MARCH 2018

ADVICE NOTE TO COMPANIES, MEMBER STATES, AND THE EUROPEAN COMMISSION

Implementation of the EU Regulation

laying down supply chain due diligence obligations for Union importers of tin, tantalum, and tungsten, their ores, and gold originating from conflict-affected and high-risk areas[1]

The EU Regulation on due diligence in mineral supply chains (Regulation) came into force on 8 June 2017. It aims to disrupt links between conflict, human rights abuses, and the global minerals trade, by requiring companies bringing ores and metals of tin, tantalum, tungsten, and gold (3TG) into the EU—from anywhere in the world—to do so responsibly. The Regulation is based on the existing, internationally-endorsed, OECD standard for responsible mineral supply chains.[2]

The Regulation requires 'Union importers' to carry out 'supply chain due diligence' on their 3TG supply chains, as a tool to source responsibly from high-risk areas. The European Commission (Commission) and EU Member States are also encouraging companies further down mineral supply chains to do the same, in line with the OECD standard.[3]

Supply chain due diligence, as described both by the Regulation and the OECD Guidance upon which it is based, is a practical tool intended to **facilitate and promote the responsible and transparent sourcing of minerals from conflict-affected and high-risk areas** (CAHRAs).[4] It provides for a risk-based approach to responsible sourcing, requiring companies to find and assess any relevant supply chain risks, then take steps to track and manage them. See the Annex for a diagram that sets out a brief summary of these steps.

While the majority of the Regulation's requirements won't take full effect until 1 January 2021, the Commission has encouraged all companies to start carrying out due diligence on their supply chains before that date.[5] Some of the Regulation's obligations on Member States and the Commission have already come into effect. The practices required by the Regulation are not new, and are all consistent with standards for responsible business conduct endorsed and encouraged by the EU since at least 2011.

This note provides practical guidance and recommendations to support companies, Member States, and the Commission to fulfil their obligations under the Regulation and linked commitments. The note is not intended to be exhaustive.

It is divided into the following Sections:

1. WHAT PROBLEM IS THE REGULATION ADDRESSING?

The extraction, transport, and trade of minerals have been linked to conflict, corruption, and human rights abuses for decades. The minerals trade has financed armed groups, bankrolled oppressive security forces, facilitated money laundering and corruption, and allowed companies to benefit from serious human rights abuses, like child labour, land-grabbing, and forced evictions. This is a global problem, affecting communities in countries like Peru, Colombia, Mexico,[6] Afghanistan,[7] Myanmar,[8] Ghana,[9] the Central African Republic,[10] and the Democratic Republic of the Congo.[11]

This trade is sustained, in part, by demand. Many of these resources are not consumed locally, but depend on access to international markets. Global supply chains carry these minerals to engines, electronics, jewellery, and many other products that are used and traded in major markets, like the EU.

The EU—as the world's largest single market—is a major player in the global trade in minerals. It is also a critical market for manufactured products that contain these minerals. Yet very few European companies are truly taking responsibility for their supply chains by properly implementing international standards.

As a result, global supply chains currently connect European companies to corruption, conflict, and serious human rights abuses. Responsible and transparent sourcing can help change this. It can ensure global supply chains offer a route to affect positive change, by asking companies throughout the supply chain to make sure minerals bring benefits rather than harms.

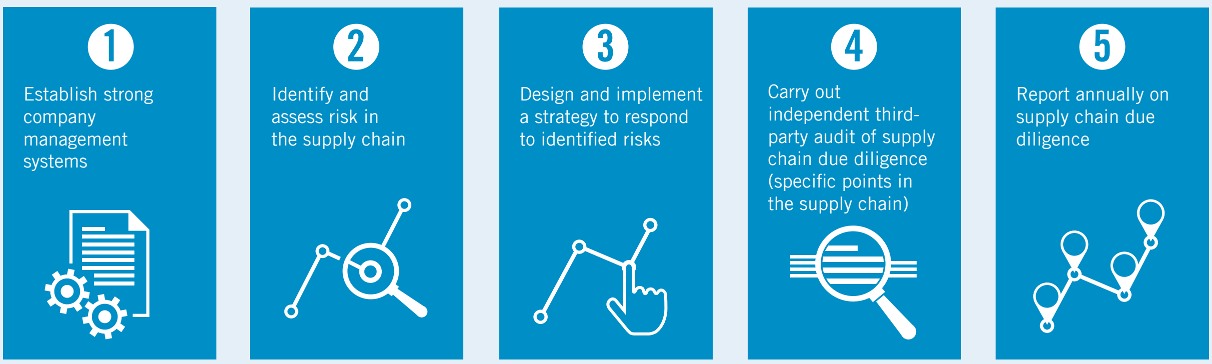
2. THE OECD'S STANDARD FOR SOURCING MINERALS RESPONSIBLY

The Regulation's supply chain due diligence requirements are firmly based on the established international standard for responsible mineral supply chains – *the OECD's Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, including its Supplements on 3TG (OECD Guidance).[12]

This **practical five-step Guidance** is designed to help companies in the minerals sector meet their corporate responsibility to respect human rights, as set out in the UN Guiding Principles on Business and Human Rights (UNGPs), and to put into practice the OECD Guidelines for Multinational Enterprises.[13]

The supply chain due diligence requirements set out in the Regulation are not new to companies or governments. The EU endorsed and committed to promoting the OECD Guidance and UNGPs as far back as 2011. The OECD Guidance also forms the basis of legislation in the U.S.[14] and Great Lakes region of Africa,[15] as well as Chinese due diligence guidelines[16] and numerous multilateral and industry initiatives. It has been endorsed by 43 governments.[17] The Guidance therefore represents a harmonised and effective standard across global supply chains.

OECD'S 5-STEP FRAMEWORK



3. THE CORE PRINCIPLES OF SUPPLY CHAIN DUE DILIGENCE

> *"In the context of this Regulation, and as set out in the OECD Due Diligence Guidance, supply chain due diligence is an ongoing, proactive and reactive process through which economic operators monitor and administer their purchases and sales with a view to ensuring that they do not contribute to conflict or the adverse impacts thereof"* **(Recital 11)**

Supply chain due diligence, both under the Regulation and OECD Guidance, upon which it is based, is **an "on-going, proactive and reactive process" (Recital 11).**[18] It enables companies to identify whether there is a risk that the minerals they trade or handle may be linked to 'adverse impacts,' such as human rights abuses, conflict, or corruption. Where risks are found, it helps them acknowledge and deal with these risks in a transparent and responsible way.

