

Technical note on the EU Commission proposal, and on the European Parliament amendments of 20 May 2015, 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.

(Brussels, 5.3.2014 COM(2014) 111final 2014/0059 (COD))

The EU Commission Proposal

The proposal aims to reduce the financing of armed groups and security forces through mineral proceeds in **conflict-affected and high-risk areas** by encouraging EU operators importing minerals and metals to comply with a self-certification mechanism.

The European Union has been engaged in searching ways of improving **supply chain transparency** since 2010 with EP Resolution¹ calling for the EU to legislate along the lines of US legislation and through two Communications in 2011 and 2012².

After considering six policy options³, the Commission tables a proposal for *Regulation establishing obligations under ‘EU Responsible Importer’ certification based on the OECD Due Diligence Guidance – Voluntary*. The proposal is based on a due diligence framework according to which EU importers, choosing self-certification, are constraint to integrate all elements of the OECD Guidance in their management system by:

- i. maintaining a system of controls and transparency over the mineral supply chain, which includes inter alia the mine of mineral origin and the smelter/refiner;
- ii. identifying and assessing risks in the supply chain against the OECD model supply chain policy;
- iii. designing and implementing a strategy to respond to identified risks;
- iv. obtaining independent third-party audit assurance of supply chain due diligence of the EU importer; and
- v. reporting publicly on supply chain due diligence.

The proposal includes more specifically:

- a) Specific **definitions** as for instance, regarding *minerals, metals, mineral supply chain, conflict-affected and high-risk areas, importer, responsible importer, self-certification, grievance mechanism, model supply chain policy, supply chain due diligence, responsible smelters or refiners, Member State competent authorities, etc.* (article 2)
- b) Possibility for importer of minerals or metals listed by the Regulation to self-certify as **responsible importer** by adhering to the supply chain due diligence obligations (set out in the Regulation) (article 3).

¹ Correctly, in the European Parliament’s amendments of 20 May 2015 (Recital 7) it is specified that there have been passed **four** EP resolutions calling the Union to legislate along the lines of the US ‘conflict minerals’ law, namely: resolutions of 7 October 2010, of 8 March 2011, of 5 July 2011 and of 26 February 2014.

² Respectively, *Commodity markets and raw materials*, COM(2011) 25 final and *Trade, growth and development*, COM(2012) 22 final.

³ EU Commission 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, Brussels, 5.3.2014 COM (2014) 111 final 2014/0059(COD), pp. 3-5.

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- c) Responsible importer obligations on, respectively: ‘Management system’, ‘Risk management’, ‘Third party audit’, and ‘Disclosure’⁴ (articles 4, 5, 6 and 7).
- d) **Ex-post checks** to be carry out by Member State competent authorities to ensure whether self-certified responsible importer comply with the obligations set out in Articles 4, 5, 6, and 7. Article 10(3) provides examples of the aforementioned checks.
- e) **Cooperation between the competent authorities** concerning the sharing and exchange of information. Article 12(3) settles the terms of this cooperation according to the legal measures regarding *data protection* and *disclosure of confidential information*⁵.
- f) Committee to assist the Commission work (article13). This committee should be a committee within the meaning of the Regulation (EU) No 182/2011⁶.
- g) **Report and review**. Firstly, on annually basis (by 30 June of each year at the latest), Member States are required to submit a report to the Commission on the implementation of the Regulation. Secondly, every three years, the Commission shall draft a report for the European Parliament and the Council. Finally, three years after the entry into force of this Regulation and every six years thereafter, the Commission shall review the functioning and effectiveness of this Regulation and further draw up a **review report** that will be submitted to the EP and to the Council. (article 15)
- h) Annexes I, II, and III provide, respectively:
 - i. The list of minerals and metals within the scope of the Regulation classified under the Combined Nomenclature;
 - ii. The list of responsible smelters and refiners' template referred to in Article 8;
 - iii. The list of Member State competent authorities template referred to in Article 9.

