



## AFRICA POLICY BRIEF

### Leaving the beaten track? The EU regulation on conflict minerals

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Since the end of the 1990s, natural resources have been the focus point of policymakers, academics, journalists, NGO activists and other observers trying to find a solution to the enduring armed conflict in Africa's Great Lakes region. The illegal exploitation of mineral resources such as gold, diamonds, tin, tantalum and tungsten has been widely considered as one of the principle causes of the ongoing violence in the eastern part of the Democratic Republic of Congo (DRC). State and non-state armed groups have been accused of using the revenues from the trade in 'conflict minerals' to enrich themselves and to finance their war efforts. In order to break the link between mining and conflict, promote transparency in the Congolese artisanal mining sector, and encourage increased due diligence efforts on the part of international companies buying Congolese minerals, a wide range of initiatives have been undertaken, both at the international and the Congolese national level.

#### INTRODUCTION

This briefing describes how the EU regulation on conflict minerals has come into existence, and in what respects it distinguishes itself from similar, earlier legislation in the United States. It argues that the European conflict minerals law, which will come into force in 2021, is especially important from a symbolic point of view. The law signals a commitment at the European level to keep the conflict minerals issue on the policy agenda and to play an active role in promoting responsible business conduct in conflict-affected areas. From a practical point of view, however, it is doubtful whether the law will actually have a big impact on the existing situation as it only targets a relatively small group of European companies. Moreover, although efforts have been made to avoid some of the shortcomings of Dodd–Frank 1502 as well as to improve the general circumstances in and around the mines, there is still a lot more that can be done in this regard. The text is divided into three sections. The first section explains when and why European policymakers decided that it was time to come up with a continental counterpart to the American conflict minerals law; the second section describes how the debate among European legislators has been centred around the choice between a voluntary and a compulsory system. The third section contains some reflections on future developments. The

briefing mainly draws on desk-based research, supplemented with data collected through interviews with European Members of Parliament, NGO activists, business associations and industry representatives between 2014 and 2017.

### CONFLICT MINERALS ON THE EUROPEAN AGENDA

The EU is a big importer of sensitive material. In 2014, the EU was estimated to account for 25% of the global trade in the 3Ts (tin, tantalum and tungsten), and 15 per cent of the global trade in gold.<sup>ii</sup> These minerals are used in different branches of the EU economy, especially in the automotive, electronics, aerospace, packaging, construction, lighting, industrial machinery, and tooling industries, as well as in jewellery.<sup>iii</sup> Surprisingly, however, despite the strategic importance of 3TG minerals (tin, tantalum, tungsten and gold) for the European economy, it has taken the EU a relatively long time to take genuinely active and concrete measures in the struggle against conflict minerals. Two factors have pushed European legislators to take a more active stance on the issue: first, the legislative discussion on conflict minerals in the United States, and, second, the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas.<sup>iv</sup> In July 2010, President Obama signed into law the Dodd–Frank Wall Street Reform and Consumer Protection Act. Section 1502 of this law, which was originally intended to transform the US financial regulatory system after the global financial crisis, obliges stock-listed companies in the United States to annually report to the Securities and Exchange Commission on whether or not they are using conflict minerals in their products. Furthermore, the law also forces these companies to explain the measures they have taken to prevent their business activities from contributing to the financing of

conflict in Africa’s Great Lakes Region. The introduction of conflict minerals legislation in the United States had a lot to do with the campaigning and lobbying efforts of the NGO community. Organisations like the US NGO the Enough Project, which was founded by the influential human rights activist John Prendergast and which enjoys the support of Hollywood celebrities like Matt Damon, Ben Affleck and George Clooney, and the British NGO Global Witness, which played a leading role in the fight against conflict diamonds at the end of the 1990s, managed to convince American legislators of the need to take responsibility in breaking the link between natural resource extraction and human rights abuses.

