleviations for SMEs;[31] and envisaging responsible disengagement only as a last resort** when other efforts fail or are not feasible.[32] **These references, however, have practical meaning for the EUFLR only if it is <u>not</u> interpreted as imposing a pure obligation of result requiring the absence of all** forced labour. Otherwise, a company following the Guidance and established HRDD standards would still face bans. A company could show that the measures it took and the prioritisation it undertook were appropriate, for example, because as an SME it could not do more or because, facing forced labour in a supply chain, it did not disengage from the supplier but instead engaged with the supplier and the affected workers to agree upon appropriate measures.[33] All of this would be futile, because the only thing that would count were a yes or no on the existence of forced labour. It would be strange to assume that the Commission

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[27] ***European Commission***, Guidelines on the application of Regulation (EU) 2024/3015 on prohibiting products made with forced labour on the Union market, C(2026) 4386 final, p. 5.

[28] Ibidem, p. 60.

[29] Ibidem, p. 49 ff.

[30] Ibidem, p. 51.

[31] Ibidem, for example at p. 52, 55, 57 f., 62.

[32] Ibidem, p. 62 f.

[33] This approach is also recommended by ***Lofti/Walker***, Beyond Paper Compliance: Why Supply Chains Struggle to Confront Forced Labour, p. 6, available at: https://www.restructurelab.org/policy-briefs/beyond-paper-compliance-bcf9y.

would release detailed EUFLR guidance recommending complex measures but not attach any significance to the measures companies take to implement them.

Another part of the Guidance could help clarify this contradiction: "Where the economic operator demonstrates, within the 30-day deadline, that it is **taking appropriate steps to address the forced labour situation, the lead competent authority may decide to grant the relevant economic operators a reasonable period of time to complete such steps and end the forced labour**, taking into account, inter alia, the complexity of the process, the feasibility of ending the forced labour, the number of stakeholders involved, and the size and resources of the economic operators concerned."[34] This could resolve the contradiction between, on the one hand, requiring an obligation of results and, on the other, providing guidance on due diligence – an obligation of means. Clearly giving the existence of appropriate measures – i.e., due diligence measures as described by the Commission itself - relevance in the investigations under Art 17 EUFLR to determine if there is a violation under Art. 3 EUFLR enables decisions that can deliver justice in the individual case in accordance with the principle of proportionality and avoid contradictory outcomes.

However, the current wording does not deliver the legal certainty that companies need but seems to leave the authorities full discretion. Where a company demonstrates appropriate measures, the authority is not obliged to take this into account, but it is free to (***"may")*** grant a reasonable period. It remains unclear what procedural consequences the existence of appropriate due diligence measures has for investigated companies. Without clearly defined consequences, the EUFLR due diligence Guidance would have only very limited relevance for the central instrument of the EUFLR, the potential imposition of import bans.

A closer look at the EUFLR itself reveals that exactly the understanding expressed at p. 20 – taking into account the existence of appropriate due diligence measures, not only the existence of forced labour in investigations about bans – is most closely aligned with the wording, system and the spirit of the law, as well as the general principles of unity of legal norms and proportionality.

3. The wording of the law

Any interpretation of the law must start from its wording. Several provisions of the EUFLR, read together, regulate the question of when products have to be investigated and stopped

[34] ***European Commission***, Guidelines on the application of Regulation (EU) 2024/3015 on prohibiting products made with forced labour on the Union market, C(2026) 4386 final, p. 20.

need to be assessed. **Art. 3 seems to clearly advocate for a pure obligation-of-results approach**, postulating that companies "shall not place or make available on the Union market products that are made with forced labour, nor shall they export such products".

This norm, however, is not to be read in isolation. Authorities must investigate potential violations following the procedure laid out in Art. 14 ff. In the preliminary phase of these investigations, authorities need to assess whether there is a "**substantiated concern" of forced labour**. Art. 17 (1) postulates that authorities conducting preliminary investigations into companies shall request information on "relevant actions they have taken in order to **identify, prevent, mitigate, bring to an end or remediate risks of forced labour** in their operations and supply chains" in line with different due diligence standards listed in (1) (a)-(d). According to Art. 17 (3), this information should, together with the information on the likelihood of risks according to Art. 14 (3), form the basis for concluding whether there is "a substantiated concern that there has been a violation of Article 3". **Art. 17 (5) further underlines the relevance of the due diligence measures**. It asks authorities to end investigations where they consider that a substantiated concern has been "eliminated, for instance due to (…) due diligence as referred to in paragraph 1 of this Article being applied in a way that mitigates, prevents and brings to an end the risk of forced labour". **Crucially, mitigation, i.e., measures that do not completely bring to an end forced labour but cause it to become less severe or intense**[35] is seen as potentially sufficient for closing investigations.

