

Ensuring the proper implementation of the EU Regulation on the responsible sourcing of minerals from conflict-affected and high-risk areas

The extraction, transport, and trade of minerals have been linked to conflict, corruption, and human rights abuses for decades. The minerals trade has financed armed groups, bankrolled oppressive security forces, facilitated money laundering and corruption, and allowed companies to benefit from serious human rights abuses, like child labour, land-grabbing, and forced evictions. As the world faces climate change, increasing populations and diminishing resources, global supply chains are under increased scrutiny. Whether examining their carbon footprint or links to corruption or other issues, it is clear that many of our supply chains are broken and systemic changes are needed to reform them. This is a global problem that affects us all, and more so communities in producing and trading nations like Peru, Colombia, Mexicoⁱ, Afghanistanⁱⁱ, Myanmarⁱⁱⁱ, Ghana^{iv}, the Central African Republic^v, and the Democratic Republic of the Congo^{vi}.

With the adoption of the [European Regulation](#) for the responsible sourcing of tin, tantalum, tungsten and gold (3TG) from conflict-affected and high-risk areas ('the Regulation') the European Union (EU) has taken an important step to disrupt the links between global mineral production and trading and human rights abuses, conflict and corruption.

The Regulation, which came into force in June 2017, imposes a due-diligence obligation on European importers of 3TG ores and metals sourced from conflict-affected and high-risk areas anywhere in the world.

While most provisions included in the Regulation will take effect from the 1st January 2021, steps are already being taken by the European Commission and EU Member States to prepare the ground.

This note provides a critical assessment of the state of implementation of the Regulation, and addresses recommendations to the Commission and Member States to duly fulfil their obligations under the Regulation.

Some work has already been done, and these efforts are also analysed in this note. Specifically, the Commission has already:

- › adopted a series of [accompanying measures](#) aimed at addressing broader and systemic problems throughout mineral supply chains;
- › put in place [a system](#) that allows for the recognition of due diligence schemes that help to 'facilitate' the requirements of the Regulation;
- › required Member States to adopt measures to identify national mineral and

metal importers, and then tasked them to access data relative to those importers' economic activities and due diligence checks and reporting and take appropriate actions in case of non-compliance.

Due diligence schemes and their role in facilitating adequate due diligence by their members

The Regulation entrusts a particular role to what it calls due diligence schemes. These schemes are essentially industry-led responsible sourcing initiatives which companies can apply to join, sometimes with a fee. They are envisaged by the Commission as a tool that may facilitate the fulfilment by economic operators of the requirements of parts of the Regulation.

A [delegated Regulation \(EU\) 2019/429](#) of 11 January 2019 ('the Delegated Act') supplements the main Regulation by establishing the methodology and criteria that the Commission will use to assess whether due diligence schemes can be recognised as 'facilitating' a company's compliance with the Regulation.

The Commission is clear, however, **that Union importers retain individual responsibility to comply with the due diligence obligations set out in the Regulation, and that being covered by or a member of a due diligence scheme does not automatically mean that a company is undertaking due diligence to the required standard** (Recital 5 of the Delegated Act, cross-referencing Recital 14 of the Regulation). It is critical that downstream

companies in particular are mindful of this detail: membership of a due diligence scheme by a smelter, refiner or importer that your company buys from or trades with does not provide *any* guarantee that the company has undertaken adequate supply chain due diligence. Downstream companies must therefore continue to independently verify and report on the due diligence of their suppliers and, critically, raise questions where reporting is insufficient or where it flags a supply chain risk.

Further, while the Delegated Act's methodology is based on a strong commitment to the OECD due diligence standard that underpins the Regulation^{vii} and the [Alignment Assessment methodology](#) which the OECD developed in 2018, it nevertheless fails to address pertinent questions on the effectiveness of the role of due diligence schemes in the implementation of the Regulation.

For example, in their 2018 [Pilot Alignment Assessment](#), which evaluated five of the most prominent industry due diligence schemes for metals, the OECD found that it is a particular challenge for, and indeed often not the intention of, due diligence schemes to ensure that all of their members are actually implementing the due diligence standards outlined by the relevant scheme. As such, companies cannot and should not be considered in compliance with the Regulation by virtue of their membership of a recognized scheme alone.

