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BRIEFING

EU initiative on responsibly importing minerals from conflict-affected regions

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Abstract

The European Commission has forwarded draft regulation to the European Parliament to limit the import of 'conflict minerals'. Including tin, tantalum, tungsten and gold, conflict minerals originate in countries and regions marked by armed conflict or the risk of conflict; the exports of these 'conflict minerals' are suspected of illicitly financing the army or other military groups. The initiative proposed by the Commission aims to limit this source of financing.

This EU initiative follows a similar US law (Section 1502 of the Dodd-Frank Act) of 2010. However, unlike the mandatory approach adopted in the US, the changes proposed in the EU's draft regulation would be voluntary. Under the US law, publically listed companies that source and/or manufacture designated minerals from the Democratic Republic of Congo and the neighbouring Great Lakes region in Africa face mandatory reporting requirements. The EU draft regulation, on the other hand, attempts to encourage importers, smelters and refiners using these minerals – regardless of their origin – to behave responsibly.

The draft regulation is currently being debated in the European Parliament as well as in the Council. As co-legislators, the two institutions must reach an agreement on the final text.

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1 Introduction: Following the US example

Following the US's example, the EU is proposing legislation to limit the chances that armed groups in conflict-stricken areas profit from the sale of local, 'conflict minerals'.

Prompted by Section 1502 of the US's Dodd-Frank Act of 2010 on controlling the trade in minerals deriving from eastern Congo and the neighbouring war-torn region (called 'conflict minerals'), the European Parliament passed a resolution on 7 October 2010 on 'Failures in protection of human rights and justice in the Democratic Republic of Congo'. This resolution asked the European Commission and the Council to examine a legislative initiative along the same lines as the Dodd-Frank Act[1]. Since 2012, the Parliament has kept its eye on the issue, passing several resolutions calling for binding legislation. The Parliament has also insisted that any EU regulation foresee close cooperation with developing countries on promoting good governance in tax matters (8 March 2011, paragraph 42). Detailed suggestions for future legislation have also emerged in the Parliament's scrutiny of EU development policy (in a resolution of 5 July 2011, paragraph 60) and in the Parliament's promotion of development through responsible business practices (resolution of 26 February 2014, paragraphs 45 and 46).

The European Commission's proposal for regulation foresees a voluntary self-certification system to be adopted by importers, smelters and refiners of these minerals.

The relevant US legislation[2], passed in 2010, was complemented by a final rule on 22 August 2012 that defines the assessment and reporting requirements for companies and users of tin, tantalum, tungsten and gold from the Democratic Republic of Congo (DRC) and the neighbouring region. The US law was motivated by concerns that the illegal exploitation and trade in conflict minerals was financing armed groups in Africa, thereby perpetuating on-going conflicts and adding to human rights violations.

On 5 March 2014, the European Commission advanced a proposal for a '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' (COM (2014) 111final)[3]. In its accompanying 'Joint Communication', the Commission explained that the integrated EU approach it proposed sought to work in three principal ways: 'reducing the opportunities for armed groups to trade in tin, tantalum, tungsten and gold in conflict affected areas; improving the ability of EU operators – especially in the downstream section of the supply chain – to comply with existing due diligence frameworks; and reducing distortions in global markets for the aforesaid four minerals sourced from conflict-affected and high-risk areas as is currently the case in the Great Lakes Region[4].'

With its proposal, the European Commission hopes to curb the trade in conflict minerals. The non-profit organisation the 'Enough Project' has estimated that the sale of these minerals generates USD 185 million annually,

[1] European Parliament resolution of 7 October 2010,
[2] Dodd-Frank Act, Section 1502 on conflict minerals,
[3] European Commission, Proposal for a Regulation, 5 March 2014,
[4] European Commission, Joint Communication, 5 March 2014, page 3 (top)

which is used to finance armed groups and the army in the African countries concerned[5].

2 The EU draft regulation in more detail

The proposed EU regulation covers tin, tantalum, tungsten and gold from all conflict-affected and high-risk areas.