Risks don't keep a schedule, and can arise in new places, at any time. Due diligence processes should therefore be built into existing management systems. When companies better understand their supply chains and business partners, they are better placed to identify and deal with risks in a timely and efficient way.

Due diligence also leaves room for learning and progress over time—companies should proactively test and improve their management systems as they develop a deeper understanding of their supply chains, making sure they can assess and manage relevant risks in line with the OECD standards. Companies should then demonstrate measurable progress through detailed public reporting.[19]

By carrying out due diligence, companies can operate and source responsibly and confidently in high-risk contexts.[20] In line with the OECD Guidance, the Regulation therefore does not require or encourage companies to stop sourcing minerals from conflict-affected and high-risk areas, or to stop bringing specific minerals into the EU. It does not demand 100% "conflict-free" guarantees or "risk-free" supply chains. It expects companies to manage these risks honestly and transparently; not to sweep them under the carpet or assume someone else is dealing with them. The primary question for a company's due diligence practices is *how* a material has been sourced and traded, not *where*.

BOX 1: Risks of "adverse impacts" that companies must address under the Regulation

The Regulation requires companies to address a range of supply chain risks linked to the extraction, trade, transport, and export of minerals anywhere in the world (see, for example, Article 4(b) and Article 5). These include risks of adverse impacts linked to:

- **Tolerating, profiting from or contributing to serious human rights abuses (like torture, forced labour, the worst forms of child labour and widespread sexual violence), war crimes or other serious violations of international humanitarian law, crimes against humanity or genocide;**
- **Supporting (directly or indirectly) non-state armed groups;**
- **Supporting (directly or indirectly) public or private security forces** who illegally control mine sites, transportation routes and upstream actors; illegally tax or extort money, minerals, intermediaries, export companies or international traders;
- **Bribery, and fraudulent misrepresentation** of the origin of minerals;
- **Money-laundering** resulting from, or connected to, the extraction, trade, handling, transport or export of minerals derived from illegal taxation or extortion;
- Non-payment of **taxes, fees, and royalties.**

See Annex II of the OECD Guidance for more detail.

Because it is focused on risks, due diligence is not a one-size fits all process. Companies may tailor their efforts, both to the risks they face and to their own individual circumstances—such as their size, position in the supply chain, and leverage over suppliers.[21]

"Union importers retain individual responsibility to comply with the due diligence obligations set out in this Regulation…" **(Recital 14)**

The Regulation makes clear that companies have an *individual* responsibility to find and address risks in their supply chains (Recital 14), as set out in the OECD Guidance.[22] This responsibility cannot be transferred to third parties.

BOX 2: Why is it important for companies to accept individual responsibility for risks?

While the UNGPs, OECD Guidance, and Regulation all encourage cooperation among various actors to strengthen due diligence processes, they also stress that companies must take individual responsibility for the specific risks in their supply chains.

Collective efforts to address industry risks are important, but they tend to focus on general problems rather than particular risks in individual supply chains. Company-level due diligence is essential to ensure that companies take ownership of the concrete and specific risks in their individual supply chains, ensuring these are identified and addressed in a meaningful way. While governments, industry programmes, journalists, and civil society have an important role to play in documenting and exposing risks, individual companies often have better access to key individuals, as well as to detailed information about the sites and transport routes in their supply chains. Unless companies are proactively engaged in examining their own individual supply chains, key risks will likely be missed or left undiscovered.

4. WHICH COMPANIES ARE COVERED BY THE REGULATION?

The Regulation applies to all **Union importers** of the minerals or metals set out in Annex I (Article 1), **irrespective of where the minerals or metals originate from.** In practice, this scope captures EU-based smelters, refiners, traders, banks, and manufacturers that import these minerals and metals into the EU. The Regulation places some specific obligations on companies depending on whether they are **'mineral importers'** or **'metal importers'**, to reflect the division in the OECD Guidance between 'upstream' and 'downstream' companies. See the diagram on page 5.

Union importers whose annual import volumes for each mineral or metal fall below **specific volume thresholds** (Article 1(3) and Annex I) are exempted from the Regulation's mandatory requirements. However, all importers should note that these volume thresholds—and the gold threshold in particular—pose a significant risk to the effectiveness of the Regulation.[24] See our recommendations to the Commission in Section 8(e) of this note.

Even if a company is not covered by the Regulation, it will still fall within the scope of the UNGPs and the OECD Guidance. EU legislators have clearly indicated that they expect all companies in mineral supply chains to be meeting this due diligence standard. In addition, the Commission has committed to make respect for the OECD Guidance a condition for its own public procurement contracts and to develop additional measures—including a downstream transparency database—to engage downstream companies. See Section 8(f) of this note.

Upstream and downstream companies under the OECD Guidance

The OECD Guidance applies different standards to companies depending on their position in the supply chain. For the purposes of the Regulation, mineral importers are 'upstream', and metal importers may be 'upstream' and/or 'downstream' depending on whether they sit downstream or upstream of smelters or refiners.

UPSTREAM COMPANIES SUCH AS SMELTERS/REFINERS, AND THEIR SUPPLIERS	DOWNSTREAM COMPANIES SUCH AS COMPANIES WHO SOURCE FROM SMELTERS AND REFINERS, AND THEIR CUSTOMERS
Smelters and refiners work with their suppliers to trace supply chains back to their origin, in order to find and manage risks along the way, including at mine sites, along transportation routes, and in trading centres	**Companies** contact their suppliers and work together to trace their supply chains back to smelters/refiners, in order to ensure they are sourcing responsibly in line with the Regulation and OECD Guidance

5. WHAT IS REQUIRED OF COVERED COMPANIES?

Union importers covered by the Regulation are required to source minerals and metals responsibly and transparently by complying with the specific standards set out in the OECD Guidance's 5-Step due diligence framework. This Section describes some of the companies' obligations under the Regulation, and explains what these obligations mean in practice, based on the standards in the OECD Guidance.

(A) MANAGEMENT SYSTEM OBLIGATIONS (ARTICLE 4)

The Regulation requires all Union importers within the scope of the Regulation to develop management systems and a supply chain policy based on the OECD Guidance (Article 4). These are the starting point of due diligence, making sure that companies have clear systems and policies in place, and that these are well-integrated into a company's day-to-day business. This includes systems for gathering information that will be used in the subsequent risk assessment process.

