

Joint Civil Society Briefing
Ensuring robust EU legislation on responsible mineral sourcing

Recommendations to strengthen the European Commission's proposal
for a *'regulation 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'*

The new European Parliament has a critical opportunity to strengthen legislation proposed by the European Commission and create responsible mineral supply chains for Europe.ⁱ

In its current form the Commission's proposal, a voluntary scheme open to a limited number of companies, is weak and unfit for purpose.

We are calling on MEPs to amend the draft legislation so that it legally requires companies to check their supply chains and identify and mitigate risk – a process known as due diligence – in line with existing international standards. Companies should also be required to report publicly on their efforts.

1. Why is an EU law on responsible mineral sourcing necessary?

For decades the trade in minerals, precious stones and other commodities has played a central role in funding and fuelling some of the world's most brutal conflicts. In conflict-affected countries like Afghanistan, Burma, Central African Republic, Colombia, Democratic Republic of Congo (DRC), and Zimbabwe, the international trade in natural resources supports abusive armed groups and provides hidden funding to security and military forces and corrupt officials.

Natural resources that have funded war and human rights abuses around the world are used and traded internationally, including by EU-based companies. As a result, companies operating in the EU risk fuelling the very conflicts that European aid flows, international post-conflict reconstruction efforts and UN peacekeeping operations try to alleviate.

In the absence of a law compelling European companies to responsibly source the natural resources they use, consumers and governments have no guarantee that products sold in the EU containing these resources do not fuel violence and conflict.

2. What does the current European Commission proposal for an EU legislation look like?

In March 2014, the European Commission published a legislative proposal designed to break the links between the trade and extraction of minerals, and the financing of armed conflicts. In theory it would create a European market for *responsibly traded* minerals sourced from conflict regions. The proposal put forward is an opt-in self-certification scheme open to around 300 to 400 companies that import tin, tantalum, tungsten and gold (mineral ores and their metals) into Europe.

In its current form, the proposal is based on the due diligence guidance developed by the OECD (OECD Guidance).ⁱⁱ It would require any importer that chooses to opt-in to comply with the OECD's due diligence framework. The OECD Guidance is an internationally recognised five-step framework already available to companies sourcing natural resources from conflict-affected and high-risk areas.

The European Commission's voluntary scheme will not prevent minerals that have funded conflict and human rights abuses from entering European markets. It will have little impact on the way European companies source natural resources from conflict and high-risk areas.

Most companies do not respond to voluntary measures. The internationally recognised OECD Guidance has been available to companies since 2010, and the EU made a commitment to promote

observance of the Guidance at the OECD Ministerial Council in May 2011. Yet a recent NGO studyⁱⁱⁱ revealed that over 80 per cent of 186 European companies surveyed did not provide any public information about the checks they had undertaken to ensure their supply chains had not funded conflict or human rights abuses. A cost benefit analysis commissioned by the European Commission in 2013 revealed that only 4 per cent of 330 companies surveyed were voluntarily preparing a public report on how they identify and address the risk of funding conflict or abuses in their supply chains.^{iv}

Section 1502 of the US Dodd Frank Act (below) has demonstrated that only the pressure generated by regulation compels companies to clean up their supply chains. Section 1502 is the first piece of legislation aimed at breaking the links between eastern DRC's lucrative minerals trade and abusive armed groups, and has prompted companies at all levels of mineral supply chains to change their sourcing practices.^v

3. How can MEPs create leading EU legislation?

Our key recommendations for EU legislation are:

