

# Strategic Issues – European Union

## The EU Conflict Minerals Regulation: from inception to implementation

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### Introduction

Regulation 2017/821 of the European Parliament and of the Council of 17 May 2017, which outlines the supply chain due diligence obligations for importers of tin, tantalum and tungsten – their ores and gold originating from conflict-affected and high-risk areas (Conflict Minerals Regulation) – was published in the Official Journal on 19 May 2017.<sup>1</sup> This publication follows the adoption of the Conflict Minerals Regulation on 3 April 2017.

By way of background, the European Commission had issued the first draft regulation in 2014. The Council of the EU and the European Parliament each considered the regulation and proposed their own versions. Negotiations were undertaken to achieve a regulation text that would be acceptable to all three institutions. In June 2016, there was a significant breakthrough on the more contentious elements of the proposed text. On 22 November 2016, the trilogue negotiations were successfully concluded. The Council of the EU approved the regulation in December 2016. On 24 January 2017, the regulation was approved by the European Parliament's International Trade Committee. Finally, on 16 March 2017, the European Parliament formally approved the Conflict Minerals Regulation by a significant majority of 558:17 (with 45 abstentions), the final step before publication in the Official Journal.<sup>2</sup>

### What are conflict minerals?

The term conflict minerals most commonly refers to four elements (tin, tantalum, tungsten and gold, which are also known as 3TG). Conflict minerals are minerals mined in conditions of armed conflict and human rights abuses, which may be sold or traded by armed groups.<sup>3</sup> This has been a problem in conflict zones and, in particular, in the Democratic Republic of Congo, where they have been linked with funding killings, violence, rape and other human rights abuses.

Key participants in the industry can knowingly or unknowingly be affected by having conflict minerals within their supply chain, whether they are downstream, upstream, intermediaries or investors.<sup>4</sup> These conflict minerals

can then enter supply chains of multinationals as they are widely utilised in the automotive, electronics, aerospace and tooling industries, often ending up in consumer products such as cars, laptops, light bulbs, mobile phones and jewellery.

### How was this area initially regulated?

Various voluntary and regulatory measures were implemented to ensure the responsible sourcing of minerals and prevention of human rights abuses.<sup>5</sup> In 2011, the Organisation for Economic Co-operation and Development published guidance on due diligence for responsible supply chains of minerals from conflict-affected and high-risk areas (OECD Guidance).<sup>6</sup> This provided detailed recommendations on effective mineral purchasing decisions and practices to enable companies to respect human rights and avoid contributing to conflict. The OECD Guidance has been recognised as an international framework for due diligence and subsequent US conflict minerals regulations have referred to it. In particular, the US Dodd-Frank Act's conflict minerals law was approved in 2012 and required companies to undertake relevant due diligence and disclose the use of minerals originating in the Democratic Republic of Congo or an adjoining country. EU Member States had also separately endorsed this OECD Guidance.

A report produced by a group of 59 non-governmental organisations, published in September 2013,<sup>7</sup> called on the European Commission to 'pass a strong law to prevent European businesses fuelling conflict and human rights abuses through their purchases of natural resources, such as tin, gold and diamonds'. The NGO coalition encouraged the EU to build on existing legislation such as the US Dodd Frank Act's conflict minerals law, requiring EU-based companies to undertake the relevant supply chain checks that would meet the international due diligence standards developed by the OECD.

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1 'Trade in conflict minerals: EU Conflict Minerals Regulation published in the Official Journal' *PLC* (23 May 2017).

2 European Conflict Minerals Regulation: Details on what EU importers must do [www.conflictmineralslaw.com](http://www.conflictmineralslaw.com).

3 Guidance: Conflict Minerals (19 June 2013) [www.gov.uk/guidance/conflict-minerals](http://www.gov.uk/guidance/conflict-minerals).

4 'Trade in Conflict Minerals: risks and regulations' *PLC* (16 March 2017).

5 Proposed EU Regulation on Conflict Minerals: commentaries and media coverage <https://business-humanrights.org/en/conflict-peace/conflict-minerals/proposed-eu-regulation-on-conflict-minerals-commentaries-media-coverage>.