Article 4 of the Regulation is based on Step 1 of the OECD Guidance, and requires that companies:[25]

- **Adopt a supply chain policy incorporating supply chain standards** that are consistent with the OECD model supply chain policy in Annex II of the OECD Guidance[26] and clearly communicate up-to-date information on the policy to suppliers and the public (Articles 4(a) and (b)).
- **Structure internal management systems to support and oversee the supply chain due diligence process** (Article 4(c)).
- **Strengthen engagement with suppliers by incorporating the supply chain policy** into contracts and agreements with suppliers consistent with Annex II of the OECD Guidance (Article 4(d)).
- **Establish a grievance mechanism** (Article 4(e)).
- **Put in place a chain of custody or supply chain traceability system** to identify suppliers and gather information (Articles 4(f) and (g)).

BOX 3: Upstream and Downstream: Shared responsibilities with differentiated obligations

For **mineral importers and metal importers who are 'upstream companies' under the OECD Guidance**,[27] the focus of the chain of custody or traceability system provided for under Step 1 is on **identifying all actors in the upstream supply chain**, and using this to generate further information on, for example: the mine of origin; the quantity and dates of extraction; locations where the minerals are consolidated and traded; transportation routes; and all payments made to governmental officials, security forces or armed groups.

For **metal importers who are 'downstream companies' under the OECD Guidance**,[28] the focus of the transparency system provided for under Step 1 is **on identifying all smelters and refiners in the supply chain, and assessing whether those smelters and refiners are meeting their obligations and sourcing responsibly.** Downstream companies are therefore not expected to trace specific minerals or metals beyond the refiner/smelter to a particular country or mine of origin. However, downstream companies will need to collect information on the countries of origin and transit, and transportation routes, that lead to their smelter or refiner—and information on the due diligence practices of the smelter/refiner—to identify 'red flags' in the smelter's/refiner's supply chains.

See the specific recommendations in the Supplements to the OECD Guidance, Step 1, for more detail.

These management systems guide the information gathering process at the heart of due diligence. All metal and mineral importers will therefore need to have systems that allow them to collect enough information on their supply chains to **identify both 'red flags' and specific risks.** 'Red flags' are indicators pointing to the possible existence of a supply chain risk. See Box 5 on page 9 for detailed information on 'red flags'.

Due diligence is an iterative and ongoing process. Where the information gathering process reveals "supply chain risks" in a company's supply chain, such as possible origin in a conflict-affected or high-risk area, the Regulation requires the company to generate **additional information** on its supply chain, in accordance with the OECD Guidance (Articles 4(f) and (g)).

The management system obligations under Article 4 of the Regulation apply **whether or not the importer sources from conflict-affected or high-risk areas, or other high-risk locations or suppliers.**

We recommend that all Union importers, irrespective of whether they source, or may source, from conflict-affected or high-risk areas:

- Collect and assess a wide range of information on their suppliers and supply chain, in accordance with the specific standards in the Supplements to the OECD Guidance. This information should include public and private information, including research reports from governments, civil society, international organisations, and industry.[29]
- Collect the information required under Article 4 of the Regulation on an ongoing, proactive basis and by taking a risk-based approach, as set out in the OECD Guidance. This involves gathering additional information on suppliers, transactions or supply chains that are considered high-risk (see Box 5 on red flags, and Box 1 on specific risks of adverse impacts).

(B) RISK IDENTIFICATION, ASSESSMENT, AND MANAGEMENT OBLIGATIONS (ARTICLE 5)

On the basis of the information gathered through its management systems, companies have an obligation under the Regulation to identify, assess and manage the risks of adverse impacts in their supply chains, as described in Steps 2 and 3 of the OECD Guidance (Article 5 and Recital 11(b)).

The objective of Steps 2 and 3 of the OECD Guidance is therefore for companies to review a range of information they have gathered under Step 1, and identify 'red flags', so that they can then find and respond to any specific risks of adverse impacts in their supply chains. This is the first step towards turning a company's policies, commitments, and information gathering into practice. The OECD Guidance and the Regulation separate this process into two distinct steps: (i) identifying and assessing risks in the supply chain;[30] and (ii) designing and implementing a risk management strategy to respond to identified risks.[31]

BOX 4: Defining and identifying conflict-affected and high-risk areas

Due diligence is about how business is done, not *where*. Neither the Regulation nor the OECD Guidance aims to discourage companies from sourcing from CAHRAs. The stated origin of material is just one of the red flags highlighted by the OECD Guidance and Regulation (see Box 5 on page 9). Material said to have originated in a higher risk location may well be sourced responsibly; and material said to have been sourced from an area not linked to conflict may still carry significant risks. As such, and under the Regulation, companies are responsible for determining if any red flags apply, including—but not limited to—whether they are or may be sourcing from a CAHRA.

The Commission's forthcoming handbook should provide tools and information to help companies assess whether a specific area is conflict-affected or high-risk, as defined in Article 2, and whether any other red flags under the OECD Guidance apply. Companies should note, however, that:

- The forthcoming list of CAHRAs is described in the Regulation as "indicative" only and "non-exhaustive" (Article 14(2)). An area's presence on the list does not preclude companies from sourcing responsibly from that area, and an area's absence from the list does not imply there are no risks associated with the trade from that area. For example, the list is unlikely to include all areas that may be high-risk trade or transit locations, or that have a high-risk of serious human rights abuses, at a particular point in time.

- The list is therefore intended as a guide to steer companies' due diligence, but it is only one piece of information they should use. Regardless of whether or not an area is on the CAHRA list, companies retain all their due diligence obligations and must conduct their risk assessment to determine if any red flags apply in their supply chain—this includes red flags that may arise in or near mining areas as well red flags that may arise further down the supply chain (e.g. linked to high-risk suppliers or transit areas).

- The list may quickly prove out of date, and will not be capable of containing sufficient detail about recent incidents around specific mines or suppliers linked to individual supply chains globally.

We recommend that all Union importers:

- Collect and assess a wide range of information on their suppliers and supply chains—tailored to the risks they face and any red flags they have identified—to make their own assessment of whether an area is conflict-affected or high-risk. This should include publicly available information (e.g. civil society reports, media reports, and UN reports) and private information (e.g. available from industry schemes or companies who share suppliers). See Section 8(d) of this note on the Commission's handbook for economic operators.

- Acknowledge the risks of fraudulent labelling, laundering and smuggling, and therefore include known smuggling hubs and high-risk trading hubs in any assessment of red flag sourcing or transit locations.

Identifying and assessing risks in the supply chain

As a first step towards identifying and assessing the risks of specific adverse impacts, Step 2 of the OECD Guidance expects companies to use the information they have collected under Step 1 to **map their supply chains and identify 'red flags'** (see Box 5 on page 9).

