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The End of Conflict Minerals on the EU Market?

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The international context

Our modern day high-tech society cannot sustain itself without the constant supply of mineral raw materials. Given that reserves of some of the most important minerals, especially metals, within the EU itself are relatively scarce, the EU Member States rely heavily on the import of these materials from elsewhere to fuel their economies. Minerals hold great potential for development for resource-rich developing countries. However, their presence can also fuel armed conflicts and human rights abuses (including child labour, sexual abuse and forced resettlement), and undermine development processes, good governance and the rule of law. Breaking the nexus between conflict and the sourcing of minerals is a critical element in guaranteeing peace, sustainable development and stability in these fragile regions. If this problem is not tackled, and conflict minerals end up in consumer electronics and other products, companies and citizens worldwide can be seen as contributing to the fuelling of violence in regions where these minerals are sourced. In this context, the EU agreed on a Regulation containing binding rules for EU companies importing conflict minerals.

Several international initiatives have already been deployed to achieve this objective. The OECD promotes adherence to the [Due Diligence Guidance for Responsible Supply Chain of Minerals from Conflict-Affected Areas and High-Risk Areas](#). The United Nations Security Council adopted [Resolution 1952 \(2010\)](#), calling on the DRC and adjacent States to apply supply chain due diligence. In the United States, [section 1502 US Dodd Frank Act](#) regulates supply chain due diligence requirements for US-registered companies importing or using covered minerals from the DRC and adjacent States. A first analysis of the results of these rules concluded that 79 % of the conflict minerals reports filed by companies did not meet the minimum requirements as imposed by Dodd Frank, whereas 21 % met those standards, showing that executing due diligence along the mineral supply chain is possible.¹ Nevertheless, Global Witness concluded that “Dodd Frank section 1502 has helped to catalyse reforms in Congo, Europe and China and has encouraged industry groups to create innovative ‘conflict free’ programmes”.² The new EU Regulation as discussed here could be seen as the European equivalent of Dodd Frank section 1502, although significant differences in scope between the two exist.

With the entry into force of the Treaty of Lisbon, the EU assumed an explicit legal duty to tackle the risks associated with the sourcing of minerals from conflict-prone regions. By virtue of article 207 TFEU, the legal basis of the new Regulation, the EU is required to implement its Common

¹ Global Witness, Amnesty International, [Digging for Transparency](#), 2015, p. 15.

² Statement taken from: <https://www.globalwitness.org/en/campaigns/conflict-minerals/dodd-frank-act/>.



Commercial Policy within the context of the principles and objectives of External Action (article 21 and 22 TEU). The objectives are important guidelines for all the Union's actions on the international scene, and refer to the promotion of the rule of law, respect for human dignity, the preservation of peace, the prevention of conflicts and the strengthening of international security. Trade in minerals conducted by EU companies should never jeopardise the attainment of these objectives or contribute to violations thereof. It is in this EU Primary law context that the Union's efforts to curb the trade in minerals sourced in conflict zones or high-risk areas should be seen.

The bumpy road towards EU consensus

The EU Regulation is the final result of intense inter-institutional debate on the [Commission proposal](#),³ issued in March 2014, that ended in June 2016 through trilogue talks led by the Dutch Council presidency. The European Parliament (EP) in particular opposed the Commission and the Council on the scope and legal force of the proposed EU rule. The proposal entailed a system of voluntary self-regulation of importers of minerals in their raw form from conflict areas or areas with an enhanced risk of armed conflict. In the accompanying [impact assessment](#), the Commission concluded that this option was the preferred one in terms of effectiveness and reasonableness and that "it improves the ability of EU downstream operators to comply with existing due diligence frameworks and is expected to contribute to the corporate social responsibility objectives of the EU enterprise policy".⁴