6 OECD 'Due diligence guidance for responsible supply chains of minerals from conflict-affected and high-risk areas' [www.oecd.org/corporate/mne/mining.htm](http://www.oecd.org/corporate/mne/mining.htm).

7 'Breaking the links between natural resources and conflict: the case for EU regulation' [www.globalwitness.org/sites/default/files/breakingthelinks%28eng%29.pdf](http://www.globalwitness.org/sites/default/files/breakingthelinks%28eng%29.pdf).

## General background to the Conflict Minerals Regulation

The EU undertook a public consultation between March and June 2013,<sup>8</sup> which was followed by further detailed consultations and an impact assessment of a possible regulation on conflict minerals. On 19 February 2014, the European Parliament's development committee voted in favour of a report,<sup>9</sup> which 'stresses that an EU regulation ... should ... create a legally binding obligation for all upstream ... and downstream companies ... to undertake supply chain due diligence to identify and mitigate the risk of conflict financing and human rights abuse'. This report was endorsed by various non-governmental organisations and civil society groups and the European Commission was urged to follow its recommendations.

On 5 March 2014, the European Commission announced that it would be 'setting up an EU system of self-certification for importers of tin, tantalum, tungsten and gold' and published its draft regulation (Draft Regulation), which was accompanied by a joint Communication on responsible sourcing of minerals originating in conflict-affected and high-risk areas.<sup>10</sup>

### Reaction to the Draft Regulation

The Draft Regulation was met with strong criticism from non-governmental organisations.<sup>11</sup> A coalition of human rights groups issued a statement flagging that 'an opt-in self-certification scheme available to a limited number of companies is likely to have a minimal impact on the way that the majority of European companies source natural resources'.<sup>12</sup>

The Draft Regulation designated 'responsible importers' voluntarily to keep their supply chains free of materials used to finance armed conflict (sourced primarily from the Democratic Republic of Congo, Angola and South Sudan) through a self-certification scheme based on global ethical sourcing guidelines. It was questioned as to how much 'bite' this would have, considering that this was essentially a voluntary opt-in scheme with no mandatory obligations.

The Draft Regulation also only covered four key minerals (tin, tantalum, tungsten and gold) within its scope. Campaigners questioned why the European Commission

overlooked the fact that other natural resources were fuelling conflict and human rights abuses.

It could be stated that the European Commission missed an opportunity to influence the behaviour of a much broader cross section of global players on the supply chain. To ensure that natural resources from conflict or high-risk areas did not enter the EU market, it was argued that the Draft Regulation should also target manufacturers and companies that import finished products in the supply chain. Finished products made in Asia, Africa or Latin America were not caught within the scope of the Draft Regulation.

The Draft Regulation was also submitted to the EU Parliament for scrutiny and it was concluded that it did not go far enough. The EU Parliament recommended:

- mandatory certification of EU smelters and refiners and
- voluntary compliance measures for importers of 3TG and downstream companies, including importers and manufacturers of components and finished products.

When this was put to the vote in May 2015, the EU Parliament voted in favour of a mandatory scheme for all stakeholders in the supply chain and not just smelters and refiners, addressing a key criticism levelled at the Draft Regulation. This started the long period of informal 'trilogue' negotiations between the EU Council, the Parliament and the European Commission. In the background of these negotiations there was an intense period of campaigning by industry insiders, stakeholders and other interested parties. Non-governmental organisations advocated for a wide mandatory regulation to be applied to the entire supply chain, whilst industry representatives argued for a more targeted and less onerous regime.<sup>13</sup>

### The Conflict Minerals Regulation: key provisions<sup>14</sup>

#### Were the criticisms of the Draft Regulation addressed?

The final form of the Conflict Minerals Regulation treads the middle point between these two conflicting views (a mandatory obligation across the whole supply chain as opposed to an opt-in scheme). The result is a mandatory obligation for companies operating in the EU that are mining, refining or importing 3TG (upstream parties) to perform due diligence on their supplies and certify that their supply chains are free from conflict minerals. This mandatory obligation will not, however, cover large downstream parties such as manufacturers, sellers or importers of finished products containing 3TG; instead, they will be encouraged to report voluntarily.<sup>15</sup>

8 Public consultation on a possible EU initiative on responsible sourcing of minerals originating from conflict-affected and high-risk areas [http://trade.ec.europa.eu/consultations/index.cfm?consul\\_id=174](http://trade.ec.europa.eu/consultations/index.cfm?consul_id=174).