- **For importers who are upstream companies:** this will involve reviewing information gathered on the *chain of custody, the activities and relationships of all upstream suppliers, and the locations and conditions of the extraction, trade, handling and export of minerals.*[32] The OECD Guidance expects these companies to gain and maintain up-to-date on-the-ground information in order to map the supply chain and assess risk effectively.[33]
- **For metal importers who are downstream companies:** this will involve *identifying the smelters and refiners in their supply chains* and collecting and reviewing information from them, and information generated under Step 1, to enable the metal importer to *identify any 'red flags'*.[34] This does not require metal importers acting as downstream companies to trace specific minerals or metals beyond the refiner/smelter to a particular country or mine of origin. **However, they will need to collect information on the countries of origin and transit, and transportation routes, that lead to their smelter or refiner—and information on the due diligence practices of the smelter/refiner—in order to identify 'red flags' and risks in the smelter's/refiner's supply chain.** No metal importer can be sure their smelter/refiner is responsible without some information about what risks they should be managing. If an importer is unable to identify smelters or refiners or collect sufficient information, this should be a considered a risk requiring action at the risk management stage (see page 10 on *'Designing and implementing a risk management strategy'*).[35]

If an importer identifies a 'red flag' or is unable to reasonably exclude a 'red flag', the OECD Guidance and the Regulation expect it to dig deeper and request more information from suppliers. The importer should gather enough information in order to assess **whether these red flags reflect the actual presence of specific risks in the supply chain.**[36] In terms of how to assess those risks:

- **Importers who are upstream companies** are essentially looking for the risk that the *circumstances in their supply chain* do not meet the standards set out in their supply chain policy, the OECD Guidance, legal instruments governing the company's own operations and business relations, and national or international laws and standards.[37]
- **Metal importers who are downstream companies** are assessing the risk that *identified smelters and refiners have not carried out due diligence in accordance with the metal importers' own supply chain policy or the OECD Guidance.* If

the importer finds that smelters or refiners in the supply chain are not—or may not be—carrying out due diligence in accordance with that supply chain policy or the OECD Guidance, the importer must then manage that risk (see page 10 on '*Designing and implementing a risk management strategy*').[38] A smelter or refiner who repeatedly fails to provide material information, publish its risk assessment, follow up on red flags or risks, or otherwise meet the OECD Guidance standards is therefore considered to be a risk, and warrants action.

A Union importers' own supply chain policy is therefore key to ensuring it is effectively identifying and addressing risks in its supply chain. To be effective, the policy must be tailored to the risks the importer faces in its particular business and, at a minimum, include the risks set out in Annex II of the OECD Guidance (see Box 1 on page 3).

BOX 5: 'Red flags' under the OECD Guidance

The Supplements to the OECD Guidance set out 'red flags' for companies at different points in the supply chain. Red flags include:

- **'Red flag locations of mineral origin and transit':** These cover situations such as where a mineral or metal: (a) originates from or has been **transported via a CAHRA**; (b) is claimed to originate from a country with **limited known reserves**, or a country through which minerals from CAHRAs are **known or reasonably suspected to transit**; or (c) is claimed to originate from **recyclable/ scrap or mixed sources** and has been refined in a country where minerals from conflict-affected and high-risk areas are **known or reasonably suspected to transit.**
- **'Red flag suppliers':** These cover situations such as where a supplier is known to have sourced from a red flag location, including a known **transit or smuggling hub.**
- **'Red flag circumstances':** These cover situations where anomalies or unusual circumstances are identified by the company which give rise to a reasonable suspicion that the mineral may contribute to conflict or serious abuses.

For a complete list of 'red flags' see the OECD Guidance, Supplement on Tin, Tantalum and Tungsten, p.33-34 and the Supplement on Gold, p. 78-80.

What information should metal importers use to assess the due diligence of smelters and refiners?

The Regulation requires **metal importers** to identify and assess risk based on available third-party audit reports for the smelters and refiners in their supply chain, and an assessment, "as appropriate", of the **due diligence practices of these smelters and refiners, in accordance with Annex II and the specific recommendations in the OECD Guidance** (Article 5(4)).

The OECD Guidance is clear that companies who source from smelters or refiners **cannot rely exclusively** on audit reports as evidence of good due diligence practices, but must also consider a range of other information sources—such as publicly available information, including reports by international organisations, civil society and the media. They should use this information to assess and verify information from suppliers.[39] As Section 5(c) of this note explains, **passing an audit or becoming a member of an industry scheme is not enough to prove that a smelter or refiner has met the OECD Guidance standard.** Recent cases show why importers cannot rely solely on audit reports and industry schemes to ensure they meet their obligations (see Box 6 on page 12).

As in all cases, an importer's due diligence should be risk-based, and so scaled in accordance with the level of risk, significance to their supply chain, and available leverage.

We recommend that:

- **All Union importers:**
  - Draw on a wide range of information in order to cross-check and verify the information they receive from suppliers and to map and assess risks in their supply chain, in accordance with the OECD Guidance. This should include publicly available information (e.g. civil society reports, media reports, and UN reports) and private information (e.g. available from industry schemes or companies who share suppliers).
  - Consider the risks of fraudulent labelling, laundering and smuggling, and therefore include known smuggling and high-risk trading hubs in any assessment of red flags, consistent with the OECD Guidance.
- **Metal importers** who are downstream companies draw on information contained in smelters' and refiners' audit reports, but do not exclusively rely on it—or on a smelter's or refiner's membership of a scheme recognised by the Commission.

Designing and implementing a risk management strategy

Once policies are in place, information has been gathered, and specific risks have been identified and assessed, the Regulation requires Union importers to manage the identified risks in accordance with the OECD Guidance.[40] This puts into practice **Step 3 of the OECD Guidance.** This is critical to turning risk identification into actual impact. The objective is not to eliminate risks, but to ensure any identified risks are acknowledged and managed responsibly.