This proposal asked the more than 300 EU traders, the 19 EU smelters/refiners and the over 100 EU manufacturers of components and semi-finished goods to "sign up" for assuming obligations under EU law.⁵ This framework was deemed far too weak by the EP, which argued that the voluntary nature of the due diligence scheme would not be sufficient to convince importers to take meaningful steps to improve their supply chain due diligence. Therefore, the EP proposed [amendments](#) that went far beyond the Commission's initial plans. For example, the EP proposed mandatory due diligence requirements for importers and "downstream" companies, i.e. the 880,000 potentially affected EU firms that use tin, tungsten, tantalum and gold in manufacturing consumer products, and obligations to provide information on the steps they take to identify and address risks in their supply chains for the minerals and metals concerned.⁶ Furthermore, the EP included obligatory third party audits of all EU smelters and refiners, financial support to micro-

³ Commission Proposal, COM(2014)111, Brussels, 5 March 2014.

⁴ Commission staff working document impact assessment, SWD(2014) 53 final, Brussels, 5 March 2014, p.64

⁵ Id., p. 36.

⁶ European Parliament Press release, [Conflict minerals: MEPs ask for mandatory certification of EU importers](#), Brussels, 20 May 2015.



businesses and small and medium-sized firms wishing to implement the obligations under the Proposal, and tougher monitoring schemes. Some of these proposals were met with strong resistance from the Council and the Commission. After several months of trilogue talks, a political understanding was reached in June 2016,⁷ and a final agreement was presented in November 2016.⁸

The regulatory framework of the EU Conflict Minerals Regulation

Obligations for Union importers

The Regulation aims to set up a unified system for supply chain due diligence in order to curtail opportunities for armed groups to trade in tin, tantalum, tungsten (the “3Ts”), their ores, and gold. Entering into force on 1 January 2021, this system should enhance transparency and certainty regarding supply of European importers and global smelters and refiners from conflict zones and areas where a risk of armed confrontation exists. Furthermore, areas included within the scope of the proposal are failed States and areas where widespread and systematic violations of international law, including human rights abuses, occur. Contrary to the Dodd Frank Act, covering only minerals sourced in the Democratic Republic of Congo and adjacent countries, the European rules will be global in reach. “Union importers” of 3Ts and gold as raw materials will have to comply with the supply chain due diligence measures set out in the Regulation,⁹ consisting of ‘management system obligations’, ‘risk management obligations’, ‘third-party audit obligations’ and ‘disclosure obligations’, schematically reflected below.

Implementation of these obligations, which are premised on the OECD Guidelines, will become mandatory for “Union importers”, importing a certain amount of the covered minerals or metals,¹⁰ thus excluding companies further downstream from the scope of the Regulation. As such, whereas the EP might have won the battle on the legal force of the Regulation (i.e. mandatory vs voluntary due diligence), it suffered a significant defeat on this particular element (i.e. upstream + downstream supply chain coverage vs. upstream supply chain coverage). As phrased by Judith Sargentini (Greens MEP), “this means that manufacturers of tablets and smartphones will not be

⁷ European Commission Press release, [EU political deal to curb trade in conflict minerals](#), Brussels, 16 June 2016.

⁸ European Commission Press release, [EU reaches landmark agreement on conflict minerals regulation](#), Strasbourg, 22 November 2016.

⁹ Including importers of their ores, concentrates, bars and rods.

¹⁰ The Regulation does not apply to importers of minerals or metals in situations where their annual import volumes do not exceed the thresholds included in Annex 1. For example, the threshold for tin ores and concentrates is set at 5,000 kg, and for tungsten and concentrates at 250,000 kg. The threshold for tantalum or niobium and ores is to be determined through a delegated act of the Commission pursuant to article 1(2)(a) and article 15(b) Regulation.



covered by the deal, a major and worrying omission”.¹¹ To compare, section 1502 Dodd-Frank requires all US listed companies for which the covered minerals are necessary to the functionality or production of a product manufactured, or contracted to be manufactured, to execute due diligence. This includes the use of components containing covered minerals, meaning that the US rule is surpassing its European counterpart in terms of legal implications in this respect. Alternatively, EU companies importing covered minerals and metals in goods or components, and which have more than 500 employees, will be encouraged to report on their plans to monitor compliance with the Regulation under the [EU’s non-financial reporting legislation](#), including their human rights policies.