9 Report on promoting development through responsible business practices, including the role of extractive industries in developing countries [www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A7-2014-0132+0+DOC+PDF+V0/EN](http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A7-2014-0132+0+DOC+PDF+V0/EN).

10 Regulation of the European Parliament and of the Council setting up a Union system for supply chain due diligence self-certification of responsible importers of tin, tantalum and tungsten, their ores and gold originating in conflict-affected and high-risk areas [http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc\\_152227.pdf](http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152227.pdf).

11 'Europe goes soft on conflict minerals, making human rights optional' (21 March 2014) [www.thenation.com/article/europe-goes-soft-conflict-minerals-making-human-rights-optional/](http://www.thenation.com/article/europe-goes-soft-conflict-minerals-making-human-rights-optional/).

12 'Proposed EU law will not keep conflict resources out of Europe, campaigners warn' (5 March 2014) [www.globalwitness.org/en/archive/proposed-eu-law-will-not-keep-conflict-resources-out-europe-campaigners-warn/](http://www.globalwitness.org/en/archive/proposed-eu-law-will-not-keep-conflict-resources-out-europe-campaigners-warn/).

13 Sustainable commodities: EU Conflict Minerals Regulation (24 March 2017) [www.reedsmith.com/en/perspectives/2017/03/sustainable-commodities-eu-conflict-minerals-regul](http://www.reedsmith.com/en/perspectives/2017/03/sustainable-commodities-eu-conflict-minerals-regul).

14 'EU Conflict Minerals Regulation finally published in the Official Journal' (19 May 2017) [www.conflictmineralslaw.com](http://www.conflictmineralslaw.com).

15 Trade in Conflict Minerals: risks and regulations (n 4).

## Who is covered?

All importers into the EU of minerals or metals containing or consisting of tin, tantalum, tungsten or gold fall within the scope of the Conflict Minerals Regulation. An importer is defined by reference to the EU Customs Code and includes any metals or minerals that are declared for free circulation in the EU.

The volume threshold has been set so that at least 95 per cent of the total imported volumes into the EU of each metal and mineral will be regulated. Importers whose annual import volumes are below a certain threshold amount are not covered – this exemption was intended to provide relief to smaller enterprises. The European Commission will monitor the gold market and EU gold imports to make sure that progress on responsible sourcing is not impeded by these low volume exemptions.

## What metals and minerals are covered?

Recycled metals are not covered by the Conflict Minerals Regulation. The following minerals and metals (and products containing them) are covered:

- tin ores and concentrates
- tungsten ores and concentrates
- gold ores and concentrates
- tungsten oxides and hydroxides
- tungsten carbides
- tantalum carbides
- gold, unwrought or in semi-manufactured forms, or in powder form
- tin, unwrought
- tin bars, rods, profiles and wires
- tin, other articles
- tungsten, powder
- tungsten, unwrought, includes bars and rods obtained simply by sintering
- tungsten wire
- tungsten bars and rods, other than those obtained simply by sintering, profiles, plates, sheets, strip and foil
- tantalum, unwrought including bars and rods, obtained simply by sintering powders
- tantalum bars and rods, other than those obtained simply by sintering, profiles, wire, plates, sheets, strip and foil.

## Obligations of EU importers

EU importers will be required to carry out the following actions:<sup>16</sup>

- adopt a supply chain policy (which must be consistent with the OECD Guidance) and communicate information about such policy to both suppliers and the wider public
- incorporate supply chain policies into contracts with suppliers

- ensure that senior management oversees supply chain due diligence and maintains records relating to internal processes designed to support it
- set out a grievance mechanism that deals with concerns in relation to the due diligence process
- gather information (evidenced by documentation) in relation to the source and nature of in scope 3TG, with additional disclosure requirements applicable to minerals from conflict-affected and high-risk areas
- assess risks in their supply chain based on available third-party reports on EU smelters and refiners and, where no such reports are available, obtain independent third-party reports as part of the supply chain due diligence
- make annual public disclosures about their supply chain due diligence.

