



Policy Briefing

10 November 2016

European Regulation on the responsible sourcing of minerals : The EU is (once again) about to weaken the upcoming Regulation.

The European Network for Central Africa (EurAc)¹ calls on representatives of Member States and of the European Parliament participating in the trilogue to revisit their copy on the establishment of the 'White List' of smelters and refiners certified as 'responsible' and on the definition of exemption thresholds for 'small' volumes of '3Ts'² and gold minerals and metals imported into the European Union (EU). What is at stake is the overall effectiveness of the Regulation, undermined by these provisions, which will reduce its impact both in terms of the identification of risk in importers' supply chains and in the fight against enrichment of armed groups trading in the minerals covered by the Regulation. EurAc also regrets the decision taken in June 2016 to produce an indicative list of conflict-affected and high-risk areas; such a list would have a negative effect on the efforts expected from companies and will once again stigmatize the Democratic Republic of Congo (DRC).

The European Commission, the European Parliament and the Council of the EU are in the process of concluding the trilogue about the new European Regulation on responsible sourcing of minerals coming from conflict-affected and high-risk areas. It should be remembered that the Parliament and the Council announced on 15 June 2016 that they had reached a political agreement on the key aspects of the draft Regulation. The compromise reached makes it obligatory to have a system to identify and manage risks in supply chains (also known as 'due diligence'), but only for importers of metals and minerals and gold³.

The current trilogue talks, dealing with the technical details resulting from the political agreement reached in June 2016, are expected to conclude on 22 November 2016. According to our information, these talks pave the way for a number of new loopholes introduced as a consequence of two mechanisms provided for in the Regulation: (1) the establishment of a White List of so-called 'responsible' smelters and refiners (hereafter: White List), and (2) the introduction of an exemption for importers of 'small volumes' of minerals and metals.

¹ The European Network for Central Africa (EurAc) is made up of 40 member organisations from civil society of 11 European countries. These organisations work on and in the Great Lakes region. They support civil society organisations in Burundi, the DRC and in Rwanda in their efforts to promote peace, the defence of human rights and development. EurAc focuses on advocacy towards European institutions and decision-makers around three priority themes for the Great Lakes Region: (1) peace and security; (2) democratisation; and (3) natural resource management. Across these themes, better governance and the strengthening of non-State actors as an alternative source of power are priority axes of our advocacy.

² Tin, Tantalum and Tungsten.

³ This means that the legislation will not include any measures regarding importers of 3Ts and gold in the form of semi-processed or finished products. There is no due diligence requirement foreseen for a significant part of (1) players in the supply chain (end users and their suppliers) and (2) quantities of 3Ts and gold imported to the EU (trade volume). This weakness in the European approach [was criticized by EurAc](#) at the time.

Risk of whitewashing

We are concerned that the White List as currently conceived could become a **whitewashing mechanism** that compromises both the due diligence system established by the Regulation and oversight of the Regulation by national authorities. The draft Regulation requests from responsible importers of 3Ts and gold minerals and metals to provide information, yearly, about the identity of all the smelters and refiners that supply them. On the basis of this information communicated to the competent authorities, the EU would publish a yearly White List of 'responsible' smelters and refiners that comply with the Regulation.

According to the current trilogue talks, **metal importers** could assume that their suppliers are compliant with the provisions of the Regulation if they source exclusively from the smelters/refiners on the White List. This aims at reducing the due diligence efforts of metal importers. The problem here is that due diligence practices of companies on the White List will not be adequately assessed, mainly because of the prominence given to due diligence industry schemes (hereafter: industry schemes) that will be accredited by the Regulation, such as, for example, [LBMA](#), [CFSI](#) or [BSP](#).

According to the Regulation, competent Member State authorities are required to carry out **ex-post checks** on the due diligence practices of importers of 3Ts and gold into the EU, with a view to verifying their compliance with the OECD Due Diligence Guidelines⁴. These checks should thus include the compliance of the smelters/refiners that import the aforementioned minerals into the EU, i.e. those located in one of the 28 EU Member States. On the other hand, no ex-post evaluation is envisaged for smelters/refiners based outside the EU, as they do not import minerals on European territory. It is envisaged that smelters/refiners **that are members of accredited industry schemes will be added to the White List**. Since the industry schemes work mainly with smelters/refiners located outside the EU, these would therefore make up the majority of companies on the White List **without any ex-post checks** on their due diligence practices.

In addition, available information on the practices of smelters/refiners based outside the EU will be limited to audit reports presented to the competent European authorities by the importers of 3Ts metals and gold to the EU who source from them. Yet **the information provided in an audit report is not sufficient in and of itself to assess the compliance with the OECD due diligence standards**.

Finally, the industry due diligence schemes do not oblige their members to carry out audits of their due diligence practices every year. More recent problems and/or risks in the supply chain of a smelter/refiner may therefore not be identified in a system where audits take place on a multiannual basis. Given that an audit usually covers only a one-year period, problems identified and documented between two audits may not be spotted if they do not fall within the 12 months covered by the assessment. Therefore, a smelter/refiner can be part of an accredited due diligence industry scheme without however necessarily meeting the requirements of that scheme. This loophole risks **allowing a non-responsible smelter/refiner to remain on the White List**, because the risks that could be revealed by thorough due diligence assessment may not be taken into account.