The OECD Due Diligence Guidance has acquired the status of being the most important international standard for responsible business conduct in areas characterised by weak governance and conflict. This can be explained by the fact that the OECD has been working on the issue of responsible business conduct since the 1970s and is therefore seen as the most authoritative voice in the debate. The Guidance, the first edition of which was published in 2011, aims to ‘help companies respect human rights and avoid contributing to conflict through their mineral sourcing practices’. The document was developed through multi-stakeholder negotiations with representatives of OECD member states, the 11 countries of the International Conference on the Great Lakes region, industry, civil society, and the UN Panel of Experts on the DRC, among others. Its attractiveness lies in the fact that it offers companies a very practical five-step approach to identifying actual and potential risks in their supply chains.

Between 27 March and 26 June 2013, the European Commission’s Directorate-General

for Trade launched a public consultation round with the aim of getting input from all stakeholders on potential EU conflict minerals legislation. In practice, most of the people taking part in the consultation belonged to either the business sector (73.2% of all respondents) or to the NGO community (11.1%).<sup>v</sup> While the different groups of participants obviously disagreed on several points (and especially on whether or not the EU should opt for a compulsory or a voluntary system, see below), there appeared to be a widespread recognition of the need to avoid some of the shortcomings of the Dodd–Frank Act. While respondents from the private sector wanted the EU to give political and financial support to ongoing mineral traceability and certification and to steer clear of overly burdensome and costly reporting and auditing procedures, respondents from the NGO community highlighted the need to privilege a risk-mitigation approach over an outcome-based approach (where the only thing that matters is the 'conflict-free' status of the minerals), to pay attention to the possible impact of the new legislation on mining communities, and to invest in capacity-building at the local level in order to ensure a proper implementation of traceability mechanisms.<sup>vi</sup>

### **THE CHOICE BETWEEN A VOLUNTARY AND A COMPULSORY SYSTEM**

Following up on the results from the public consultation round, Catherine Ashton, the EU High Representative for Foreign Affairs and Security Policy, and Karel De Gucht, the EU Trade Commissioner, made a joint communication on 5 March 2014 on the launch of an integrated EU approach with regard to the responsible sourcing of minerals from conflict zones. Ashton and De Gucht introduced a draft regulation and a set of accompanying measures. The draft regulation essentially consisted of a system of self-certification for European importers of 3TG. The idea was to make the

supply chain more transparent by publishing a list of EU and global 'responsible smelters and refiners' on an annual basis.<sup>vii</sup>

The position of the European Commission was to address the issue through a voluntary approach. Instead of forcing EU companies to comply, like the US government had done with Dodd–Frank 1502, the Commission wanted to make it attractive for companies to behave responsibly by offering them different types of rewards, including incentives for bidders in public procurement projects of the EU and its Member States, financial support for small- and medium-sized enterprises, and visible recognition for all participants in the programme.<sup>viii</sup> The Commission proposed to focus on the most important importers of raw materials at the EU level and on the metal smelters and gold refineries, because the latter constitute 'choke points' in the supply chain: they are the last point at which the origin of the minerals can still effectively be traced. Under the voluntary system proposed by the Commission, companies would be invited to accept voluntary audits of their supply chains with a view to receiving certification that their activities did not fund any violence. Unlike the Dodd–Frank Act, which was only focused on cleaning up the mineral trade in Africa's Great Lakes region, the geographical scope of the European system (an 'opt-in self-certification system') would be much broader, seeking to promote due diligence across the globe in the 3TG mineral trade.<sup>ix</sup>

Somewhat surprisingly, however, on 20 May 2015, the European Parliament voted in favour of far-reaching amendments to the proposal of the Commission, demanding mandatory due diligence requirements for both importers of raw materials and products containing those minerals. In doing so, the Parliament overturned the Commission's proposal and highlighted its commitment to the spirit of the OECD Due

Diligence Guidance, which is ‘intended to provide a common reference for all actors throughout the entire mineral supply chain’.<sup>x</sup> The strongest advocates of a mandatory system for all EU importers, and for a compulsory system of independent third-party audits of the due diligence practices of EU-based refiners and smelters (instead of the system of self-certification as proposed by the Commission) were Members of the European Parliament (MEPs) belonging to left-wing groups in the European Parliament: the Socialists and Democrats Group, the Green/European Free Alliance Group and the European United Left/Nordic Green Left Group. Their main argument was that a voluntary system would be ineffective, because, in their view, most companies do not check their suppliers and fail to publish information on their due diligence practices, unless they are legally obliged to do so – a point that is also supported by research.<sup>xi</sup> For their part, MEPs at the conservative end of the political spectrum, such as most of those belonging to the European Conservatives and Reformists Group and to the European People’s Party Group, were dissatisfied with the results of the vote, because they feared that mandatory legislation covering the entire supply chain was ‘unrealistic’ (potentially affecting 880,000 European companies using 3TG in their products) and also because they thought it would probably have the same negative side effects as those observed in the case of Dodd–Frank 1502.<sup>xii</sup>