Manufacturers, importers and sellers of finished products and components that contain 3TG will not have mandatory obligations enforced upon them, although they may be required to provide voluntary reports. There are also no obligations placed on transporters and other intermediaries.

## Locations covered

It should be noted that there is no accepted definition for 'conflict-affected and high-risk areas'. It has previously been defined as an operating environment that 'may increase the risks of enterprises being complicit in gross human rights abuses committed by other actors'. The Geneva Academy is developing criteria and indicators to identify conflict-affected areas (in line with international humanitarian law), as well as high-risk areas in specific zones within a country. Such areas may be identified by, for example, (i) the presence of an international or non-international armed conflict, (ii) widespread or serious human rights violation and/or (iii) political and social instability or repression.<sup>17</sup>

The Conflict Minerals Regulation focuses on conflict minerals from all 'conflict-affected and high-risk areas' around the world. This is in direct contrast to the US rule, which has a focus on conflict minerals from the Democratic Republic of Congo and adjoining countries only.

## Which due diligence framework applies?

It is left up to the European Commission to establish the specific supply chain due diligence schemes that will apply but it is expected that the due diligence reviews will be undertaken in accordance with the OECD Guidance, unless other frameworks are also accepted by the European Commission.

<sup>16</sup> Sustainable commodities: EU Conflict Minerals Regulation (n 13).

<sup>17</sup> Concept note for a side event at the Business and Human Rights Forum 2013 [www.ohchr.org/Documents/Issues/Business/ForumSession2/Events/3Dec.1.SideEventProposal\\_GenevaAcademy.pdf](http://www.ohchr.org/Documents/Issues/Business/ForumSession2/Events/3Dec.1.SideEventProposal_GenevaAcademy.pdf).

## Reactions to the Conflict Minerals Regulation

The European Parliament had scored a victory over the *mandatory* due diligence requirements for importers from all 'conflict-affected and high-risk areas' and not just Central Africa. However, some criticism remains over the final version. For example, smaller importers of minerals and metals (jewellers and dentists) will not be required to comply with mandatory due diligence requirements and will be required to regulate themselves. However, the volume thresholds for the exemptions appear to be relatively high (up to 100 kg of gold), potentially enabling serious mineral traders to avoid adequate regulation. EU Member States also managed to push for the inclusion of a series of import thresholds that would further decrease the number of companies required to comply – a representative for Amnesty International labelled these volume thresholds as 'dangerous loopholes'.

Furthermore, companies that bring in the same minerals but in components or finished products will not be covered, arguably leaving another loophole. It is envisaged that the three-year review clause (see 'The Conflict Minerals Regulation in the long term' below) will fill in this regulatory gap but it remains to be seen how effective this scrutiny will be.<sup>18</sup>

## Outstanding issues

A list of responsible smelters and refiners will be published by the European Commission so that companies can ascertain if any of these source their metals or minerals from conflict-affected and high-risk areas.<sup>19</sup> One of the main items also still expected from the European Commission is a non-binding handbook, which will assist companies in ascertaining what constitutes a 'conflict-affected and high-risk area'. The contents of this handbook might be surprising to many as it will flag areas that include many parts of the world from which importers source their minerals and metals. Interestingly, even having significant commercial relationships in such regions could subject non-importers to questions about their sourcing and operations.<sup>20</sup>

Furthermore, the Conflict Minerals Regulation calls for the European Commission to adopt several 'Delegated Acts', which will create implementing provisions. Under these legislative instruments, the European Commission will amend thresholds for certain concentrates and for certain tin-related and tantalum-related substances. These Delegated Acts will also set out the methodology and criteria to determine if other due diligence schemes comply with the Conflict Minerals Regulation. The European Commission is to consult with the OECD in order to develop this framework. The Conflict Free Sourcing Initiative (CFSI) is carrying out a pilot assessment to

ascertain how the industry's standards, systems and implementation align with the existing OECD Guidance. It should be noted that the CFSI's conflict minerals reporting template (CMRT) has become the due diligence information gathering tool of choice for all industries and importers within the scope of the Conflict Minerals Regulation will most likely use this tool as well.<sup>21</sup>