The emphasis of the OECD Guidance and the Regulation is therefore on **promoting constructive engagement with suppliers—not on disengaging from high-risk areas or otherwise de-risking.** In many cases, disengaging or de-risking will neither be responsible, nor consistent with the objectives of the Regulation or underlying OECD Guidance. Mining, especially artisanal mining, is a source of critical livelihoods in many producing countries. Disengagement can have profound impacts on local livelihoods and development, so any risk management plan and any decision to disengage should take into account the potential social and economic impacts of that decision. Supply chain due diligence aims to engage the leverage and resources of the supply chain to tackle problems and drive improvements. For all of these reasons, disengagement is generally a last resort.[41]

The OECD Guidance provides detail on risk management standards and practical strategies which companies can use to prevent and mitigate risks in their supply chains, while continuing to engage with and exert pressure on suppliers who can most effectively prevent or mitigate identified risks.[42]

Step 3 of the OECD Guidance expects companies to, for example:[43]

- **Report findings** to designated senior management, and enhance engagement with suppliers.
- **Devise and adopt a risk management plan**, which outlines the company responses to risks identified in Step 2, in accordance with its supply chain policy and Annex II of the OECD Guidance. Companies may manage risk by: (i) continuing trade while measurable risk mitigation efforts are ongoing; (ii) temporarily suspending trade while pursuing ongoing measurable risk mitigation; (iii) disengaging with a supplier after failed attempts at mitigation or "where mitigation appears not feasible or unacceptable".[44] Companies should consult with suppliers and affected stakeholders on the strategy for measurable risk mitigation.
- **Implement the risk management plan, and monitor and track performance of risk mitigation.** Companies should manage those risks that do not require termination of a supplier relationship through measurable risk mitigation, with clear performance objectives and indicators. Companies may build leverage over upstream

suppliers who can most effectively prevent or mitigate the identified risks, or support corrective measures—such as providing technical guidance in the form of training, upgrading management systems, or facilitating participation in broader sector-wide initiatives. Upstream companies should monitor and track performance in cooperation and consultation with relevant stakeholders.[45]

- **Carry out additional fact and risk assessments** for risks requiring mitigation, or after a change of circumstances. Supply chain due diligence is a dynamic process and requires on-going risk monitoring. After implementing a risk mitigation strategy, companies should therefore repeat Step 2 of the OECD Guidance.[46]

As with the other steps in the OECD Guidance, different standards apply to companies at different points in the supply chain. For example:

- A **metal importer** may need to devise and adopt a risk management plan specifically enabling it to identify smelters or refiners in its supply chain(s), if it has been unable to do so under Steps 1 and 2 of the OECD Guidance (Article 5(5) of the Regulation).[47] This differs in focus to the risk management plan for a mineral importer.[48]
- If a **metal importer** has identified a smelter or refiner who is still in the process of implementing the OECD standards, the importer should ensure the smelter or refiner demonstrates "significant and measurable improvement within six months" from the adoption of the risk management plan.[49] Measuring improvement relies on the availability of detailed and public reports, in line with the Regulation and Step 5 of the OECD Guidance.

Companies should note that they have an existing responsibility under international standards on business and human rights to remediate the adverse human rights impacts that they have caused or contributed to. Where a company has not caused or contributed to the harm suffered, but this adverse impact has occurred at any point in its supply chain, the company should take a role in the remediation of the harm (in cooperation with other relevant actors, such as suppliers and relevant national authorities). This responsibility continues even when a company suspends or discontinues a trading relationship with a supplier.[50]

We recommend that all Union importers:

- **Manage risks on a proactive, ongoing basis** in accordance with the specific risk management standards in Step 3 of the OECD Guidance.
- **Take into account the impacts of disengagement, including the economic impacts,** in their risk assessment and risk management plan.

(C) AUDITS AND THE LIST OF GLOBAL RESPONSIBLE SMELTERS AND REFINERS (ARTICLES 6 AND 9)

The Regulation requires **all Union importers** to carry out independent third-party audits of their due diligence practices in accordance with the audit principles set out in Step 4 of the OECD Guidance (Article 6(1)).

Metal importers are exempt from the audit requirements only if they make available, to the relevant competent authority, "substantive evidence, including third-party audit reports" demonstrating that all smelters and refiners along their supply chain "conform to the provisions of this Regulation" and therefore to the OECD Guidance (Article 6(2)). This is deemed to be the case if the metal importer sources exclusively from the list of smelters and refiners that the Commission is required to establish under Article 9 of the Regulation.

The Regulation and the OECD Guidance expect companies to make use of information contained in available audit reports of their suppliers as part of their due diligence. They do not, however, expect companies to rely exclusively on a supplier's audit, or its membership of a due diligence scheme recognised by the Commission.

Completing an audit—or being a member of a recognised scheme—does not on its own prove that a smelter or refiner satisfies the requirements of the Regulation. The case studies in Box 6 show the risks of relying exclusively on audits or industry scheme certifications when assessing a company's behaviour. Other issues include:

- **Audit cycles are often as long as three years.** Recent problems and/or risks in the supply chain of a smelter or refiner may therefore not have been picked up by a scheme in which audits only take place every few years. In addition, since an audit will usually cover a period of one year only, problems which have been identified and documented in between two audits might not be picked up at all.
- **Membership of a recognised due diligence scheme does not necessarily mean a company satisfies its requirements, or the requirements of the Regulation.** Private industry schemes may choose to deal with a reported breach or instance of non-compliance internally/privately, and may not regularly report information on the non-compliance of its membership. Industry schemes may therefore include among their members, for some time, non-compliant members, or members that are subject to a non-public review or assessment.

BOX 6: Case studies – why audit reports or industry scheme certifications cannot be relied on as evidence of good practice

The case studies below demonstrate the limitations of relying exclusively on third party audits or industry scheme certifications. Each example exposes the shortcomings in the due diligence of a refiner that had passed audits and was industry accredited.

- **In 2016, the Global Initiative against Transnational Organized Crime reported that the judicial authorities of Peru had accused six international gold refiners**, of which four were accredited by the London Bullion Market Association (LBMA), of **criminal acts** arising from the "seizure of gold" in Peru between 2013 and 2014 and of the **money laundering** of the proceeds of illegal mining.[51] Miami-based **NTR Metals**, a major U.S. refiner and a subsidiary of Elemetal LLC ('Elemetal'), was one of the companies named in the report. At the time, Elemetal's gold refiner in Jackson, Ohio (Elemetal Refining LLC) was certified by the LBMA and the Conflict Free Smelter Initiative (CFSI).[52] However, it was not until a year later, in March 2017, when Bloomberg published investigators' findings in relation to NTR Metals that the LBMA and CFSI de-listed Elemetal Refining LLC.[53] **It is unclear what the industry schemes were doing in the interim to assess and manage the risks associated with the allegations linked to NTR Metals.** Last year, three former NTR Metals employees were arrested for their alleged involvement in a multi-billion dollar gold money-laundering scheme. The U.S. Department of Justice has since stated that all three have pleaded guilty to a money-laundering conspiracy,[54] and reportedly all three have been sentenced to between six and seven and a half years in prison. Elemetal and its subsidiary NTR reportedly pleaded guilty on 16 March 2018 to one count of failure to maintain an adequate anti-money-laundering programme. Elemetal agreed to a fine of $15 million as part of a plea agreement with federal prosecutors. At the time of writing the plea agreement is yet to be approved by a federal judge but is due to be considered on 24 May 2018.[55]
- **In 2015, the Berne Declaration (now Public Eye) exposed shortfalls in the due diligence of one of the world's largest gold refiners, certified by the LBMA but allegedly purchasing gold extracted by children in Burkina Faso.** The Berne Declaration stated that the company declined their requests for meetings and did not respond to questions sent by email.[56]