The proposal envisages also a “Legislative Financial Statement” including:

- The framework of the proposal initiative (e.g. title, nature, objective(s) of the proposal as well as the duration and financial impact);
- The management measures;
- The estimated financial impact of the proposal/initiative.

⁴ Peculiarly, Art. 7 requires responsible importer to annually (by 31 March of each year at the latest) provide specific information to MS competent authority as well as to publicly draft a report on the basis of its supply chain due diligence policies and practises for responsible sourcing.

⁵ Precisely, Directive 95/46/EC and Regulation (EC) No 45/2001 on data protection and the provisions of the Council Regulation (EEC) No 2913/92 relating to the disclosure of confidential information.

⁶ Regulation (EU) No 182/2011 of The European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission’s exercise of implementing powers.

The European Parliament amendments

On 20 May 2015, the European Parliament (EP) adopted the amendments on the aforementioned proposal.

First of all, the EP requires all Union importers to comply with the obligations settled in the Regulation and in line with the due diligence framework of reference.

More specifically:

- a) The title resulted modified as follows: ***Union system for self-certification of importers of certain minerals and metals originating in conflict-affected and high-risk areas ***I***
- b) In the Preamble:
 - a. Recitals 1a, 5a, 9a, 11a and 11b, 12a, 13a and 13b, 15a and 15b, and 16a have been inserted in order to, respectively:
 - i. Focus on Human Right abuses;
 - ii. Highlight the purpose of the Regulation as to ‘*eliminating* the financing of armed groups by means of controlling trade of minerals from conflict regions’;
 - iii. Stress the need to harmonise the provisions of the Regulation with the *flexible and progressive* nature of due diligence processes;
 - iv. Take into account the Directive 2014/95/EU on the disclosure of information⁷ as well as to recognise the existing ‘industry schemes’ aimed at breaking the link between conflict and the sourcing of tin, tantalum, tungsten and gold;
 - v. Envisage the creation of the ‘European certification of responsibility’;
 - vi. Fix a transitional period of two years for making provision in order to allow the Commission to set up a ‘third-party audit system’. This latter has also to regularly review its financial assistance and political commitments -especially in the Great Lake Region;
 - vii. Settle ‘accompanying measures’ aimed at promoting a global, coherent and comprehensive approach is taken to promote responsible sourcing from conflict affected and high-risk areas.
 - b. Recital 2 has been replaced by emphasising the aim of the Regulation as to **prevent** the financing of armed group and not just to **minimise** it.
 - c. Recital 13 has been amended by inserting ‘recycled metals’.
 - d. Recital 16 has been modified by changing the timing of the review mechanism, as follows: “Two years after the date of application of this Regulation and every three years thereafter”.
- c) Article 1 is amended in order to broaden the scope of the regulation. Not only the Regulation sets up a Union system for supply chain due diligence **certification** (instead of a **self-certification**), but also it requires to comply with obligations to *all*

⁷ Directive 2014/95/EU of the European Parliament and of the Council requires companies with more than 500 employees to disclose information on a number of policies including human rights, anti-corruption and supply chain due diligence

*Union importers*⁸ and no longer just to those *who choose to be self-certified as responsible importers*. Art. 1 paragraphs 2a, 2b, 2c, and 2d are inserted in the interest of *excluding* the ‘recycled metals’ from the scope of the Regulation, highlighting the commitment to ‘prevent unintended distortion of the market’, and taking into account the position of SME.