1. **The opt-in scheme should be replaced by a mandatory requirement** for companies covered by the law to carry out and report publicly on their supply chain due diligence efforts, in line with the OECD Guidance.
2. **The scope of companies covered by the law should be broadened** from the limited number of primary importers of covered materials, to include end-user companies that *first place component parts or finished products* containing those materials on to the EU market.
3. **The proposal's material scope should be widened** to include any natural resources produced in conflict-affected or high-risk areas where extraction or trade risks contributing to, or being associated with, human rights abuses and conflict. At a minimum, the proposal should apply to all mineral resources sourced from conflict-affected and high-risk areas, with a mechanism to include other natural resources over time.
4. **The proposal's current audit obligations and public reporting obligations** should be amended so that they explicitly require compliance with the OECD Guidance.^{vi} For example, the proposal should require companies to ensure that auditing is carried out in accordance with audit scope, criteria, principles and activities set out in the Guidance. The proposal should also compel companies to publish full independent third party audit reports of their due diligence practices in accordance with the Guidance.
5. **The proposal's global geographical scope should be maintained** - however the definition of 'conflict-affected and high-risk areas' should be replaced with the OECD definition.^{vii} The current definition proposed by the European Commission is: *'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 abuses'*. This definition excludes elements of the OECD definition, such as: (a) areas in a state of widespread violence and (b) widespread violations of national, as well as international, law.
6. **Sanctions** should be relevant and proportionate to the infringement of the regulation.

4. What is the international context in which EU legislation is being proposed?

EU Member States have a duty under international and European human rights law to ensure that those businesses operating within their jurisdiction are not causing or contributing to human rights abuses, directly or indirectly, through their business activities.^{viii} Businesses also have a duty under international law to respect human rights, including a responsibility to conduct human rights due diligence.^{ix}

Voluntary standards

The UN Security Council and OECD have developed risk-based due diligence standards for companies sourcing minerals from conflict-affected and high-risk areas:

- **OECD Guidance** translates the second pillar of the UN Guiding Principles, relating to corporate responsibility, into an operational five-step framework for companies to use when sourcing natural resources from conflict-affected and high-risk areas. A broad international consensus has emerged around the OECD Guidance, which recommends that all companies along the supply chain carry out and report on their due diligence efforts.
- **The UN Security Council has endorsed due diligence standards** almost identical to those developed by the OECD for all companies, including European firms, sourcing minerals from the DRC.^x

The **Chinese government**, through the China Chamber of Commerce of Metals, Minerals & Chemicals Importers & Exporters, actively participated in a recent OECD forum^{xi} on responsible mineral supply chains where they co-launched the Chinese language translation of the OECD Guidance. The Chamber of Commerce has committed to launching a 'Guideline for Social Responsibility in Outbound Mining Investments' in summer 2014. The draft version includes guidance on conducting supply chain due diligence in accordance with international standards.

Due diligence legislation

Governments outside the EU have already introduced mandatory legal requirements on how companies manage minerals supply chains in an effort to interrupt instances of conflict financing. These requirements, which reference the OECD Guidance, have led to significant changes in business practices, particularly in the African Great Lakes Region. They have also set a clear international benchmark for how responsible sourcing should happen.

In the absence of robust supply chain due diligence legislation, the EU risks lagging behind at a time when governments and progressive companies elsewhere are making important progress towards implementing responsible sourcing practices.

These include:

- **Section 1502 of the 2010 U.S. Dodd Frank Wall Street Reform and Consumer Protection Act** requires companies listed with the Securities and Exchange Commission (SEC), including European firms, to carry out due diligence to a nationally or internationally recognised due diligence framework to determine whether their products contain minerals that have funded armed groups in DRC or its eight bordering countries. The OECD Guidance is the international standard currently available to companies.
- **Twelve African country members** of the International Conference of the Great Lakes Region (ICGLR) have made OECD due diligence a requirement for issuing certificates under their regional mineral certification scheme.^{xii}
- **The Congolese government** introduced domestic legislation in February 2012 requiring companies operating in its tin, tantalum, tungsten or gold mining sectors to undertake supply chain due diligence according to the OECD standard.^{xiii}
- **The Rwandan government** adopted similar legislation in March 2012 based on the OECD Guidance.