## Immediate next steps

The Conflict Minerals Regulation entered into force on the 20th day following its publication in the Official Journal and therefore applied from 9 July 2017 onwards. However, certain articles (specifically, the due diligence obligations) are only due to apply from 1 January 2021. In the intervening period, adherence to due diligence guidelines (including the OECD Guidance and London Bullion Market Association Responsible Gold Guidance (LBMA Guidance)) is more an issue of compliance rather than a legal requirement.<sup>22</sup>

Despite this, importers are encouraged to apply the due diligence procedures as soon as possible as there could potentially be negative financial and reputational consequences of having relationships with smelters and refiners that do not comply with the required consultations and approved third-party audit process requirements. Therefore, importers should be proactive and start managing their supply chains well in advance of the January 2021 cut-off date, as these processes can be time consuming and expensive.<sup>23</sup> Companies that fall within the scope of the Conflict Minerals Regulation will be required to use the OECD Guidance (or any other guidelines that may be approved in the future) as the framework for the supply chain due diligence procedures.<sup>24</sup>

In relation to the UK and in light of the Brexit decision, the legislation will apply to UK companies within the scope of the Conflict Minerals Regulation for at least as long as the UK is part of the EU, although the application of the legislation after this point is not certain. On 10 October 2016, the Secretary of State confirmed that the Great Repeal Act will convert existing EU law into domestic law. In the intervening period and to the extent not already done so, it would make sense for the relevant companies to start making preparations to comply with the framework.<sup>25</sup>

Regulation should consider the following preliminary actions:<sup>26</sup>

- naming internal conflict minerals team
- developing conflict minerals policy
- mapping supply chains and gather product recipes and materials content data

18 Various articles on the London mining network <http://londonminingnetwork.org/2016/11/eu-agrees-mandatory-law-on-conflict-minerals-but-exemptions-cause-concern/>.

19 'EU Conflict Minerals Regulation finally published in the Official Journal' (n 14).

20 Final EU Conflict Minerals Regulation: only the publication step remains (3 April 2017) [www.conflictmineralslaw.com](http://www.conflictmineralslaw.com).

21 *ibid.*

22 Trade in Conflict Minerals: risks and regulations (n 4).

23 EU Conflict Minerals Regulation finally published in the Official Journal (n 14).

24 Final EU Conflict Minerals Regulation: only the publication step remains (n 20).

25 Trade in Conflict Minerals: risks and regulations (n 4).

26 European Conflict Minerals Regulation: details on what EU importers must do (n 2).

- developing supplier engagement information
- monitoring the adoption of Delegated Acts by the European Commission
- reviewing the outcome of the CFSI OECD pilot assessment (results are expected in 2017)<sup>27</sup> and
- monitoring any general developments that may limit, weaken or suspend the US conflict minerals rule.

### **The Conflict Minerals Regulation in the long term**

By 30 June each year, Member States will be required to report to the European Commission on the implementation of the Conflict Minerals Regulation and specifically on notices of remedial action issued by their competent authorities, as well as on third-party audit reports.

The European Commission will also, by 1 January 2023 and every three years afterwards, review the functioning and effectiveness of the Conflict Minerals Regulation. It will take into account its impact on the ground, including the promotion and cost of responsible sourcing of the minerals from conflict-affected and high-risk areas and the impact on EU economic operators. An important additional consideration will be the accompanying measures outlined in the Joint Communications of 5 March 2014, which could determine if additional mandatory measures will be required.<sup>28</sup>

It is expected that with these monitoring measures in place the true efficacy of the Conflict Minerals Regulation can be determined and the human rights abuses at the centre of these 'conflict minerals' can be addressed, which is arguably the overarching aim of this legislation.

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27 'CFSI welcomes European Union Conflict Minerals Regulation' [www.conflictreesourcing.org/about/media-news/news/cfsi-welcomes-european-union-conflict-minerals-regulation/](http://www.conflictreesourcing.org/about/media-news/news/cfsi-welcomes-european-union-conflict-minerals-regulation/).

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28 'Sustainable commodities: EU Conflict Minerals Regulation' (n 13).