- Article 1 of the Regulation specifies that the purpose of the proposal is to limit opportunities for armed groups and security forces to trade in tin, tantalum and tungsten, ore and gold. This is to be accomplished by establishing a 'system for supply chain due diligence self-certification' on a voluntary basis, involving importers, smelters and refiners that source the specified minerals from conflict-affected and high-risk areas.
- Article 2 defines the minerals and metals covered by the regulation, the different mineral supply chains and their participants, the procedure of self-certification and supply chain due diligence, and also the meaning of 'conflict-affected and high-risk areas'.

  The European Commission's definition of 'conflict-affected and high-risk areas' is based on Regulation (EU) No 995/2010 of 20 October 2010, which described the obligations of operators bringing timber and timber products to the market (EUTR)[6]. (The EU legislation on timber and timber products is mandatory, unlike the proposal for conflict minerals.)
- Article 3 is addressed to importers of minerals and metals and describes the procedure that would make the importer a 'responsible importer': all that is required is 'declaring to a Member state competent authority that it adheres to the supply chain due diligence obligations set out in this Regulation'. Authorities in the Member States will be obliged to undertake *ex-post* verification of compliance.
- Article 4 spells out in detail the 'responsible importer's' management obligations in terms of transparency, standards (incorporating the OECD Due Diligence Guidance[7]), the structure of an internal management system, communication with suppliers, and documentation to establish a supply chain traceability system.

During the initial phase of application, the EU scheme would be based on incentives for responsible importers to participate. After three years, the effectiveness of the process would be reviewed.

- Article 5 obliges the 'responsible importer' to engage in risk identification within the mineral supply chain and to help prevent adverse impacts.
- Articles 6-7 oblige the 'responsible importer' to organise audits via an independent third party and disclose the results to the competent authority of the relevant Member State (annually, by 31 March).
- Articles 8-14 oblige the European Commission and the EU Member States to compile lists of responsible smelters and refiners; to designate

[5] The Enough Project, http://www.raisehopeforcongo.org/content/about/enough-project
[6] Regulation No EU 995/2010 (EUTR),
[7] OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas http://www.oecd.org/daf/inv/mne/GuidanceEdition2.pdf

one or more competent authorities in charge applying the regulation; to describe the designated competent authority's procedure of *ex post* verification of responsible importers; to document these checks and to organise cooperation between competent authorities; to designate the competent advisory committee; and to lay down the rules on infringement.

- Article 15 stipulates the Member States' reporting requirements to the Commission (by 30 June of each year). On the basis of these Member States' reports, the Commission must compile a report for the European Parliament and the Council every three years. After the first three years following the entry into force of the regulation – and every six years thereafter – the Commission will review the operations and effectiveness of the regulation, including analysing the promotion and cost of responsibly sourcing minerals from designated areas. This report is to be shared with the Parliament and the Council.

3 Comparing the EU regulation and the Dodd-Frank Act

The EU has adopted a 'carrot approach', while the US has a 'stick-approach'.

Both the US and the EU were motivated by the same aim: blocking the financing of illegal armed groups and irregular parts of the security forces by increasing the transparency of certain mineral deposits' exploitation.

Both the US and the EU target tin, tungsten, tantalum (the '3T minerals') and gold.

The US law is geographically restricted to the Republic of Congo and the neighbouring Great Lakes region.

However, while the US law is geographically restricted to the Democratic Republic of Congo and the neighbouring Great Lakes region of Africa – including Angola, Burundi, Central African Republic, Rwanda, South Soudan, Tanzania, Uganda and Zambia – the EU proposal is global in scope. The EU text covers all areas in which an armed conflict has occurred, as well as states considered fragile, post-conflict or otherwise suffering from weak governance or violations of international law. To help 'responsible importers' determine whether their sources are in conflict-affected or high-risk areas, the European Commission will establish an expert group.

The EU regulations aims to discourage companies from importing 'conflict minerals' from countries with poor governance , a history marked by conflict or violations of international law. An EU expert group will help determine these countries.