In addition, metal importers should not simply rely on a smelter's or refiner's presence on the Commission's list of responsible smelters and refiners under Article 9 to conclude that it has done adequate due diligence. It is unclear how the due diligence practices of smelters/refiners will be monitored and enforced by the Commission or Member State competent authorities, either before or after they have been added to the list. It is not clear, for example, how non-EU companies on the list will be assessed, especially those that do not export directly to the EU, and so do not report directly to any competent authorities. There is therefore a very real possibility that non-compliant companies will be included on the list, and may remain there for some time. This creates an obvious risk for importers and other companies sourcing from the list.

It is therefore critical that importers tke individual responsibility for their own due diligence, make good faith efforts to review other sources of information, including publicly available reports, and verify the information they receive from suppliers.

We recommend that:

- **All metal importers** make good faith efforts to carry out an individual assessment of the due diligence policies and practices of all smelters and refiners in their supply chain, consistent with the OECD Guidance. They should verify information they receive from suppliers, including information contained in audit reports, by taking into account: (i) relevant information in the public domain, such as reports by international organisations, civil society and media organisations, which may not have been considered or included in a supplier's audit; (ii) the auditee company's public reporting, including its upstream risk assessment and risk management plan; (iii) other information on the supply chain, if available, such as upstream incident reports.

(D) PUBLIC REPORTING OBLIGATIONS (ARTICLE 7)

> *"Union importers of minerals or metals shall, on an annual basis, publicly report as widely as possible, including on the internet, on their supply chain due diligence policies and practices for responsible sourcing. That report shall contain the steps taken by them to implement the obligations as regards their management system under Article 4, and their risk management under Article 5, as well as a summary report of the third-party audits, including the name of the auditor, with due regard for business confidentiality and other competitive concerns."* **(Article 7(3))**

The final step in the five-step due diligence process is public reporting. Both the OECD Guidance and Regulation require detailed public reporting on the due diligence efforts companies have put in place and implemented.

Specific, measurable public reporting is a critical part of the due diligence process—not an optional extra. It is also frequently misunderstood. It is not just a means of monitoring companies or overseeing their efforts. Public reporting is key to translating company due diligence into actual change along supply chains, and especially in producing areas. It is not possible for a company to practice good due diligence if it does not publicly report in detail on its efforts.

- **Public reports are a tool for companies to demonstrate concrete, measurable progress.** The OECD Guidance allows for improvement over time, and does not expect companies to achieve everything all at once. But improvement implies a comparison. Only regular and detailed public reporting provides information that is specific enough to facilitate an assessment of whether it amounts to genuine improvement.
- **Public reports are a vehicle for sharing information on risk and risk management along the supply chain, including with smaller companies.** Supply chain due diligence aims to enlist the resources and leverage of the entire supply chain to find and deal with problems, and so drive improvement. This is only possible if information about specific identified risks is effectively shared throughout the supply chain. Companies further down the supply chain (such as international traders, smelters, refiners, component manufacturers or consumer-facing brands) may be well placed to engage with the upstream—by providing expertise and training, adjusting contracts or putting pressure on governments or third parties to help remedy risks. But in order for the entire supply chain to share in the responsibility of addressing risks, those risks must be reported publicly, and in sufficient detail, to enable other companies in the supply chain to engage.
- **Detailed and transparent reporting generates public confidence in the due diligence measures companies are taking.**[57] It is a means of demonstrating to investors, shareholders,

customers and the general public that the company is implementing the due diligence policy it has committed to. It is a means of explaining—and justifying—the company's decisions and actions. For example, why it has prioritised a particular risk over another, or why it has disengaged in one scenario but not another.

- **Timely and public reporting is therefore part of a company's defence when accidents happen.** Responsible sourcing requires companies to manage risk, not eliminate it. Public reporting allows companies to acknowledge risks, and detail their efforts to manage them responsibly, before adverse impacts arise.

What level of public reporting is required?

Both the Regulation and Step 5 of the OECD Guidance set out clear public reporting standards for companies.

With the exception of commercially sensitive and privileged information, Step 5 of the OECD Guidance states clearly that companies should report on both their policies and practices, with the Supplements making it clear that this includes disclosing the company's risk assessment, including all identified risks, and the risk management plan.[58] Similarly, the Regulation makes clear that companies should publicly report on their "due diligence policies *and practices*", and on the specific *"steps taken to implement"* their obligations (Article 7(3)).

Companies should be able to describe and identify particular risks in a way that allows them—and their downstream purchasers and other third parties—to understand the risks, engage substantively in the process of assessing and addressing these risks, and monitor and track progress towards managing them. But, when naming suppliers, transportation routes or mine sites, for example, companies can take due regard of legitimate business confidentiality and other competitive concerns.[59]

Detailed reporting on specific identified risks, and how a company has assessed them, is what makes it possible for the supply chain to engage collectively in the process of addressing those risks—turning company due diligence into change and impact.

The specific standards in the Supplements to the OECD Guidance vary in nature and scope according to a company's position in the supply chain. Different expectations therefore apply to mineral importers and metal importers under the Regulation. The Gold Supplement provides the most detail for companies.