The unexpected result of the vote in the European Parliament left the Dutch presidency, which began on 1 January 2016, with the difficult task of finding a compromise on the EU mineral regulation. This was very challenging because the majority position in the European Council was in many respects close to that in the European Commission. Only a handful of Member States were prepared to go

beyond a purely voluntary approach. Therefore, on 1 February 2016, a series of ‘trilogues’ were initiated: informal three-way talks between representatives of the Commission, the Parliament and the Council behind closed doors.<sup>xiii</sup> After four of these trilogues, the Dutch presidency was able to reach a political agreement about the framework for the EU mineral regulation. The main points of this agreement are the following:<sup>xiv</sup>

- ✓ Importers of 3TG minerals and metals originating from conflict and high-risk areas need to apply due diligence, although there will be an exemption for importers of small volumes
- ✓ Importers of 3TG in the form of semi-processed or finished products are not subject to these due diligence requirements
- ✓ The obligations in terms of due diligence will be based on the OECD due diligence guidance
- ✓ Existing and future initiatives that meet the requirements of the EU regulation will be recognised
- ✓ External experts will be tasked with the composition of an indicative list of conflict and high-risk areas that will be updated on a regular basis
- ✓ The functioning and the effectiveness of the regulation will be evaluated by the Commission. The evaluation report will assess, among other things, to what extent downstream companies such as electronics companies and car producers have applied due diligence on a voluntary basis. If it turns out that the collective efforts of European companies fail to have a sufficient influence on the circumstances in conflict and high-risk areas, the Commission can decide to develop additional legislation

There will be a transition period giving companies and authorities the necessary time to implement the new regulations

On 16 March 2017, the text of the EU mineral regulation was approved during the plenary session of the European Parliament. The strong discrepancy between the system demanded by the European Parliament and the eventual outcome of the trilogues under the Dutch presidency can be mainly attributed to the fact that the Council and the Commission – based on their positions – were not inclined to support a mandatory system that included all EU importers.<sup>xv</sup>

### **PERSPECTIVES FOR THE FUTURE**

The news about the approval of the EU mineral regulation has been overshadowed by rumours about an upcoming executive order from President Trump that will supposedly suspend Dodd–Frank 1502 for a period of two years. This suspension, which will reportedly be justified with the claim that Dodd–Frank 1502 has led to a de facto embargo on Congolese minerals and to a climate of socioeconomic instability threatening US national security interests, has been received with great disappointment by campaigning organisations such as Global Witness, who have described it as 'a gift to warlords and corrupt businesses'.<sup>xvi</sup> Other observers are less pessimistic. According to Fabiana Di Lorenzo, who works for Estelle Levin, a consultancy firm specialising in the issue of due diligence in the global mining industry, the impact of Trump's executive order will not be as big as many seem to think. First of all, in Di Lorenzo's opinion, the repeal of Dodd–Frank 1502 will be partly compensated by other mandatory legislation and by soft laws that will likely ensure the continuation of responsible business practices in the mining industry. Second, NGOs and civil society activists can be expected to continue acting as

watchdogs, naming and shaming corporate actors that fail to comply with internationally accepted norms and standards in the mining sector. Third, the EU mineral regulation has a much broader geographical scope than Dodd–Frank 1502, since it not only applies to Africa's Great Lakes region but to all conflict-affected areas across the globe. Therefore, it is reasonable to assume that the coming years will witness an expansion – rather than a reduction – of due diligence initiatives and practices on a worldwide level. Fourth and finally, since the introduction of Dodd–Frank 1502, there have been a growing number of multi-stakeholder partnerships between private companies, governments, supranational organisations, and NGOs to jointly promote the creation of transparent mineral supply chains. According to Di Lorenzo, these partnerships have not only yielded positive results in terms of banning 'dirty' minerals from the global market, but also in terms of stimulating a stronger involvement and commitment of upstream actors in monitoring and managing supply chains. Consequently, Trump's executive order will not automatically lead to a situation in which companies massively revert to their old ways of doing business with armed actors and their civilian representatives.<sup>xvii</sup>