It follows from the above that the **White List could lead to the whitewashing of a considerable number of companies where due diligence practices were not at all or not adequately evaluated** by the competent authorities responsible for enforcing the Regulation. **It is therefore not acceptable that smelters/refiners that subscribe to industry schemes be automatically added to the White List, without the competent European authorities carrying out an independent and individual evaluation of each company on the White List.**

⁴ OECD (2016), [OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk areas](#), OECD publications. This Guide is supposed to be the minimal standard applied by the Regulation.

We recall that the establishment of a White List is not a requirement of the OECD standard. It is an additional tool conceived by the EU in order to facilitate the implementation of the Regulation by the 3Ts and gold importers and by the national authorities responsible for its enforcement. If such a tool is to be created, we believe it is essential that **additional verification measures are put in place** and that **sufficient resources are provided** in order to mitigate the risks it introduces to the due diligence system envisaged in the Regulation. Without such changes, the White List will hamper the due diligence efforts expected of the metal importers sourcing from the smelters/refiners that are on the List.

Too large an exemption for the ‘small’ volumes imported

According to the agreement reached in June 2016 between the Parliament and Council, the obligations envisaged by the Regulation will apply only to importers of 3Ts and gold whose imports exceed a specified annual threshold. In other words, **companies whose imports are below these annual thresholds will not be required to comply with the due diligence obligations contained in the Regulation**. These thresholds were initially proposed by Member States in order to ensure that smaller companies importing such minerals and metals – companies which according to the States do not have the capacity to carry out the necessary checks – be exempt from these obligations.

Participants in the trilogue are currently in the process of defining the thresholds for each of the minerals and metals in question (3Ts and gold). Last June, co-legislators committed to the ‘large majority of imported volumes of minerals and metals [being] covered by due diligence requirements’, the President of the INTA Parliamentary Commission having announced that at least 95% of imports would be covered. According to our information, **the threshold currently under discussion for gold imported in mineral or metal form would be 100kgs**. A somewhat surprising figure if one considers the value of 100kgs of gold (about 3 million Euro, depending on purity and the market) and taking into account the aim of the Regulation, namely to limit the financing of armed groups and human rights violations through the minerals trade. In addition, according to Amnesty International, approximately 90% of importers of gold into the EU would fall under the 100kgs threshold⁵.

In the African Great Lakes region, of the four minerals covered by the Regulation gold is undoubtedly the one most commonly used as a source of enrichment by armed groups that control parts of territories in the eastern DRC (through the illegal taxation of mining and of transport, or through the direct involvement of these groups in the gold trade). Gold is the mineral most commonly smuggled into neighbouring countries (Uganda, Rwanda and Burundi), since it has a higher exchange value and is more easily concealed and transported than the 3Ts. The value of artisanal gold illegally exported from the DRC in 2013, corresponding to 98% of the national production, was between USD 383-409 million⁶.

The definition of import thresholds under which companies will not have to verify risks in their supply chains should therefore take into account the **monetary value** and the risks associated with imports, and not just the relative trade volume – limited though it may be – they represent. The import of 3 million Euro worth of gold from a conflict zone is a high-risk operation that should be subject to a minimum control on the supply chain. This demand does not just apply to gold, since other exemption thresholds for the 3Ts currently under discussion in the trilogue are also estimated in tonnes and are also of the value of several million Euro.

EU policymakers agreed in June 2016 that the due diligence requirements will only cover companies that import ores and metals into the EU. This decision to cover only a limited part of the supply chain increases the loopholes identified in the exemption system as envisaged currently in the trilogue. Indeed, the companies further down the supply chain wishing to establish due diligence, despite the fact that the Regulation does

⁵ See <http://www.amnesty.eu/en/news/blog/all/suggested-eu-rules-on-conflict-mineral-trade-risk-exclusion-of-90-of-importers00089/#.WBtS6i3hC71>.

⁶ UN Group of Experts on the Democratic Republic of Congo (2014), *Final Report 2013*, United Nations Security Council, S/2014/42, 23 January.

not impose them any checks, would have no leverage to require information from their suppliers whose imports fall below the exemption thresholds.

For example, if company Y imports 100kgs of gold from the Central African Republic in one year, without having conducted a risk analysis in accordance with due diligence standards, and subsequently sells this batch of gold to company X based within the EU, compliance with the OECD Guidelines would require company X to ask questions of company Y and to try to make it more accountable. According to the draft EU Regulation however, company X would not be subject to the due diligence requirements because it is not considered an importer of gold into the EU. Company X could even buy gold from dozens of importers without exercising due diligence, provided that each of the importers from which it purchases fall under the threshold decided by the EU. It could therefore market several hundreds of kilos of gold inside the EU, without having had to undertake any risk controls related to these transactions.