It is important for investors, downstream companies and future legislators to recall that the EU methodology for the recognition of due diligence schemes does

not require schemes applying for recognition to prove that they have adequate tools in place (and that they apply them) with regards to the actual implementation of due diligence standards and policies by their members (see Article 3 of the Delegated Act). To ensure that membership of due diligence schemes does not offer leeway for poor or absent supply chain due diligence checks in practice, the Commission should evaluate whether the scheme is actually undertaking what is laid out in its policies and standards when assessing applications – or make clear on the Commission’s due diligence scheme recognition page that, although the schemes’ standards meet the OECD recommendations *on paper*, there is no guarantee that member companies do so *in practice*.

Moreover, the Delegated Act’s methodology does not apply to the (re)verification of schemes that have already been recognised by the EU Commission, nor to changes to the schemes over time. This is a major gap and it increases the risk that the Commission’s so called ‘White List’ of ‘global responsible smelters and refiners’ within and outside of the EU (Article 9 of the Regulation) could turn into a whitewashing list. Future legislators, and companies using the list of recognised due diligence schemes to assist with their supply chain scrutiny, must be mindful of this weakness.

Finally, membership of a due diligence scheme that has undergone a recognition process by the Commission carries privileges: it is for instance taken into account when the Commission decides on adding smelters and refiners to the White

List. Furthermore, EU importers are exempted from auditing requirements if they source from smelters and refiners from this list (Article 6(2) of the Regulation). Given that membership of an industry scheme provides no guarantee of a company’s individual responsible sourcing efforts, these legislative mechanisms provide possible loopholes for companies that are not trading to the required standard, but are a member of a scheme. This underlines the importance of individual scrutiny by downstream companies and investors, in particular of the due diligence of any company on the White List that has been placed there by virtue of membership of an industry scheme.

Recommendations to the Commission

- › The Commission should base their assessment of due diligence schemes not only on their policies and standards, but also on the actual implementation thereof, or make clear that an assessment of implementation has not taken place.
- › The Commission should conduct iterative assessments of recognised schemes to verify compliance over time.

Disclosure of data on national importers

Competent authorities, the bodies within Member States charged with oversight of the Regulation, must ensure that a list of all Union Importers that fall under the

Regulation within their respective country is publicly available. Article 11(2) of the Regulation is based on the assumption that the public is informed of the Union importers who are subject to due diligence requirements.

However, Member States' Customs Agencies have raised objections about their ability to disclose lists of national importers, as well as data regarding their imports. To date, Customs Authorities have cited a 'confidentiality' clause in the Union Customs Code (UCC) as the reason why they will not disclose the names of Union importers. The requested information, so goes the argument, is to be considered as 'confidential by nature' and thus protected under Article 12(1) of the UCC. However, we would challenge this argument on the basis that the information about Union importers that Competent Authorities cite as confidential is already publicly available via commercial entities.^{viii} Furthermore, even if the first paragraph of Article 12(1) of the UCC stands, the second paragraph of Article 12(1) of the UCC clearly allows disclosure if there is a legal obligation or authorisation to disclose information.

For the dutiful implementation of the Regulation, it is essential therefore that the list of national importers is made publicly available by Competent Authorities.

Transparency is a cornerstone of supply chain due diligence. The existence of a public list of Union importers allows third parties to raise 'substantiated concerns' (Article 11(2) of the Regulation) over importers' effective compliance with the Regulation, which in turn may trigger ex-post checks by the Competent authorities

(Article 11 of the Regulation). Finally, transparent monitoring of the implementation of the Regulation is necessary for its credibility and effectiveness. Existing international transparency requirements within the extractive sector, such as those set out by the Extractives Industries Transparency Initiative (EITI), have created a precedent that Competent Authorities must not undermine.

Keeping names of Union importers private reduces much-needed transparency, and minimises the ability for third-party checks on the implementation of the Regulation and behaviour of importers, which are critical for the credibility of this Regulation.