- **Importers who are upstream companies** should publish, for example, not only their supply chain policy and information on their management structure, but also their **upstream risk assessment** (in accordance with Annex III of the OECD Guidance), the **risk management plan**, and a description of the practical steps taken to **manage identified risks.**[60] They should disclose the company's efforts to monitor and track performance, the actual and potential risks identified, all instances and results of follow-up to evaluate significant and measurable improvement, and report all instances where the company has decided to disengage, consistent with the model policy in Annex II.[61]
- **Metal importers who are downstream companies** should similarly publish information on the policies and systems that they have in place, and on the **practical steps** they have taken to: (i) identify smelters and refiners in the supply chain; (ii) assess those smelters' and refiners' due diligence practices; (iii) identify and manage identified risks. They should publish the risk assessment, the actual or potential risks identified, and the risk management plan. They should disclose the importer's efforts to monitor and track performance for risk mitigation and all instances and results of follow-up to evaluate significant and measurable improvement.[62]

We recommend that:

- **All Union importers** publish *detailed, measurable* information on their due diligence policies and practices, in accordance with Step 5 of the OECD Guidance.
- **Specifically in relation to identifying, assessing and managing risks,** this includes publishing—with due regard to legitimate business confidentiality and competitive concerns: (i) the importer's **detailed risk assessment,** including detailed information on any **specific risks identified** during the risk assessment; and (ii) the importer's **risk management plan,** including detailed information on:
  - the practical steps taken to manage each identified risk and why, such as information on each decision to disengage (and why) and an explanation of how and why the company has prioritised risks; and
  - the efforts made by the importer to monitor and track performance for risk mitigation and all the instances and results of follow-up to evaluate significant and measurable improvement.
- **All Union importers** consider what strategies that they can use to report on risks to the greatest extent possible while respecting legitimate confidentiality and competitive concerns (e.g. by providing for relevant exceptions in confidentiality clauses or by anonymising the source of information).
- **Metal importers** publish the names and addresses of all identified smelters/refiners in their 3TG supply chains and publish audit reports or assessments that they have commissioned with respect to their own due diligence efforts or that of a smelter or refiner.
- **All Union importers who are smelters or refiners** publish their full audit reports, in accordance with Step 4 of the OECD Guidance.

(E) RECYCLED AND SCRAP MATERIALS (ARTICLE 7)

Companies that import 3TG as recycled or scrap material are within the scope of the Regulation, but are subject to reduced due diligence requirements (Article 1(6) and Article 7(4)). An importer who can "reasonably conclude" that metals are derived *only* from recycled or scrap sources must: (i) publicly disclose its conclusion; and (ii) describe in reasonable detail the supply chain due diligence measures it exercised in reaching that conclusion (Article 7(4)).

The due diligence that these importers carry out is important in part because the scale of the trade in scrap and recycled 3TG is significant. Recycled gold, for example, is a major part of the gold supply chain; it accounted for as much as a third of global gold supply in 2015.[63] It is also a known weak-spot in the supply chain, with material from conflict-affected and high-risk areas mislabelled as scrap in an effort to evade scrutiny. Like other forms of 3TG, scrap or recycled metals can be linked to high-risk suppliers and high-risk locations, including through trading or transit hubs, where scrap material may be mixed with mined material from high-risk locations.[64]

Inadequate due diligence by importers of recycled or scrap material could therefore allow high-risk supply chains to be left unchecked.

We recommend that importers of recycled and scrap material:

- **Publish** detailed information on the steps they have taken to implement Article 7(4), including: (i) a description of the evidence they have relied on; (ii) the steps they have taken to verify information received from suppliers.
- **Comply** in full with the due diligence standards in the OECD Guidance, including specific recommendations for recyclers and traders of recycled material.
- **Recognise** their due diligence responsibility, and do not uncritically accept the accuracy of all material designated as scrap or recycled.

See Sections 7 and 8 for recommendations to Member States and the Commission.

6. WHAT SHOULD COMPANIES NOT COVERED BY THE REGULATION DO IF THEY USE OR TRADE MINERALS, OR PRODUCTS CONTAINING MINERALS?

Companies further downstream who bring 3TG into the EU—for example in products or components—are not currently covered by the Regulation. However, the Commission has made clear that it expects downstream companies to meet the standards of the Regulation and the OECD Guidance—otherwise, they face the possibility of mandatory rules in the future. It has made a number of commitments in relation to downstream companies—such as developing reporting tools and standards to promote due diligence, setting up a new "transparency database" and making respect for the OECD Guidance a condition for its own public procurement contracts. See Section 8(f) of this note.

To meet their existing responsibility to respect human rights, **all companies in the minerals supply chain** should already have put in place and be implementing the due diligence systems and processes set out in the OECD Guidance. **The OECD Guidance covers the entire mineral supply chain, from mine to end-user, and all minerals—not just 3TG.** Its underlying premise is that supply chain due diligence works most effectively when it successfully engages and mobilises the resources and leverage of the entire supply chain in responding to risks. The EU and its Member States endorsed and committed to promoting the OECD Guidance in 2011, thereby expecting *all companies along mineral supply chains* to carry out supply chain due diligence in line with its standards. The EU is currently the Chair of the multi-stakeholder group that oversees the development and implementation of the Guidance.

We recommend that:

- **All companies who are outside the scope of the Regulation, but use and/or trade minerals or metals in any form, including products containing those minerals,** carry out supply chain due diligence in line with the OECD Guidance.
- **Downstream companies** that use and/or trade minerals or metals, or products containing minerals, publish Step 5 due diligence reports, e.g. through the Commission's "transparency database" once it is established.[65]

See Sections 7(e) and 8(f) of this note for recommendations to Member States and the Commission in relation to downstream companies.

7. MEMBER STATES' OBLIGATIONS

Member States are subject to a number of obligations that apply before January 2021 (see below). In addition, early preparatory work by Member States will likely help to set harmonised enforcement standards; identify and stimulate early implementation by importers; educate importers, particularly smaller companies, about the Regulation's requirements; and provide competent authorities with experience in monitoring supply chain due diligence before 2021.

Before 1 January 2021, Member States are required to carry out the following:

- **Inform the Commission** of the names and addresses of their competent authority by 9 December 2017 (Article 10(1)).
- **Obtain information from customs authorities** on annual import volumes per Union importer, and provide this information on request to the Commission (Article 18). See Section 8(e) of this note.
- **Identify all Union importers** in their jurisdiction for the purposes of monitoring and reporting on implementation (Articles 3(2), Articles 10-13 and Article 17).
- **Cooperate to build the capacity and tools needed to ensure harmonised enforcement** and effective implementation of the Regulation throughout the Union (Recital 20, Article 3(2), Articles 10-13 and Article 17).
- **Lay down rules applicable to infringements,** and notify the Commission of these rules (Recital 20, Article 14).

(A) SCOPE OF EX-POST CHECKS (ARTICLE 11)

The Regulation requires Member State Competent Authorities (MSCAs) to carry out "appropriate" ex-post checks, including on-the-spot inspections, in order to "ensure that Union importers of minerals or metals comply with the obligations in Articles 4-7" (Article 11). MSCAs are required to take a **risk-based approach**, and, on the basis of their risk assessment, carry out ex-post checks that examine at a minimum:

- Union importers' implementation of their obligations;
- Documents and records that "demonstrate the proper compliance" with those obligations; and
- Audit obligations.