Element under the Regulation	Description of obligations of the “Union importer”
Management system obligations (article 4)	(a) Adopt and communicate information to suppliers and public on supply chain policy for minerals potentially sourced in conflict-affected areas
	(b) Incorporate due diligence standards in supply chain based on OECD Due Diligence Guidance
	(c) Structure internal management systems to support supply chain due diligence
	(d) Strengthen engagement with suppliers by incorporating supply chain policy into contracts and agreements
	(e) Establish a grievance mechanisms as an early-warning-system
	(f) Operate a chain of supply chain traceability for minerals and metals, supported by documentation providing detailed information on, among others, the supplier and country of origin (for minerals), or smelter/refinery (for metals)
Risk management obligations (article 5)	(1a) Identify and assess risks in the supply chain based on the information retrieved pursuant to article 4 Regulation
	(1b) Implement a strategy to respond to the identified risks, including: <ul style="list-style-type: none"> • Reporting of findings to senior management • Adopting risk management measures consistent with OECD Due Diligence Guidance, including suspension of trade or disengagement of suppliers • Implementing the risk management plan and undertaking additional fact and risk assessments
Third-party audits (article 6)	(1) Carry out independent third-party audits, including all supply chain due diligence activities of the importer, in order to establish compliance with article 4, 5 and 7.
	(2) Importers that make available substantive evidence demonstrating that all smelters and refiners in their supply chain are compliant to the provisions of the Regulation (e.g. are listed according to article 8 Regulation), are exempted from the third-party audit obligation
Disclosure obligations (article 7)	(1) Make available the third-party audits to the competent authorities of the Member State
	(2) Communicate information gained pursuant to supply chain due diligence measures with downstream purchasers, with due regard of business confidentiality
	(3) Publicly communicate supply chain due diligence policies and practices for responsible sourcing as widely as possible

¹¹ Greens Press release, [Conflict minerals: Binding rules agreed as EU finally takes action](#), 22 November 2016.



List of responsible smelters and refiners

An important element of the Regulation is the Union list of global responsible smelters and refiners, which is to be adopted through an implementing decision of the Commission. The List will include the names and addresses of responsible smelters and refiners, i.e. those smelters and refiners covered by supply chain due diligence schemes recognised by the Commission. Whereas these facilities are generally the last stage to which the origin and chain of custody of minerals can be traced, they play an important role in the mineral value chain. The eleven EU based smelters of 3Ts and nine refiners of gold are considered “Union importers”,¹² and are thus covered by the Regulation and expected to implement the full range of measures included therein.

The 280 smelters of 3Ts and the 140 refiners of gold outside of the EU are called upon to undergo an independent third-party audit. This is, however, not a mandatory requirement. Nevertheless, the mandatory due diligence of the Union importers, as envisaged in the Regulation, implies the incorporation of measures in contracts aimed at enhancing the responsible sourcing of these facilities, and the collecting of information on smelters and refiners in the context of the establishment of a system of supply chain traceability. When, through this information, risks are identified in the supply chain of a smelter or refinery which jeopardise the adherence of the Union importer to the Regulation, the latter should act upon this risk, for example by temporarily suspending trade with the smelter/refinery or terminating the business relationship permanently.

Whether the Union importers have sufficient leverage over non-EU smelters and refiners remains to be seen. The dominant position of smelters and refiners vis-à-vis downstream companies and the lack of respect for ethical concerns and corporate social responsibility of mainly Asian, smelters and refiners, was acknowledged in the Impact Assessment. So far, implementing initiatives aimed at committing smelters and refiners to due diligence measures has proven to be a difficult endeavour. Positive exceptions can be found though, such as the Malaysian smelter engaged in the Dutch Conflict Free Tin Initiatives (see next section).