Recommendations to Member States

- › Member States should ensure that Customs Agencies make the list of national importers available to Competent Authorities
- › Member States' Competent Authorities should make the list of national importers available to the public

Penalties for non-compliance

The Regulation is implemented through public enforcement. Member States are tasked with the effective and uniform implementation of the Regulation throughout the Union (Article 10 of the Regulation). Yet, their means of enforcement appear to be limited. While the Regulation bestows a solid set of

competences on Member States to assess the compliance of Union importers, the only formal instrument provided to tackle non-compliance is a notice of remedial action to be taken by a Union importer. Penalties for non-compliance in contrast are currently not included, so that Competent Authorities would have to use lengthy court processes in cases in which importers ignore a notice of remedial action. This sets an extremely low bar for accountability for companies engaged in irresponsible sourcing or that fail to or inadequately report on their supply chain efforts.

For the efficient functioning of the Regulation, immediate measures for Member States' authorities to react to compliance failures must be available. The objective of the Regulation – namely preventing the financing of human rights abuses and conflict, among others, by creating transparency and certainty regarding supply practices – can only be achieved if a critical number of importers indeed carry out due diligence.

Recommendation to Member States

- › Appropriate measures should be put in place to sanction non-compliance by national importers with the Regulation's due diligence obligations

Public Procurement

Prior to the adoption of the Regulation, the EU Commission committed to the implementation of accompanying measures leading to an integrated approach to responsible sourcing in parallel

with the Regulation. The Regulation reiterates this commitment in Recital 25. One of the main accompanying measures, in order to promote uptake of responsible sourcing by downstream companies, is to make respect for the OECD Due Diligence Guidance that underpins the Regulation a condition in public procurement contracts 'through performance clauses in the European Commission's own public procurement contracts'.^{ix} The Commission in fact committed to 'encourage EU Member States to foster the uptake of OECD Due Diligence Guidance or equivalent schemes through performance clauses of procurement contracts signed by their authorities as foreseen under the EU Public Procurement Directive. To this end, the Commission will develop recommendations and implementing guidance to Member State authorising officers.'^x To our knowledge, the EU Commission has not taken any steps so far.

Recommendations to the Commission

- › The Commission should adhere to its own commitment and make respect for the OECD Due Diligence Guidance a condition in its public procurement contracts
- › The Commission should provide guidance to Member States as to the development of appropriate national public procurement policies

Other Accompanying Measures

In 2015, the EU committed 20 million euro to a series of 'accompanying measures'

destined to support responsible mineral sourcing in conflict-affected and high-risk areas.^{xi} While many of the measures adopted so far are aimed at supporting artisanal mining and reinforcing state structures, interventions remain disconnected from each other. In addition, measures have rarely engaged relevant civil society from producing countries – running the risk of not responding to the needs of very different geographical areas. For instance, about 5.5 million euro from the accompanying measures envelope have been attributed by the Directorate General for International Cooperation and Development (DEVCO) to the European Partnership for Responsible Minerals (EPRM). These funds, destined to support artisanal mining in producing countries, have been made available by the EPRM through a call for proposals only available in English, a barrier to the participation of civil society organisations in many non-English-speaking countries.^{xii} Moreover, according to the terms set by the EPRM, consortia of organisations applying for such funds should include a company, the role of which is not made clear in the tender guidelines.^{xiii} The presence of a private actor as a condition for applying greatly reduces the chances of small, civil society organisations involved in artisanal mining.

Moreover, the accompanying measures have been used to support local traceability and certification schemes, the effectiveness and durability of which has been called into question. In particular, local traceability schemes are often expensive

and their cost is unevenly distributed along the supply chain, often falling disproportionately on the shoulders of companies and economic actors on the upstream end of the supply chain^{xiv}, who in turn often transfer them to artisanal miners.^{xv} The Commission should envision investing in alternative schemes and solutions for certification and traceability that can better distribute its costs along the supply chain.