This shows that the legislator did not want the investigation to focus on the binary evaluation of a yes or no on the occurrence of forced labour. Otherwise, a simple reference to the requirement of assessing if a forced labour incident did occur and if so, whether it was successfully remediated, would have sufficed. The model created by Art. 17 is more differentiated. By making **information not only on remediation but on the whole cycle of forced labour due diligence a deciding factor in the investigation**, it gives the authorities a measure of discretion that allows them to assess the circumstances of the individual case and identify appropriate and proportional responses. A further examination of the provisions concerning SMEs shows that the EUFLR's system supports this approach.

4. System of the EUFLR

The interpretation of a legal norm also needs to consider the systematic context, i.e., how a certain interpretation of the norm would relate to other norms within the same legal act. If

[35] See definition of mitigate in Merriam-Webster „to cause to become less harsh or hostile" or „to make something less severe, painful or intense" or „to lessen" https://www.merriam-webster.com/dictionary/mitigate.

a certain interpretation were to hinder the functioning of other norms while another interpretation would not, this indicates that the latter interpretation should be used.

In the context of the question of what consequences the existence of appropriate due diligence measures should have for investigations under the EUFLR, Art. 14 (4) and Art. 18 (3) are particularly relevant. Art. 14 (4) provides that authorities shall, in **preliminary investigations, "take into account the size and economic resources of the economic operators concerned, in particular whether the economic operator is an SME, and the complexity of the supply chain**." Art. 18 (3) provides that authorities shall, when making information requests in formal investigations „take into account the size and economic resources of the economic operators, in particular whether the economic operator is an SME, the quantity of products concerned, the complexity of the supply chain, as well as the scale of suspected forced labour (…)". Recital 32 reinforces the need for differentiation, stating that "Micro, small and medium-sized enterprises (SMEs) can have limited resources and ability to ensure that the products they place or make available on the Union market are free from forced labour. The Commission should therefore issue **guidelines on due diligence in relation to forced labour, which should also take into account the size and economic resources of economic operators**."

Under an interpretation of the EUFLR that solely focused on the question of there being a forced labour violation or not, these factors could not be taken into account appropriately. The existence of a forced labour violation does not depend on whether it occurs in the supply chain of an SME or in a complex supply chain. **However, all the factors referred to are relevant when determining the appropriateness of due diligence measures**, which is also underlined by Art. 11(a) that asks the EU Commission to take into account the size and economic resources of economic operators when setting out its guidance on due diligence. Guidance that lays out due diligence requirements aligned with these principles would, however, be of extremely limited practical value if adhering to them were irrelevant for the single most relevant legal question under the EUFLR: is a product marketable in the EU or not? The need to take into account the existence of due diligence measures and their appropriateness is further underlined by the telos of the law, as expressed in the Recitals of the EUFLR.

5. Telos of the Law

Another relevant factor in interpreting the law is its' telos: the purpose of the relevant provisions. In the words of the Court of Justice of the European Union (CJEU): "the Recitals of an EU act constitute important elements for the purposes of interpretation, which may

clarify the intentions of the author of that act."[36] Recitals 3, 36, 44 and 59 are particularly relevant to the question addressed in this legal opinion.

Recital 3 underlines the relevance of the right to effective remedies for violations of fundamental rights and access to effective remedy for victims of forced labour, which is in line with the right to effective remedy in Art. 47 CFR. Recital 36 goes on to emphasise the need for guidelines on remediating forced labour and defines remediation as "the restitution of the affected person or persons or communities to a situation equivalent or as close as possible to the situation they would be in had forced labour not occurred, proportionate to the company's involvement in the forced labour, including financial or non-financial compensation provided by the company to a person or persons affected by forced labour and, where applicable, reimbursement of the costs incurred by public authorities for any necessary remedial measures." **The need for effective remediation is thus strongly emphasised and seems to be a core concern of the legislator**.

This concern could be undermined if investigations concerning forced labour bans under the EUFLR focused only on whether forced labour had occurred and did not take into account measures to address it. Such an approach could create incentives for companies that identify forced labour to terminate business relationships rather than begin remediation, in an effort to avoid bans. **Starting to take remedial measures can be burdensome, expensive and time-consuming, especially when addressing structural issues or issues deeper in the supply chain.[37] Companies might not see this as worthwhile** if a ban could ensue whenever the authorities took note.