The question is, of course, to what extent this optimism is justified. While it is true that the number of soft and hard law instruments available for tackling the conflict minerals phenomenon has tremendously increased in the past decade, it cannot be denied that the repeal of Dodd–Frank 1502 will have the effect of lifting the legal pressure on tens of thousands of downstream companies in the United States to report on their due diligence efforts. Likewise, the EU mineral regulation in its current form seems to let the majority of the downstreamers off the hook. While EU-based smelters, refiners and direct importers of 3TG minerals and



metals are legally required to report on what they do in terms of due diligence, importers of small volumes of 3TG minerals and metals are only 'encouraged' to do so under the new regulation. For each of these minerals and metals an annual threshold will be fixed, and only companies whose imports exceed this threshold will need to report on how they identify and address the risks in their supply chains. This restriction of due diligence reporting requirements has been heavily criticised by international NGOs campaigning on the issue of conflict minerals, who argue that the new EU regulation lacks ambition. They are disappointed by the fact that nothing will prevent European downstream companies from making use of the services of smelters and refiners outside the EU, including those based in countries without a binding conflict minerals legislation.<sup>xviii</sup> Critics have also expressed concern over the EU's plan to work with a list of conflict-affected and high-risk areas compiled in consultation with external experts. Although this list is said to be indicative, non-exhaustive and subject to review on a regular basis, it is feared that it may once more create a situation in which certain mineral-rich conflict-affected countries become stigmatised (the DRC for example) and therefore avoided by international mineral buyers.<sup>xix</sup>

Finally, a few words need to be said about the 'accompanying measures', the set of political, diplomatic and development measures that are meant to ensure the effective implementation of the EU mineral regulation, and that are also of vital importance to avoid – or at least alleviate – possible negative socioeconomic effects of the new regulation. Disappointingly, from the outset of the negotiations about the European conflict minerals law, these accompanying measures have not been given the priority they deserve. This can be gathered from the fact that they were not part of the original draft legislation

proposed by the Commission, but that they were only mentioned in the March 2014 Joint Communication of the European Commission and the European External Action Service, which was merely a policy document with no mandatory authority. Although, on March 2015, the EU High Representative, the EU Commissioner for Trade and the EU Commissioner for Development published a letter in which they announced the allocation of EUR 20 million for accompanying measures in the period between 2016 and 2020, there are still important gaps, as highlighted in a new report by EurAc (the European Network for Central Africa), a network of 40 civil society organisations working on issues related to Africa's Great Lakes region. Most importantly, EurAc's report points out a serious lack of financial support for measures that help to address persistent governance problems in Congo's artisanal mining sector, such as poorly functioning public mining services, military involvement in mining activities, and mineral smuggling to neighbouring countries, among other things.<sup>xx</sup> As long as the complexity and urgency of these governance problems continues to be underestimated by policymakers, there is little hope that the new EU mineral regulation will do much to change the existing situation on the ground. If the EU and its Member States are serious about responsible mineral sourcing and about improving the working and living conditions of people in the artisanal mining sector, they will have to come up with stronger accompanying measures than is currently the case.

