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NOTE

From:	Presidency
To:	Delegations
Subject:	Presidency Flash for the Working Party on Competitiveness and Growth on 22 February 2024 - Forced Labour

Forced Labour

22 February 2024

Dear delegations,

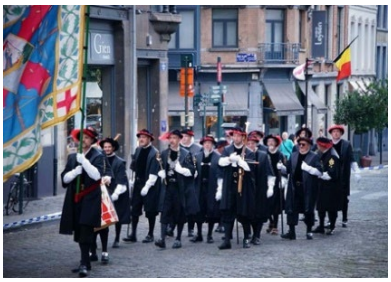
On Thursday afternoon (half-day session starting at 14.30), we will hold our final WP discussing the Parliament's mandate, ahead of the trilogue on 4 March.

The discussion of today will focus on three main issues : the decisions (chapter 4), means to address state-imposed forced labour, and the database (article 11). Whilst we always strive for transparency, it was not possible to present elaborate drafting on all issues. We have however outlined a number of principles regarding possible landing zones.

The Presidency looks forward to enriching discussions.

Best regards,

[redacted]



The Ommegang is a Brussels folk procession that currently takes place twice, on the first Wednesday of July and the preceding Friday, on the Grand-Place in Brussels.

The return to the Renaissance: the public is welcomed in the Renaissance village implanted in the Sablon where craftsmen living as in the olden days will deliver the secrets of their professions, such as the function of surgeon, barber and the work of forge and ironwork.

Annex 1

Political issues

A. Decisions

The main difference between both mandates is the centralisation of the adoption of decisions establishing the violation of the prohibition in Article 3 with the Commission via an implementing act (Council mandate) as compared to the establishment of the Commission as 28th competent authority, taking decisions on equal footing with Member States (EP mandate).

The EP expressed three concerns regarding a fully-centralised approach:

- The time required to adopt a decision, jeopardising the effectiveness and deterrent effect of the Regulation.
- The risk of the comitology procedure being hijacked for (geo)political reasons rather than decisions being fact- and product-based.
- The abandonment of a fundamental principle of the internal market: mutual recognition of decisions.

During the last Working Party, the Presidency presented a new allocation key for investigations based on the location of forced labour risks (Article 14a). As a reminder:

a) If the risks are located outside the EU, the Commission leads the investigation (§1).
b) If the risks are located within a Member State, the competent authority of that Member State leads the investigation (§2).

To ensure continuity and efficiency, the Presidency suggests aligning decision-making with the allocation of investigations, following the principle of 'who leads the investigation, takes the decision' (without any derogation).

While respecting Member States' sovereignty, this approach would address three key concerns:

- Geopolitical: the Commission takes decisions for cases outside the EU.
- Political: a Member State cannot decide on cases in another Member State.
- Technical: mutual recognition of decisions between Member States would only apply for cases within the EU, following standard internal market practices.

In this respect, the Presidency would like to recall that products reaching end users fall outside the scope of the Regulation (art. 1(2)). The definition of end users notably covers any natural or legal person to whom a product has been made available as a professional end user in the course of its industrial or professional activities (art. 2(ka)).

To address some of the EP's concerns while improving the decision-making mechanism, the Presidency proposes to amend Article 20 on decisions. A proposal for a redraft can be found in Annex 2.

The Presidency therefore proposes to :

1. Maintain to the extent possible the Council mandate's logic regarding the procedure (§1-4), including the ex ante review (§7), by adopting a neutral approach (i.e., "lead competent authority" as defined in Article 14a) regarding who takes the decision.
2. Preserve the adoption of decisions via an implementing act and a specific 'no-opinion' clause in case the Commission acts as lead competent authority, in line with the Council mandate (§4a, 5).
3. Introduce mutual recognition (§5b) and elements of review of decisions (§6, 6a, 8) in case a Member State acts as lead competent authority, stemming from the initial Commission proposal.

Q1 – Can Member States support this approach ?

Furthermore, the Presidency explores the possibility that before making a decision, a competent authority (from a Member State) should consult the Network with a proposal as to the conclusion to be drawn, ensuring ownership by all Member States (e.g., by consensus or according to the rules of procedure of the Network) and preempting issues related to the mutual recognition of decisions. An additional safeguard could be considered to prevent a decision from being hijjacked for political reasons.

Q2 – Do Member States agree with this proposal?

Finally, to address the EP's concerns about the length of the process, the Presidency explores defining a deadline within which competent authorities or the Commission shall close the investigation and take a decision.

Q3 – How much time do competent authorities need to conclude an investigation?