The Recitals seem to recognise this problem and foresee an approach to addressing it. Recital 44 asks that "**authorities should grant reasonable time to economic operators to identify, mitigate, prevent and bring to an end the risk of forced labour**, taking into account inter alia, the complexity of the process and the number of stakeholders involved". This indicates that the legislator's intention is to give relevance not only to the fact that forced labour is identified but also to the due diligence measures taken to address it, including by calling on the authorities to grant reasonable time for companies to conduct such measures. This is only possible if decisions on forced labour bans are not taken solely on the basis of the binary evaluation of forced labour being present or not.

Recitals 36 and 59 reinforce this point. Recital 36 calls for guidance on responsible disengagement in the context of forced labour. But most crucially, Recital 59 also asks authorities to take the risk of responsible disengagement into account themselves. They

[36] CJEU, C-418/18, para 75.

[37] As an example, see the Dingidul Agreement, the measure that was deemed appropriate by workers and the CBP in the Natchi case described above under II 1: https://femnet.de/informationen/materialien-medien/datenbank-der-materialien/materialien-menschenrecht-arbeitsrechte/4490-fact-sheet-the-dindigul-agreement-to-end-gender-based-violence-and-harassment.html.

should "take into due consideration the risk of disengagement by economic operators who are either related to products or regions in the database, or who have had their product removed from the Union market, as well as the consequences on affected workers. The lead competent authority should therefore, where appropriate, support economic operators in adopting and carrying out suitable and effective measures for bringing forced labour to an end. Responsible disengagement includes complying with collective agreements and articulating escalation measures." The legislator recognises the **likely incentive for companies to disengage from problematic suppliers and also calls on authorities to take this into account, by supporting companies in taking appropriate measures to bring the identified forced labour impacts to an end**.

The consideration of Recital 59, asking the authorities that decide on bans to take account of responsible disengagement is a logical continuation of the principle of responsible disengagement as a last resort for companies. ***Even*** companies, which are not the primary duty bearers of human rights, need to consider human rights impacts triggered by their termination of business relationships**. It would be contradictory if authorities of the state as primary duty bearers for human rights, did not have to consider such human rights impacts triggered by import bans**. The bans can be considered a qualitative equivalent of terminating or suspending a business relationship: certain planned sales to a certain destination/customer cannot go ahead. Quantitatively, they will often be a lot more relevant: in one case, a company cannot sell its goods to a particular other company; in the other, a company cannot sell its goods to an entire market. Authorities should therefore include this assessment in their investigations, for example by seeking the view of workers whose rights are deemed to be violated before imposing a ban that is nominally intended to protect them.[38]

The understanding of these Recitals is clear: responsible disengagement should be a last resort, remedy should be prioritised and authorities should take note of this when exercising their function, i.e., deciding about bans. This clearly shows an inclination towards an understanding that would react to identified forced labour issues not with bans, but with appropriate due diligence and remediation. This understanding is reinforced by the position of the EUFLR in the system of due diligence obligations in the EU.

[38] See also Lofti/Walker, Beyond Paper Compliance: Why Supply Chains Struggle to Confront Forced Labour, p. 6, available at: https://www.restructurelab.org/policy-briefs/beyond-paper-compliance-bcf9y.

6. System of HRDD requirements in EU law and international standards on responsible business conduct

EU law cannot be interpreted in a vacuum: "Every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof (…)."[39] Therefore the **EUFLR can not be interpreted in a vacuum, but rather by considering what the interpretation of a specific legal question would mean for related laws of the same legislator**.

This underlines the need for the **EUFLR to be applied in a coherent manner with other relevant legal requirements and standards on human rights in supply chains**. As explained above under II, 1, all relevant due diligence standards call for appropriate measures and allow for prioritisation and continuous improvement and underline the need for responsible disengagement as a last resort. An understanding of the EUFLR that would not ask authorities to take into account the existence of appropriate due diligence measures but only the binary question of the existence of forced labour impacts would be incoherent with this system. It would create the perverse incentive for companies to disengage instead of addressing problems, disincentivising effective due diligence.[40] That would effectively create additional, extremely strict obligations regarding forced labour in supply chains that would create incentives against effective due diligence as required by other standards.