Voluntary guidance already exists for companies. Research shows that the vast majority of European companies do not check their supply chains in line with the OECD Guidance. Passing a law premised on a voluntary scheme will not ensure companies source minerals responsibly and to a consistent

standard. Nor will it achieve the EU's stated aim to reform the "demand-side" of mineral supply chains and "avoid a fragmented approach in the EU market".^{xiv}



- ⁱ The Commission stated in its [press release](#) dated 5 March 2014 that it is “committed to preventing international trade in minerals from intensifying or perpetuating conflict”. Further specific objectives are set out on page 31 of the [Impact Assessment](#) accompanying the Proposal.
- ⁱⁱ The Organisation for Economic Development and Co-operation (OECD) Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, available at: http://www.oecd-ilibrary.org/governance/oecd-due-diligence-guidance-for-responsible-supply-chains-of-minerals-from-conflict-affected-and-high-risk-areas_9789264185050-en.
- ⁱⁱⁱ SOMO, ‘Conflict due diligence by European companies’, November 2013, <http://somo.nl/news-en/sourcing-of-minerals-could-link-eu-companies-to-violent-conflict>. Note that 19 of the companies surveyed by SOMO (11%) are dual listed in the US and Europe, and so are directly impacted by Dodd Frank Act Section 1502.
- ^{iv} European Commission, ‘Assessment of due diligence compliance cost, benefit and related effects on selected operators in relation to the responsible sourcing of selected minerals’, p.61.
- ^v Global Witness, April 2014, <http://www.globalwitness.org/sites/default/files/Seeing%20the%20Light%20April%202014.pdf>.
- ^{vi} OECD Due Diligence Guidance, Step 4 (Carry out independent third-party audit of smelter/refiner’s due diligence practices) and Step 5 (Report Annually on Supply Chain Due Diligence) <http://www.oecd.org/daf/inv/mne/GuidanceEdition2.pdf>. The OECD Guidance states that the objective of Step 4 is: “To carry out an independent third-party audit of the smelter/refiner’s due diligence for responsible supply chains of minerals from conflict-affected and high-risk areas and contribute to the improvement of smelter/refiner and upstream due diligence practices, including through any institutionalised mechanism to be established at the industry’s initiative, supported by governments and in cooperation with relevant stakeholders.” The objective of Step 5 is: “To publicly report on due diligence for responsible supply chains of minerals from conflict-affected and high-risk areas in order to generate public confidence in the measures companies are taking.”
- ^{vii} The OECD definition is on page 13 of the OECD Due Diligence Guidance: “Conflict-affected and high-risk areas are identified by the presence of armed conflict, widespread violence or other risks of harm to people. Armed conflict may take a variety of forms, such as a conflict of international or non-international character, which may involve two or more states, or may consist of wars of liberation, or insurgencies, civil wars, etc. High-risk areas may include areas of political instability or repression, institutional weakness, insecurity, collapse of civil infrastructure and widespread violence. Such areas are often characterised by widespread human rights abuses and violations of national or international law.”
- ^{viii} Guiding Principle 7, Guiding Principles on Business and Human Rights, UNOHCHR, 2011, available at: http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.
- ^{ix} The UN Guiding Principles and pillar two of the Protect, Respect, Remedy Framework also set out the responsibilities of business. See Guiding Principle 11, Guiding Principles on Business and Human Rights, UNOHCHR, 2011, available at: http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.
- ^x See UN Security Council Resolution 1952 (2010), [http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1952\(2010\)](http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/1952(2010)).
- ^{xi} <http://www.oecd.org/corporate/mne/icglr-oecd-un-forum-paris-may-2014.htm>.
- ^{xii} See the ICGLR Regional Mineral Certification Manual: www.oecd.org/investment/mne/49111368.pdf.
- ^{xiii} Arrêté ministériel N.0057.CAB.MIN/MINES/01/2012 du 29 février 2012 portant mise en oeuvre du mécanisme régional de certification de la Conférence Internationale sur la Région des Grands-Lacs « CIRGL » en République Démocratique du Congo, Article 8.
- ^{xiv} European Commission, Commission Staff Working Document, [Impact Assessment](#) accompanying the Proposal, p.4: http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152229.pdf.