B. Means to address state-imposed forced labour and non-cooperation

A cornerstone of the Parliament's mandate is the dedicated mechanism to address state-imposed forced labour (SIFL). We have already outlined the broad lines of the EP's proposed mechanism in a previous flash. This list below details each point as distinct elements:

1. A specific focus on SIFL in the database (row 158c)
2. A delegated act identifying specific economic sectors in specific geographic areas at high risk of SIFL, based on the database (row 166a)
3. Guidance for economic operators on due diligence in relation to SIFL (row 166d/166h)
4. Including the possibility of SIFL as an additional criterion in the risk-based approach (row 188a)

5. The possibility for lead competent authorities to refrain from requesting information to an economic operator during the preliminary investigation where that request may pose a risk to the investigation (row 188f). This is not directly linked to SIFL in the EP mandate but also covers cases of broader non-cooperativeness from economic operators.
6. Inclusion of the possibility to conclude substantiated concern in the preliminary investigation in case of non-cooperation from economic operators (row 188h)
7. Reversal of the burden of proof where an investigation was initiated based on the SIFL delegated act: economic operators must demonstrate that a product coming from a geographic area and economic sector listed in the delegated act was *not* made with SIFL (rows 203f, 212d)
8. Maintaining the Commission's non-cooperation clause to conclude the investigation (row 212d)

Considering our discussions during Working Party meetings and the certain openness of Member States to discuss SIFL, while firmly sticking to the Council's red lines, the Presidency proposes a more granular approach to address the EP's requests.

1. Firmly oppose the use of a delegated act (point 2) and focus on the database instead.
2. Accept to create a dedicated sub-category in the database specifically for SIFL (point 1). The Presidency further proposes to outline, in the Regulation, specific criteria of what constitutes SIFL, based on the definition in art. 2(b), to help characterise the content of this sub-category. These criteria could align with the ILO's upcoming revision of its SIFL indicators. The Presidency sees this as a step towards the EP without necessarily introducing new elements beyond what is already included in the database. It would still have no legal standing and remain indicative and non-exhaustive.
3. Accept to include specific SIFL guidance for economic operators (point 3). The Presidency believes that this can only be beneficial for economic operators in this type of circumstances.
4. Accept SIFL as a criterion in the risk-based approach (point 4). This would only further specify what is already in the spirit of the Council's approach : the scale and severity of forced labour, but would be a big reassurance to the EP.
5. Accept the possibility to refrain from requesting information from economic operators during the preliminary investigation on a case-by-case basis (point 5). In the EP's position, this clause aims to avoid warning an economic operator at the beginning of the process. The Council's approach was to foresee this avoidance of warning in the investigation phase (art. 18§1 "unless it would jeopardise the investigation"). The EP argues that since economic operators would have already been contacted at the preliminary stage, they would already be aware of the investigation. Therefore, it would be more logical to refrain from requesting information at the preliminary stage rather than during the investigation. Considering that this principle is in line with the Council's mandate, the Presidency would suggest accepting this clause and supporting the EP's position on art. 18§1 (row 203b) by removing "unless it would jeopardise the investigation" from the chapeau.
6. Accept the non-cooperation clause at preliminary investigation stage (point 6): this is a sensible addition in the Presidency's opinion, as the current Council's mandate did not specify on what information the competent authority should base itself to conclude to substantiated concern if the economic operator did not respond to an information request.

7. Strongly reject the reversal of the burden of proof (point 7). The Presidency has understood that it should be upon the competent authorities to prove a violation.
8. Amend the Commission's non-cooperation clause (point 8). Parliament has outlined that the current non-cooperation clause is too weak to tackle SIFL, hence why it proposed the delegated act + reversal of burden of proof mechanism. As the Presidency is proposing to reject those two elements, the suggestion would be instead to outline more explicitly what type of situations may constitute non-cooperation.

Q4 – Can Member States support the Presidency's approach on each of the points?

Following point 8, a strengthened non-cooperation clause in art. 20 could include the following elements :

- "Any other relevant and verifiable information" should explicitly include information coming from other sources (listed under Article 14) and stakeholders (in the logic of Article 15(1) and 18(4), see PDY flash from 20/02), in particular official UN and ILO reports and reports from reputable NGOs. These should be given increased weight in the assessment of all the gathered evidence, considering that the evidence from the economic operator may be unreliable.
- "Not possible to gather information and evidence" should cover not only the impossibility to gather evidence due to an obstruction from the economic operator in the preliminary and investigation phases, but also where the obstruction comes from the local government (for field inspections).