There are several indications, both in the EUFLR's articles and the recitals, that the **legislator intends to resolve such tensions in favour of due diligence**. Art. 1 (3) states that the EUFLR "**does not create additional due diligence obligations for economic operators other than those already provided for in Union or national law**." This expresses the intent to avoid creating yet another overlapping standard that would complications in the field of due diligence. The addition "other than(…)" can be seen as a hint that the EUFLR is intended to align with other due diligence standards that are already provided for in Union and national law. In line with this, as we show above under III 3, 4, 5 multiple articles and recitals of the EUFLR are aligned with due diligence principles. Most importantly, Art. 17 (1) a and c underline this by recalling the relevance of due diligence standards set by EU law and the due diligence standards of the UN, the ILO and the OECD for investigations under the EUFLR that could lead to product bans. Recital 9 shows that the legislator was taking into account HRDD obligations established in the EU Batteries Regulation and the EU Conflict Minerals Regulation.

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[39] CJEU, C 283/81, para 20.

[40] This connection between effectiveness and giving the opportunity to address problems is also laid out in Recital 44 of the EUFLR, which states that giving the companies the opportunity to take measures to address forced labour reinforces the effectiveness of addressing forced labour.

An interpretation that considers the need for systemic coherence of EU Law would therefore also argue for an understanding that would react to identified forced labour issues not with bans, but with appropriate due diligence and remediation. This interpretation result is reinforced when considering the proportionality principle.

7. Lack of proportionality of EUFLR investigations that do not consider the existence of appropriate due diligence

The principle of proportionality is a general principle of EU law, enshrined in Article 5(4) of the Treaty on European Union: "Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties." Recital 26 underlines this, asking that authorities "should be guided by the principle of proportionality when implementing this Regulation. Competent authorities and the Commission should ensure, in particular, that all the measures and actions carried out during the preliminary phase of the investigation and during the investigation and those set out in the decision are **suitable and necessary to achieve the desired purpose and do not impose an excessive burden** on economic operators".

Investigations under the EUFLR that only focus on the binary question of forced labour without considering the existence of appropriate due diligence measures would **fail to meet the requirements of necessity and proportionality stricto sensu**. Since another interpretation - as an obligation to consider both the existence of forced labour impacts and appropriate due diligence measures - is possible and more consistent with the principle of proportionality (see above, 1-6), this interpretation must be followed.

Union law further has to be "**necessary** in order to achieve the objectives legitimately pursued by the legislation in question, when there is a choice between **several appropriate measures recourse must be had to the least onerous**".[41] The declared goal of the EUFLR to "eradicate the use of forced labour and promote decent work and labour rights worldwide" is certainly legitimate. Forced labour risks taint a very significant number of products. These problems often have complex and structural causes and improvements can usually only be achieved gradually and over time. It could therefore already be argued that an obligation to investigate only the binary question of the existence of forced labour when considering bans would not be appropriate, as it would be a standard that cannot be reasonably met.[42] It is likely that the declared goal can be achieved in a more suitable manner if investigations consider not only the occurance of forced labour but also

[41] CJEU, C-331/88, paragraph 13.
[42] See above under II.

appropriate measures. Only that would make it possible to take potential adverse impacts duly into account. It also makes it easier to prevent incentivising immediate termination and incentivize proactive collaboration between buyers and suppliers. It is certainly less onerous, because it allows for considerations of appropriateness and proportionality that can take account of the complexities business, especially SMEs, face in implementing forced-labour free supply chains.

Some might nevertheless argue that the clear signal of zero tolerance of an approach only considering the binary question of yes or no could be more effective than the collaborative, continuous improvement framework of investigations that takes into account the existence of appropriate measures. Even if that were true, this approach would still fail the test of proportionality in stricto sensu: "the disadvantages caused must not be disproportionate to the aims pursued".[43] **The disadvantages for human rights, businesses and trade of an interpretation that focuses solely on the occurrence of forced labour in comparison with an approach also taking into account the existence of appropriate measures are significant.**[44] It would therefore be disproportionate to the aims pursued. The disadvantages for both EU businesses, their suppliers and rightsholders would be significantly less onerous under an interpretation that also takes into account the existence of appropriate measures. Imports of goods and commodities would still face the risk of being prevented from entering the EU where buyers and suppliers fail to show appropriate HRDD measures. That is a threshold which is not always easy to meet in practice. However, as termination would be a last resort, with differentiated rules allowing businesses to remain in situations involving risks if they work to improve them, business disruptions would be an exception. Where companies show they understand the prioritised risks in their supply chain and take measures to address them, the standard would be met, and import stops could be prevented even where violations occur if companies react with effective and adequate remedial measures. Importers and their suppliers could work together to improve the situation over time. Rightsholders would benefit from measures to continuously improve their situations.