The major difference between the EU Regulation and the Dodd-Frank Act is to be found in their enforcement provisions. While the Dodd-Frank Act has made compliance with its reporting requirements mandatory, the implementation of the proposed EU regulation encourages self-certification by 'responsible importers'. In the EU, once a company has taken the decision to voluntarily obtain certification as a 'responsible importer', it has committed itself to comply with the due diligence and disclosure obligations of the EU regulation when sourcing the designated minerals. To make self-certification as 'responsible importer' attractive for EU companies, the European Commission has proposed introducing incentives for bidders in EU and Member States public procurement projects, in the form of financial support for small and medium-sized enterprises (SMEs) and visible recognition for all those participating.

The EU regulation establishes a trial period of three years following the

In the US, only publically listed companies are subject to reporting requirements, and these apply only to mineral imports from a designated African region.

entry into force of the regulation. Six years after this trial period, its effectiveness will be reviewed. Mandatory measures will not be ruled out in the future.

Within the US, the reporting requirement applies to an estimated 6 000 publically listed companies in the US and abroad. These companies must report annually to the US Security and Exchange Commission (SEC) on the basis of the US Exchange Acts as soon as they manufacture or contract to manufacture products containing a 'conflict mineral', including scrap or recycled sources from the designated countries. This effort to trace 'conflict minerals' within products' supply chains is apparently considered the principal challenge to compliance with the regulation. Among the 1 300 companies that submitted their first reports after the 2 June 2014 deadline, a majority indicated that the origin of the minerals could not be unambiguously traced.

4 Reactions by stakeholders, civil society and advocacy groups in the US and the EU

While non-governmental organisations and other advocacy groups have generally welcomed mandatory character of the US law, the US business sector – which has had to comply with the reporting requirements – has launched complaints.

In the US, the business sector – represented by the US Chamber of Commerce and the National Association of Manufacturers (NAM) – filed a lawsuit on 19 October 2012 against the SEC asking that the disclosure requirements for the 'conflict mineral' rule be modified or omitted (in whole or in part). While emphasising that the sector fully supported responsibly sourcing its minerals and had no intention of perpetuating armed conflict or human rights abuses, businesses objected that the reporting requirement to trace the content of minerals throughout the value chain was too complicated and burdensome[8].

Dodd-Frank Act Section 1502 required that the first reports be filed by the end of March 2014. Field research by the 'Enough Project' published in June 2014 concluded that the law's reporting requirement had already yielded positive effects[9]. The fact that minerals sourced from eastern DR Congo were subject to the reporting requirement had meant that those minerals not certified as 'conflict-free' had become less expensive – 30 to 60 % less than certified minerals – which meant that the revenues of the armed groups trading in conflict minerals had been reduced. The survey also revealed that electronic companies have sourced more minerals from DR Congo, which has developed a validation process to evaluate mines as conflict-free or not. Of DR Congo's 155 mines, 112 have apparently passed the test. Finally, the Enough Project's survey named other positive side-effects of the Dodd-Frank Act, including a third-party conflict-free audit system, a conflict-free smelter programme and the engagement of multilateral organisations such as the Organisation of Economic Cooperation and Development (OECD) and the United Nations.

[8] http://business-humanrights.org/en/documents/company-responses-re-lawsuit-against-sec-over-final-rule-accompanying-section-1502-of-dodd-frank-act

[9] enough Project, The Impact of Dodd-Frank and Conflict Minerals Reforms on Eastern Congo's Conflict, June 2014

The European Commission hopes to offer sufficient incentives for European importers, smelters and refiners to comply with the EU reporting requirements and complete the voluntary process of self-certification.

The European Commission's assessment of the US's mandatory approach (which is, again, restricted to the African Great Lake Region) comes to a quite different conclusion. The EU's opinion is that the Dodd-Frank Act has encouraged companies to divert their mining investments away from the region and towards other countries not affected by conflict, rather than undergo the due diligence reporting process. This evaluation has been supported by the US's information technology industry, which has spoken of a *de facto* embargo on minerals from DR Congo and the neighbouring region. Some smelters' clients have reportedly demanded 'Congo-free' – rather than conflict-free – minerals. This unintended negative consequence, coupled with the steep fall in prices for uncertified minerals, has had devastating effects on impoverished artisanal miners[10]. US industry spokespeople have also suggested that by focussing on the business sector, the law has closed its eyes to the – very often ambiguous – role of governments in these African countries.