- d) In Article 2, points *b a*, *q a*, and *q b* are added in order to furnish definitions of ‘recycled metals’, ‘industry scheme’, and ‘armed groups and security forces’; points *h* and *i*, concerning the ‘responsible importer’ and ‘self-certification’ definitions, have been deleted; and points *e* and *g* have been replaced.
- e) Article 7a and 7b are inserted, respectively, with a view of defining the Commission’s procedure regarding the ‘List of responsible importers’ and setting the ‘Due diligence obligations applicable to smelters and refiners’.
- f) Article 8 is entirely modified. Particularly, *paragraph 2* specifies that the list of responsible smelters and refiners have to take into account ‘the existing equivalent industry, governmental or other due diligence schemes covering the minerals and metals within the scope of this Regulation’; and *paragraph 4* adds the requirement for the Commission to ‘publish, including in internet’ the information included in the list in a timely manner.
- g) In Article 10, paragraph 1 removes the word ‘self-certified’ and paragraph 2 replaces the word ‘may’ with ‘shall’ in order to emphasize the obligation to conduct checks when a competent authority is in possession of relevant information.
- h) Article 12a is inserted by reason of introducing a handbook prepared by the Commission containing ‘non-binding guidelines’ for companies, ‘explaining how best to apply the criteria for those areas that may fail within the scope of this Regulation’.
- i) In Article 13, paragraph 2 - subparagraph 2 is deleted.
- j) Article 15a is added in order to establish ‘accompanying measures’ aimed at enhancing the effectiveness of the Regulation.
- k) In Annex II, the Column Ca is inserted concerning the ‘Type of mineral’.

⁸ Accurately, « all Union importers who source minerals and metals falling within the scope of this Regulation, in accordance with the OECD Due Diligence Guidance » - Art. 1(2).

Comparing the EP and the COM proposals

The following matrix is provided in order to better identify the focal points of divergence between the Commission’s proposal and the amendments adopted by the European Parliament.

	COMMISSION’S PROPOSAL	EP’S AMENDEMENTS
Purpose	Not emphasized.	This Regulation is one of the ways of <i>eliminating</i> the financing of armed groups by means of controlling trade of minerals from conflict regions.
Certification system	Self-certification.	“European certification of responsibility”.
Downstream companies	Not specified.	They shall take all reasonable steps to identify and address any risks arising in their supply chains for minerals and metals coming within the scope of the Regulation ⁹ .
Verification by third-parties	This possibility was not envisaged.	Certified responsible importers of smelted and refined metals shall be exempted from carrying out independent third-party audits provided they submit substantive evidence that all smelters and refiners in their supply chain conform to the provisions of this Regulation.
List of responsible importers	<ul style="list-style-type: none"> - Not contemplated - The Commission shall update the information included in the list in a timely manner. 	<ul style="list-style-type: none"> - Commission shall adopt and make publicly available a decision listing the names and addresses of responsible importers of minerals and metals within the scope of this Regulation. - It must update and <i>publish, including on the internet</i>, the information included in the list in a timely manner.

⁹ In this connection, they should be required to provide information on the due diligence practices they employ for responsible supply chains. The exercise of due diligence must be tailored to the activities of the undertaking in question, its size and its position in the supply chain. The Commission may provide further guidelines on the obligations to be met by undertakings, depending on their position in the supply chain, to ensure that the system involves a flexible procedure that takes into account the position of SMEs.

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<p>Due diligence obligations applicable to smelters and refiners</p>	<p>Smelters and refiners were not subjects of obligations.</p>	<p>Smelters and refiners established in the Union which process and import minerals and concentrates thereof would have an <i>obligation</i> to apply the Union system for supply chain due diligence or a due diligence system recognised as equivalent by the Commission.</p> <p>In case of failure to comply:</p> <ul style="list-style-type: none"> - corrective measures; - penalties by MS competent authorities (persistent failure)
<p>Transition period</p>	<p>Not inserted.</p>	<p>Provision should be made for a two-year transitional period to allow the Commission to set up a third-party audit system and for responsible importers to become familiar with their obligations under this Regulation.</p>
<p>Accompanying measures</p>	<p>Not included.</p>	<p>They were included in order to enhance the effectiveness of the Regulation.</p>
<p>Strengthened review clause</p>	<p>No later than three years after entering into force and every six years thereafter.</p>	<p>Two years after the date of application of this Regulation and every three years thereafter.</p>