Given the challenges associated with an interpretation as an obligation of results and the openness of the EUFLR to another understanding that takes into account the due diligence measures taken by companies, the necessary interpretation of the EUFLR in line with the principle of proportionality calls for an understanding that requires investigations to take account not only of the occurrence of forced labour but also of the existence of appropriate measures to address it.

[43] CJEU, C-331/88, paragraph 13.
[44] See above under II.

8. Result of the legal analysis

Investigations on potential product bans under the EUFLR should not only take into account whether forced labour was identified but also whether it is being addressed by appropriate due diligence measures.

IV. Implications for the EUFLR and Suggestions for Clarification in the Guidance

The current Guidelines issued by the European Commission indicate openness to an interpretation that requires authorities not only to investigate the existence of forced labour but also assess if appropriate due diligence measures are being taken. Only such an interpretation would allow authorities to take into account a company's demonstration of appropriate steps to address the forced labour situation and to grant it a reasonable period of time to complete such steps. However, the **current wording is insufficiently clear to provide companies with the legal certainty they need to be confident that it is worthwhile to take appropriate measures instead of disengaging when they encounter forced labour**. It does not define criteria that help companies assess when steps can be deemed "appropriate" and it gives authorities full discretion to deal with the situation, meaning that they could, based solely on the wording, even conclude that where appropriate steps are being taken, they might still impose product bans. To give companies the legal certainty they need, the clarifying changes below would be helpful (additions in bold):

> "Where the economic operator demonstrates, within the 30-day deadline, that it is taking **appropriate due diligence** ~~steps to address the forced labour situation~~ **in line with the recommendations on human rights due diligence in Chapter 6 of this guidance,** the lead competent authority ~~may decide to~~ **shall assess such steps and, where deemed appropriate,** grant the relevant economic operators a reasonable period of time to complete such steps and end the forced labour, taking into account, inter alia, the complexity of the process, the feasibility of ending the forced labour, the number of stakeholders involved, and the size and resources of the economic operators concerned"

By implementing these changes, the Guidance would give the due diligence recommendations real meaning and enable authorities to consider the nuances of individual cases appropriately. Asking if "appropriate" steps are being taken would enable

authorities to **take into account, as mandated by the EUFLR, what can be expected of a company that is an SME.**

Making the existence of "appropriate" measures a relevant criterion in the investigations would also allow authorities to really take into account the complexities business face, as required by the EUFLR. **Companies buy hundreds or thousands of different products** and must decide ex ante which products warrant more in-depth measures (prioritization). Asking companies to analyze all products in detail at the same time to avoid bans would not be proportionate. The Guidance recognises this, recommending scoping followed by an in-depth assessment of high-risk areas, further prioritization and measures to address prioritized impacts.[45] Clarifying that the existence of appropriate due diligence would be part of the standard authorities' need to assess would further enable them to deal with these complexities appropriately.

For example, it might occur that authorities investigate a substantiated concern of forced labor in the supply chain of a certain product which the company has not prioritized for in-depth measures. If appropriate due diligence is a criterion in the investigations, authorities could assess whether the investigated company had good reasons, from an **ex-ante perspective, for having prioritized other products for forced labor due diligence** up to that point because it had identified higher risks there. Such a prioritization should be considered appropriate due diligence as far as it followed the rules laid out in the EUFLR guidance on due diligence. If, however, **ex post**, it becomes clear – for example, through an NGO report or a complaint or through the investigation itself – that there is an actual forced labor case in the supply chain of the specific product, the situation changes. This occurrence shows that the likelihood of an adverse impact is now to be considered extremely high, potentially at 100%. Given that forced labor is one of the gravest human rights impacts, from this point high likelihood and high severity would make prioritization and measures necessary. As long as these are promptly and effectively implemented, this should still be considered a situation of appropriate due diligence.

If forced labour occurs and has not yet been addressed, the relevant questions for assessing the appropriateness of due diligence should therefore be: (1) Was the ex-ante deprioritization of the potential adverse impact in line with the prioritization criteria? (2) Did the company start appropriate measures ex post, given that the actual occurrence showed that the likelihood of an impact is extremely high? Not incentivizing prioritization in line with human rights criteria in this way would risks that companies prioritize measures with a focus on which product is most essential for their business operations and not where measures would create most human rights impact by addressing forced labor effectively.

[45] ***European Commission***, Guidelines on the application of Regulation (EU) 2024/3015 on prohibiting products made with forced labour on the Union market, C(2026) 4386 final, p. 59 f.