While the EU regulation is not yet ready, critics have already argued in favour of a much stricter European system than is in the proposal.

While the European Commission seems convinced that its voluntary approach would be preferable to the US's approach, European civil society groups, NGOs and even a group of Catholic leaders throughout the world (CIDSE)[11] along with a group of investors from the private sector[12] have expressed concerns that the EU proposal will not help eliminate conflict minerals sourced in extreme conditions of exploitation, violence and modern slavery. Critics have argued that the EU proposal should be made mandatory, both to elicit a more certain impact and to ensure harmony between the EU and the US rules for sourcing conflict minerals. Others have labelled the proposal as generally weak, as it does not target finished products – such as mobile phones – that contain the minerals in question.

The European business sector welcomes the voluntary approach.

A public consultation[13] conducted by the European Commission has revealed that European businesses support the effort to curtail the role of raw materials in financing armed groups and elements of the security forces through trade in certain minerals. The sector generally welcomes the European Commission's voluntary approach, and believes that it will increase transparency for the sourcing of the minerals in question. Focusing on importers and smelters, businesses suggest, will be less burdensome than adopting a due diligence procedure that applies to the entire supply chain. Experiences in the US have shown respondents suggest, that supply chains are far too complex. The consultation yielded further recommendations: minerals sourced from metals exchanges' storehouses should be excluded from the scope of application; the definition of conflict areas should be narrowed, unambiguous rules for *ex post* checks at Member State level should be defined; management's risk obligations – such as the compulsory establishment of multi-stakeholder dialogues – should be

[10] Information Technology Industry Council, Hearing on 'The Unintended Consequences of Dodd-Frank's Conflict Minerals Provision', 21 May 2013,
[11] CIDSE Catholic leaders' statement on conflict minerals, 9 October 2014,
[12] Eurosif, Investor Statement on EU Proposed Conflict Mineral Regulation,
[13] Report on Public Consultation on A possible EU initiative on responsible sourcing of minerals originating from conflict-affected and high-risk areas, July 2013,

reduced; disclosure obligations should not be excessive; and the list of responsible smelters and refineries should be extended to include outside EU territory.

Expert groups are working on the list of minerals and geographic scope of the regulation.

The European Commission has set up two expert groups, one to define the 'List of minerals and metals within the scope of the Regulation classified under the Combined Nomenclature' (ANNEX I) and another to clarify the meaning of conflict and high-risk areas (Article 2, (e)). The European Commission has also announced that it will develop guidelines to facilitate the implementation of the regulation.

At the Council level, the European Commission presented its proposal to the Member States on 5 March 2014. Since April 2014, the Council's Working Party on Trade Questions (WPTQ) has discussed the draft regulation. According to Council representatives, it is presently too early to determine when the Council will react officially. Given that the Commission's proposal remains undefined in certain important ways– including the definitions to be provided by the two expert groups (*see above*) and the designation of the Member States' 'competent authorities' to oversee implementation – discussions in the Council are likely to continue for quite some time.

5 The situation in the European Parliament

Because the draft regulation concerns the EU's common commercial policy, the European Parliament and the Council are co-legislators and will have to reach an agreement jointly on the final text of the legislation.

The draft regulation is legally based on Article 207 Treaty on the Functioning of the European Union (TFEU), relating to the EU's common commercial policy. Article 294 TFEU – ordinary legislative procedure – will therefore apply. The European Parliament's Committee on International Trade (INTA) will be the lead committee. The Committee on Development (DEVE) and the Committee on Foreign Affairs (AFET) have indicated that they may provide opinions on the draft before the INTA Committee's final vote, currently foreseen for March 2014.

Discussions in the INTA Committee are scheduled to begin with a public hearing on 4 December 2014. As co-legislator, the Parliament is likely to scrutinise, *inter alia*, the type of minerals covered by the draft regulation, its geographical scope (definition of conflict-affected and high-risk areas), the type of businesses addressed and the – already contentious – question of whether the regime should be mandatory or voluntary.

Ultimately, the Parliament must come to an agreement on the final text of the legislation with the Council, its co-legislator. Several readings may be necessary for this to happen.