Implementation

The Member States will have to designate “responsible authorities” charged with the implementation of the Regulation. Their responsibility includes the carrying out of ex-post checks of Union importers. The Member States have to lay down rules applicable to infringements of the provisions of the Regulation, and report once a year on its implementation to the Commission.

¹² Impact Assessment, p. 21.



Already, practical examples exist which indicate that implementation of due diligence and traceability measures along the entire mineral supply chain is possible, even in the most challenging circumstances. The Dutch government has gained extensive experience in implementing due diligence schemes through its support to the “[Conflict Free Tin Initiative](#)” (CFTI).¹³ The CFTI showed that companies can source conflict free minerals from the DRC in accordance with legislation, such as the US Dodd Frank Act and the OECD Guidelines, through the use of joint industry programmes such as “[ITRI Tin Supply Chain Initiative](#)” (iTSCi) and the “[Conflict Free Smelter Program](#)” (CFSP). Among others, Fairphone and Phillips received conflict-free tin through this project.

Challenges ahead: Inclusion of more minerals?

A fundamental line of criticism raised has been the focus on only four types of minerals and their ores, even though well-documented examples exist of other materials being sourced from conflict-zones or areas where human rights are not respected. Three examples are provided here.

Cobalt

UNICEF estimated in 2014 that approximately 40,000 children work in mines across the southern regions of the Democratic Republic of Congo (DRC). Many of them are involved in cobalt mining. It is widely recognized that the involvement of children in mining constitutes one of the worst forms of child labour. Chronic exposure to dust containing cobalt can result in potentially fatal lung diseases. Furthermore, the vast majority of the labour force does not have the most basic protective equipment such as gloves, work clothes or facemasks.¹⁴ The DRC government is not capable of meaningful intervention aimed at stopping child labour and safeguarding the working conditions of artisanal miners. The EU is an important customer for the DRC, importing significant amounts of cobalt (2009: 573 tons, 2010: 520 tons, 2013: 845 tons).¹⁵ A strong argument can be formulated for the inclusion of cobalt and its ore, copper, within the scope of the Regulation.

Coal

PAX performed research on the wave of paramilitary violence that swept the mining region of the northern Colombian Cesar department between 1996 and 2006, the effects of which still resonate throughout the region. In their report, “[The Dark Side of Coal](#)”, they concluded that, through US

¹³ Information retrieved from: <http://solutions-network.org/site-cfti/>.

¹⁴ Information retrieved from: Amnesty International, “[This is what we die for: Human rights abuses in the Democratic Republic of the Congo power the global trade in cobalt](#)”, Amnesty International Ltd, London, 2016.

¹⁵ European Commission, *Report on Critical Raw Materials for the EU: Critical raw materials profiles*, 2014, p.37. Annex to: COM(2014)297, Brussels, 26 May 2014.



mining company Drummond and Prodeco, a subsidiary of Swiss-based Glencore, European energy companies, as clients of these companies, contributed indirectly to human rights violations in the Cesar department. This would constitute a valid ground for qualifying the region as a “conflict affected and high-risk area” under the Regulation. The Regulation, for now, does not include coal in its scope.

The Dutch government concluded a “[Covenant on the improvement of the coal supply chain](#)” with five energy companies aimed at improving the social and environmental conditions in coalmines. Considering the fact that both systems are premised on the OECD Guidelines, future possibilities to develop synergies between the Dutch approach and the Regulation should be investigated if the coal value chain continues to be associated with human rights violations. A unified EU-level policy towards value chain due diligence in the coal mining sector would certainly send a stronger signal to coal mining companies worldwide.