  Additionally, the forms of non-cooperation can be explicitly mentioned to include:

  - deliberately providing incorrect or misleading information,
  - deliberately delaying the investigation,
  - refusing to submit information at one's disposal,
  - refusing to submit to inspections,
  - covering up information during inspections
  - or otherwise impeding the investigation.

Q5 – Can Member States support these principles for a revised non-cooperation clause?

C. Database

The Parliament argues that the database should be run entirely (system and content) by external experts, to avoid a potential politicisation of the content. In the Presidency's view, this approach is as valid as the Council's mandate, where the Commission should bear some of the responsibility for the content published, but which would also include more oversight from the Commission on the content published. Considering that the goal of the database is to be based on existing and openly available resources, Parliament believes that no additional responsibility is needed, as the database would simply act as a compilation tool to facilitate access to existing information. In that view, they want to

maintain their mandate and ensure that external experts are fully responsible for the database.

Q6 – Can Member States endorse the Parliament's position on this point?

Annex 2

Drafting proposals

Chapter IV

Decisions

Article 20

Decisions

1. Lead competent authorities shall assess all information and evidence gathered pursuant to Article 15, 18 and 19, and, on that basis, establish whether the products concerned have been placed or made available on the market or are being exported in violation of Article 3, within a reasonable period of time from the date they initiated the investigation pursuant to Article 18(1).

2. Notwithstanding paragraph 1, where it was not possible to gather information and evidence pursuant to Article 15(2), 18(2) or 19, lead competent authorities may establish that the products concerned have been placed or made available on the market or are being exported in violation of Article 3 on the basis of any other relevant and verifiable information.

3. Where lead competent authorities cannot establish that the products concerned have been placed or made available on the market or are being exported in violation of Article 3, they shall inform the economic operators that have been subject to the investigation. They shall also inform all other competent authorities through the information and communication system referred to in Article 8(1). Such information shall not preclude the launch of a new investigation into the same product and economic operator in case new relevant information arises.

3a. Before adopting the decision referred to in paragraph 4, lead competent authorities shall give the economic operators under investigation the opportunity to submit observations on the preliminary findings on which they intends to adopt their decisions, within a time limit set by lead competent authorities, which shall not be less

than 30 working days or, in case of perishable goods, animals and plants, not less than 5 working days. Lead competent authorities may, where appropriate, request the support of other relevant competent authorities.

4. Where lead competent authorities establish that the products concerned have been placed or made available on the market or are being exported in violation of Article 3, they shall without delay adopt a decision containing:

(a) a prohibition to place or make the products concerned available on the Union market and to export them;

(b) an order for the economic operators that have been subject to the investigation to withdraw from the Union market the products concerned that have already been placed or made available on the market and/or to remove content from an online interface referring to the products or listings of the products concerned;

(c) an order for the economic operators that have been subject to the investigation to dispose of the products concerned in accordance with Article 24.

4a. Where the Commission acts as lead competent authority, decisions referred to in paragraph 4 shall be adopted by means of implementing acts in the form of a decision. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 33(2). The Commission shall endeavour to adopt its decision pursuant to paragraph 4a within [6] months from the date it initiated the investigation pursuant to Article 18(1).

5. Lead competent authorities shall notify the final decision to all economic operators to which it is addressed and communicate it to all competent authorities, through the information and communication system referred to in Article 8(1).

5a. Decisions taken pursuant to paragraph 4 by a competent authority in one Member State shall be recognised and enforced by competent authorities in the other Member States**,** in so far as they relate to products with the same identification and from the same supply chain for which forced labour has been found.

6. Economic operators that have been affected by a decision of a Member State competent authority pursuant to this Regulation shall have access to a court to review the procedural and substantive legality of the decision.

6a. Paragraph 6 shall be without prejudice to any provision of national law which requires that administrative review procedures be exhausted prior to recourse to judicial proceedings.

7. A lead competent authority that has taken a decision pursuant to paragraph 4 may, on its own initiative or upon request by an economic operator concerned by that decision and who is able to submit new substantial information that was not brought to the attention of the lead competent authority during the investigation and included in the file referred to in paragraph 1, repeal at any moment a decision adopted pursuant to paragraph 4 for one of the following reasons:

(a) there has been a substantial change in any of the facts on which the decision was based;

(b) the decision was based on incomplete, incorrect or misleading information.

8. Decisions adopted by Member State competent authorities pursuant to this Article are without prejudice to any decisions of a judicial nature taken by national courts or tribunals of the Member States with respect to the same economic operators or products.