This intra-European trade becomes one of the potential weak link in the EU system. It is therefore critical that this system, partial as it is in view of the June agreement, is not made even more vulnerable **by loopholes created by overly high exemption thresholds.**

A list of conflict-affected and high-risk areas generating adverse effects

The political agreement of June 2016 also envisages that an **indicative list of conflict-affected and high-risk areas** (hereafter: CAHRAs list) will be produced along with the Regulation. This decision contradicts the global geographic approach adopted up to now by the EU in order to avoid repeating the mistake of the U.S. Dodd-Frank Act, which focuses exclusively on minerals produced in the DRC. **EurAc believes that the global geographic approach was one of the few positive advances in the project of Regulation proposed in March 2014⁷.**

The introduction of a CAHRAs list raises several problems. In the first place, such a list could lead to the **stigmatisation** of certain regions and countries and **dissuade companies from sourcing from them**. Even if it is only 'indicative', the list risks creating 'market distortions' and reversing the aim of the Regulation, which is precisely to facilitate and encourage responsible sourcing from conflict-affected and high-risk areas. This in turn raises the question of the **choice of countries/regions** to be included in the list: it seems already obvious that the DRC will be on the list, while there is uncertainty regarding other regions/countries that are concerned by the 'conflict minerals' phenomenon (Colombia, the Central African Republic, Myanmar, ...).

According to the political agreement of June 2016, the drawing up of the list will be entrusted to 'external experts' on the basis of existing information derived from, inter alia, the academic world and industry schemes. We are nonetheless entitled to question what mechanisms will be put in place to guarantee the **independence of these external experts**. The decision to list or not list countries will inevitably have diplomatic and economic implications. This is, therefore, a highly political decision, and there is no guarantee at this stage that pressure will not be exerted both within and outside the EU in attempts to influence it. **EurAc** and its Congolese civil society partners therefore fear **unequal treatment between different countries/regions, of which the DRC would most certainly be the first to suffer the consequences.**

It should also be stressed that this list risks **impeding the implementation by companies of due diligence in their supply chains**, as envisaged by the OECD standard. It risks, in particular, diverting attention from other key countries/regions where risk controls should be carried out, such as transport and transit zones or trading centres through which contraband minerals penetrate the international market. As a result, companies are

⁷ In the proposed Regulation presented by the Commission, conflict-affected and high-risk areas are defined as "areas in a state of armed conflict, fragile post-conflict as well as areas witnessing weak or non-existent governance and security, such as failed states, and widespread and systematic violations of international law, including human rights abuse". This definition is relatively close to that proposed by the OECD.

likely to **neglect risk indicators** identified by the OECD (also called ‘red flags’) that are not directly linked with the region or country of origin – such as, for example, the risks associated with specific suppliers.

In addition, the principal aim of due diligence is to identify and deal with risks specific to individual supply chain. Conflicts, human rights violations, and the red flags associated with them are dynamic and evolve over time. Lists, on the other hand, are static and cannot paint a precise picture of the location of these risks at any given moment. **A list covering entire countries or regions will not provide companies with the exact information they need** to carry out effective and targeted due diligence.

The June 2016 agreement also states that the list will ‘considered to be non-exhaustive’ and that ‘the companies sourcing from areas which are not on the indicative list maintain their responsibility to comply with the due diligence obligations’ prescribed in the Regulation. We can thus consider that the list provides **no added value in terms of due diligence**, while increasing risks for companies and more than likely generating negative effects in the DRC. **EurAc believes that it should be completely abolished.**

Recommendations

For these reasons, and so as to avoid a further weakening of the OECD Guidance following the one brought about by the political agreement of 15 June 2016, **EurAc calls on representatives of Member States and of the European Parliament to review their position before the next trilogue meeting**, due to take place on 22 November 2016, as follows:

- Ensure that the **due diligence practices of companies on the White List** of certified ‘responsible’ smelters and refiners **comply with the obligations contained in the Regulation**, and in particular with the OECD standard. To this end, it is necessary, as a priority, to **scale down the role of due diligence industry schemes** which, even if they provide useful technical and financial assistance to companies for the implementation of due diligence, are no substitute for the individual responsibilities of a company in exercising due diligence in its supply chain or the responsibility of States to enforce the Regulation. It is necessary at the same time that:
 - smelters/refiners who are members of industry schemes **are not automatically added** to the White List;
 - an **independent mechanism** is put in place through the Regulation to verify the compliance of the due diligence practices of each company on the List with the OECD standard;
 - **sufficient resources** are provided for the functioning of this independent verification mechanism.
- Scale down the **annual thresholds for the importing of minerals and metals** below which importers of 3Ts and gold will not be required to comply with the Regulation. This re-evaluation should be done based on the **monetary value** of the proposed thresholds and not only based on the import volume as a nominal (number of kilos/tonnes) or relative (% of imports to the EU) value. The monetary value of thresholds chosen for 3Ts and gold should be defined **on the basis of the risks of financing armed groups and of human rights violations** that these imports pose in conflict-affected and high-risk areas.
- Abandon the introduction of an **indicative list of conflict-affected and high-risk areas** in the Regulation.

For further information, please contact:

Frédéric Triest – EurAc Deputy Director

frederic.triest@eurac-network.org ; +32 490 43 76 70