Jade

In 2014, Global Witness exposed the tight grip of military and political families on the multi-billion dollar trade in one of most precious gemstones found on Earth. Companies owned by the family of former Myanmar dictator Than Shwe and his friends benefit almost exclusively from the lucrative trade, mainly with China. Very little revenue reaches the people of Kachin State, the site of the Hpakant jade mines, or the population of Myanmar as a whole, who see their livelihoods disappearing and their landscapes being destroyed by the intensifying scramble for jade. These injustices fuel an internal armed conflict between the central government and the Kachin Independence Army, which has claimed thousands of lives and seen 100,000 people displaced since it reignited in 2011.¹⁶

Contrary to the US,¹⁷ the EU did not impose a ban on the trade in jade from Myanmar. What is more, recent [Council Conclusions](#) and a policy document on an [EU strategy vis-à-vis Myanmar](#) completely ignore the corrupt and environmentally and socially devastating nature of the jade trade as constituting one of the main challenges faced by the country. If the EU, one of the main donors to the country, wants to act upon its obligation to assist third countries in the sustainable development of their natural resources, Myanmar is a good place to start. Including jade from Myanmar - although irrelevant in terms of export to the EU - on the list of covered minerals, and

¹⁶ Information retrieved from: Global Witness, [Jade: Myanmar's Big State Secret](#), Global Witness, October 2015, p. 40.

¹⁷ See [Executive Order](#) by President Obama on 7 August 2013.



thus putting it on the radar of the EU Institutions and the Member States could boost awareness of the problem.

Other developments to watch

The Commission will review the impact on the ground and on EU companies of the Regulation in 2023, and thereafter every three years. This review may result in the adoption of additional measures, including ‘more mandatory measures in order to ensure sufficient leverage of the total EU market on the responsible global supply chain of minerals’. Is the Regulation heralding the end of the use of conflict minerals on the EU market? Considering the well-documented human rights violations associated with other minerals, it can be argued that the struggle to clean up mineral supply chains should not end with the adoption of this Regulation. Furthermore, the following additional elements will have an influence on the effectiveness and success of the Regulation and should be watched closely during the run-up to the first review.

Impact on downstream companies (not covered by the Regulation) – Whereas downstream companies have been explicitly excluded from the scope of the Regulation, (partly) based on the belief that they would voluntarily take on reporting on human rights, the extent to which they have integrated reporting on the human rights situation in their value chains should be monitored closely.

Impact on non-EU smelters and refiners – The key position of smelters and refiners in the mineral supply chain warrants a review on the extent to which the Regulation impacts on non-EU facilities, especially on those located in the Middle East and Asia. When EU leverage turns out to be insufficient, closer coordination with other actors, such as the US and China should be sought or stricter measures vis-à-vis those facilities should be considered.

Possible expansion of mandatory due diligence to other sectors – It is true that the link between human rights violations and production of minerals is often obvious, but this can be the case in other sectors as well. In April 2015, the EP called for mandatory human rights due diligence for corporations,¹⁸ and requested that the Council consider the necessity of new EU legislation ‘to create a legal obligation of due diligence for EU companies outsourcing production to third countries, including measures to secure traceability and transparency’. It remains to be seen to what extent this proposal will be picked up, although it seems that the widespread call for more

¹⁸ European Parliament, [joint motion for a resolution on the second anniversary of the Rana Plaza building collapse and progress of the Bangladesh Sustainability Compact](#), Doc. nr. 2015/2589(RSP), 28 April 2015.



transparency and better supply chain due diligence for the increasingly global supply chains of EU companies cannot be ignored.

Temporary suspension of Dodd Frank section 1502 by the Trump Administration – In February 2017, the Trump administration announced a temporary suspension of the US conflict mineral rule for two years. The unintended negative consequences such as ‘lost livelihoods’ in the DRC and upfront compliance costs for US businesses of \$3 to \$4 billion, and \$200 million annually thereafter, were cited as the main reasons behind this decision. Remarkably, the Draft Executive Order linked the efforts to curb the trade in conflict minerals to defending the national security interest of the US and acknowledged the role of humanitarian missions played therein. Therefore, the Administration pledged that ‘more effective means’, targeting specific companies known to be engaging in the trade of conflict minerals, will be considered to replace the suspended rule.¹⁹

¹⁹ Lynch, S.N., Stephenson, E., *White House plans directive targeting ‘conflict minerals’ rule*, Reuters, Washington, 8 February 2017.