Recommendations to the Commission

- › The Commission should communicate more clearly on what accompanying measures are taken and how they are implemented
- › Tenders facilitating the implementation of the accompanying measures should be accessible to civil society from producing countries, for instance making it possible to apply in languages other than English, such as French, Spanish and Arabic
- › The EPRM and the Commission should reconsider the inclusion of a private sector actor as a condition to participate in tenders within the scope of the accompanying measures
- › The Commission should evaluate and review the accompanying measures on the basis of their effectiveness, and should consider whether further measures are needed



ⁱ Global Initiative Against Transnational Organised Crime, 'Organized Crime and Illegally Mined Gold in Latin America', 9 April 2016, <http://globalinitiative.net/documents/organized-crime-and-illegallymined-gold-in-latin-america/>

ⁱⁱ Global Witness, 'War in the Treasury of the People: Afghanistan, lapis lazuli and the battle for mineral wealth', 5 June 2016, <https://www.globalwitness.org/en/reports/war-treasury-people-afghanistanlapis-lazuli-and-battle-mineral-wealth/>

ⁱⁱⁱ Global Witness, 'Jade: Myanmar's "Big State Secret"', 23 October 2015, <https://www.globalwitness.org/en-gb/campaigns/oil-gas-andmining/myanmarjade/>

^{iv} Human Rights Watch, 'Ghana: Child Labor Taints Gold Supply Chain', 10 June 2015, <https://www.hrw.org/news/2015/06/10/ghana-child-labor-taints-gold-supply-chain>

^v Amnesty International, 'Chains of Abuse: The Case of Diamonds from the Central African Republic and the Global Diamond Supply Chain', 30 September 2015, <https://www.amnesty.org/en/documents/afr19/2494/2015/en/> ; Global Witness, 'A Game of Stones', <https://www.globalwitness.org/en/campaigns/central-africanrepublic-car/game-of-stones/#chapter-0/section-0>

^{vi} Amnesty International, "'This Is What We Die For": Human Rights Abuses in the Democratic Republic of the Congo Power the Global Trade in Cobalt', 19 January 2016, <https://www.amnesty.org/en/documents/afr62/3183/2016/en/>; Global Witness, 'River of Gold', 5 July 2016, <https://www.globalwitness.org/en/campaigns/conflictminerals/river-of-gold-drc/>

^{vii} OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas (3rd edition), <http://www.oecd.org/corporate/mne/mining.htm>

^{viii} For example, IHS Makrit, <https://ihsmarkit.com>, Panjiva, <https://panjiva.com/> and other similar payable services

^{ix} Joint Communication, 'Responsible sourcing of minerals originating in conflict-affected and high-risk areas Towards an integrated EU approach', 5.3.2014, JOIN(2014) 8 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014JC0008&from=EN> , p 11

^x Joint Communication, 'Responsible sourcing of minerals originating in conflict-affected and high-risk areas Towards an integrated EU approach', 5.3.2014, JOIN(2014) 8 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52014JC0008&from=EN> , p 12

^{xi} See the joint letter to the European Parliament by High Representative Federica Mogherini, Trade Commissioner Cecilia Malmström and International Cooperation and Development Commissioner Neven Mimica of 18 March 2019

^{xii} European Partnership for Responsible Minerals, <https://europeanpartnership-responsibleminerals.eu/callforproposal>

^{xiii} European Partnership for Responsible Minerals, Call for Proposals, <https://europeanpartnership-responsibleminerals.eu/call-for-proposals>. "A partnership consists of a minimum of two partners, of which at least one must be a company."

^{xiv} For example, in 2016 80% of the ITRI Tin Supply Chain initiative (iTSCI) was financed by upstream members, with downstream companies contributing less than 2%. See <https://www.itsci.org/wp-content/uploads/2017/01/iTSCi-Booklet-2016-.pdf>, p. 17

^{xv} See EurAc, Accompanying Measures to the EU Regulation on Responsible Mineral Sourcing. Towards an improved governance of the artisanal mining sector in the DRC, https://www.eurac-network.org/sites/default/files/position_paper_-_eng_accompanying_measures_to_the_eu_regulation_on_responsible_mineral_sourcing_-_march_2017.pdf