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## Endnotes

- <sup>i</sup> At the time of writing, the author works as an FWO postdoctoral fellow at the Department of Conflict and Development Studies at Ghent University. Between 2012 and 2015, he coordinated and took part in a research programme at Wageningen University focused on the socioeconomic and governance implications of mining reforms in the Democratic Republic of Congo. The research program was funded by WOTRO (a division of the Netherlands Organization for Scientific Research (NOW)), and led by Professor Dorothea Hilhorst. The author gratefully acknowledges the financial support of WOTRO, which made the research for this paper possible. He also wishes to thank Maria van der Heide, Frédéric Triest, and an anonymous reviewer at the Egmont Institute for their very valuable comments on earlier versions of this paper. Needless to say, all remaining errors are the full responsibility of the author.
- <sup>ii</sup> *Financial Times* (2014) EU plans voluntary rules on conflict mineral imports. 6 March.
- <sup>iii</sup> *Targeted News Service* (2015) Conflict minerals: MEPs ask for mandatory certification of EU importers. 20 May.
- <sup>iv</sup> Königs T., Wahedi S. and Waterbolk T. (2014), 'The EU response to the trade in conflict minerals from Central Africa'. *Dovenschmidt Quarterly* 3(1), 26.
- <sup>v</sup> EC Directorate-General for Trade (2013) *Report on the public consultation on a possible EU initiative on responsible sourcing of minerals originating from conflict-affected and high-risk areas*. Brussels: European Commission, 4.
- <sup>vi</sup> *Ibidem*.
- <sup>vii</sup> In the EU, there are more than 400 such importers. The EU is one of the biggest markets for 3TG.
- <sup>viii</sup> Directorate-General for External Policies (2014) *Briefing EU initiative on responsibly importing minerals from conflict-affected regions*. Brussels: European Commission, 6. It is important to emphasise that accompanying measures such as funding possibilities for small- to medium-size enterprises and public procurement incentives were only mentioned in the communication to the European Parliament and the Council. They were not part of the original draft regulation put forward by the Commission, and, as a result, they did not go through the legislative process.
- <sup>ix</sup> *Financial Times* (2016) EU plans voluntary rules on conflict mineral imports. 6 March.
- <sup>x</sup> OECD (2013) *Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas: Second Edition*, 20.
- <sup>xi</sup> McCarthy, D., and P. Morling (2015) *Using regulation as a last resort: Assessing the performance of voluntary approaches*. Sandy, Bedfordshire: Royal Society for the Protection of Birds.
- <sup>xii</sup> European Parliament (2015) *Conflict minerals MEPs ask for mandatory certification of EU importers*. Press release - External/International Trade, 20 May.
- <sup>xiii</sup> Thomas D.A. and Stokes K. (2016) EU conflict minerals regulation – what’s going on?. *Conflict Minerals Law blog*, 17 February. Available at: <http://www.conflictmineralslaw.com/2016/02/17/eu-conflict-minerals-regulation-whats-going-on/>.
- <sup>xiv</sup> Letter from the Minister of Foreign Affairs to the House of Representatives (Tweede Kamer), 24 June 2016.
- <sup>xv</sup> Personal communication with a due diligence expert in the European NGO community, 16 March 2017; personal communication with a parliamentary assistant at the European Parliament, 27 March 2017.
- <sup>xvi</sup> Press release – Global Witness, 8 February 2017.
- <sup>xvii</sup> di Lorenzo F. (2016) Dodd–Frank 1502: the future of due diligence if Dodd–Frank is repealed under the new presidency. *Estelle Levin blog*, 1 December. Available at: [www.estellelevin.com/dodd-frank-1502-future-due-diligence/](http://www.estellelevin.com/dodd-frank-1502-future-due-diligence/).
- <sup>xviii</sup> Bernaz N. (2016) The draft regulation on conflict minerals: “smart mix” or missed opportunity?. *Rights as Usual blog*, 27 October. Available at: <http://rightsasusual.com/?p=1106>; Global Witness (2016) *Conflict minerals in Europe: stop the EU supporting a deadly trade*. Briefing, 3 November.
- <sup>xix</sup> EurAc (2016) *European regulation on responsible sourcing of minerals: the EU is (once again) about to weaken the upcoming regulation*, Policy Briefing.
- <sup>xx</sup> EurAc (2017) *Mesures d’accompagnement au Règlement de l’UE sur l’approvisionnement responsable en minerais: Pour un renforcement de la gouvernance du secteur minier artisanal en RDC*. Report. Available at: [www.eurac-network.org/sites/default/files/fr\\_web\\_brochure\\_reglement\\_minerais\\_march\\_2017\\_-\\_final\\_0.pdf](http://www.eurac-network.org/sites/default/files/fr_web_brochure_reglement_minerais_march_2017_-_final_0.pdf).



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