It is therefore insufficient to rely exclusively on a company's due diligence report or its audit report. As Article 11 makes clear, Member States have a much broader obligation—to evaluate what steps a company has taken, and is taking, *in practice* to implement their due diligence obligations.

BOX 7: Taking a risk-based approach

Member States have substantial experience in using a risk-based approach to assess companies' due diligence processes, social and environmental reporting and risk management systems in different sectors (for example, the EU Anti-Money Laundering Directive, the EU Timber Regulation, the UK Modern Slavery Act, and the UK Bribery Act). In the context of this Regulation, a risk-based approach requires MSCAs to prioritise assessing the due diligence processes and practices of those companies whose supply chains have, or are likely to have, the highest risks—of corruption, money laundering, conflict finance or human rights abuse. The level of risk is determined by the likelihood that the risk materialises and the potential severity of the subsequent harm. **A risk-based approach encourages Member States to draw on the full range of information available, including the due diligence reporting of companies and other publicly available information**—such as civil society reports and reports by international organisations—to assess whether particular sectors, transactions or supply chains are high-risk. Authorities can use this approach to focus their efforts on driving impact where it is most needed.

A company that openly sources minerals from a conflict-affected or high-risk area is not necessarily higher risk than a company which is under suspicion of fraud, which buys 3TG from a known transit hub for smuggled minerals, which suddenly starts trading large volumes of scrap, or which is routinely missing key documentation.

Member States should build on their experience with anti-money laundering and other risk-based systems to ensure that they take a harmonised approach to understanding risk in 3TG supply chains, and to prioritising checks on Union importers. For example, a risk-based approach could involve prioritising checks on companies:

- which source from known transit hubs for minerals from conflict-affected and high-risk areas and other red flag locations (as defined in the OECD Guidance)
- which source from higher risk suppliers
- based on past performance and disclosure
- which have been named in relevant public reports by international organisations, civil society organisations or other third parties
- which are reasonably suspected of, or at higher risk of, committing or contributing to fraud, money laundering, corruption or bribery, or the other types of risks set out in Annex II of the Guidance
- which are otherwise the subject of "substantiated concerns" by third parties or other relevant information (Article 11(2))
- which appear to be making use of volume thresholds or scrap exceptions to avoid scrutiny.

What are the risks of relying exclusively on audits or membership of a recognised scheme?

In doing their assessment, MSCAs can take into account—**but should *not* exclusively rely on—a company's audit, membership of a recognised scheme or presence on the Commission's list of global responsible smelters and refiners.** A review of audit reports or membership of a recognised scheme is only one aspect of the assessment. In order to draw conclusions about the quality of due diligence *practices*, MSCAs will need to draw on diverse sources of information—including public reports by international organisations, governments, civil society, and local and international media, and industry literature. The OECD Guidance expects companies to take into account a wide range of information when assessing risk in their supply chain, and Member States should apply a similar standard. For example:

- **MSCAs cannot simply assume that companies that have been audited, or who are members of recognised schemes, meet the full requirements of that scheme by virtue of their membership alone.** Industry schemes may include among their members, and may do for some time, non-compliant companies, or companies that are subject only to private reviews or assessments. Some schemes do not monitor their members' due diligence practices or enforce their own standards. Others may claim to enforce their standards, for example via private audits or corrective action plans until the next audit, but continue to witness due diligence failings that have gone unaddressed. Audit cycles can be as long as three years which means these failings could be unaddressed for some time.
- **Member States should not assume that smelters and refiners on the Commission's list are compliant.** Depending on how robust the mechanism is for monitoring and enforcing the Commission's list[66], it seems unlikely that the Commission or other independent assessor will be in position to carry out ongoing assessments of the due diligence practices of all companies on the list—particularly non-EU companies who do not supply directly to the EU. There is therefore a risk that a non-compliant company sits on the list for some time, while benefiting from the reduced oversight and scrutiny that presence on the Commission's list brings.

See Section 5(c) of this note and the case studies in Box 6 on page 12 for more detail.

What level of public reporting is required of companies?

For a detailed explanation of the public reporting standards expected of Union importers under the Regulation and the OECD Guidance, see Section 5(d) of this note.

In order to meet the standards for ex-post checks set out in Article 11 of the Regulation and to properly assess whether an importer's due diligence meet the Regulation's standards in full—on paper *and in practice*—**we recommend that Member States** take all reasonable steps to do the following:

- **Agree on harmonised criteria** to determine the features which make a company or supply chain higher risk for the purposes of ex-post checks, to be periodically reviewed in consultation with the European Commission. This should take account of all red flags under the OECD Guidance, not just stated country of origin.
- **Assess information published on the Union importer's website** in accordance with Article 7(3) of the Regulation and the OECD Guidance, **and any other documents and records provided by the company to the MSCA as evidence of compliance**—such as the quality of the risk assessment and the risk management plan.
- **Assess relevant public information** on the company and its supply chain, such as suppliers' due diligence reports, public reports by international organisations, governments, civil society, and local and international media and industry literature.
- **Assess information provided to the MSCA by third parties** (including as substantiated concerns under Article 11(2) of the Regulation).

- **Assess available third-party audit reports and evidence of conformity with a recognised scheme**, provided by the importer in accordance with Article 7(1) of the Regulation. MSCAs should review audit reports and all evidence available to the auditor, in order to determine whether the audit complies with Article 6 on paper and in practice, and to gather evidence on the company's due diligence practices.
- **Carry out on-the-spot inspections**, per Article 11(3) of the Regulation.
- **Request access to and assess** other relevant information from the importer, such as available upstream risk assessments and incident reporting.
- **Carry out a reasonable number of interviews** with various functionaries of the company, including company management, and with programmes and auditors (where relevant), and relevant external stakeholders.
- **Verify information received** from companies, programmes, and auditors, including by the methods listed above.

MSCAs should carry out these steps when assessing the due diligence practices of both: (i) Union importers who carry out audits under Article 6 of the Regulation; and (ii) metal importers who claim the audit exemption under Article 6(2).

(B) EX-POST CHECKS OF METAL IMPORTERS CLAIMING THE AUDIT EXEMPTION

Metal importers are exempt from the audit requirements if they make available, to the relevant competent authority, "substantive evidence, including third-party audit reports" demonstrating that all smelters and refiners along their supply chain "conform to the provisions of this Regulation" and therefore to the OECD Guidance (Article 6(2)). This is deemed to be the case if the metal importer sources exclusively from the list of smelters and refiners that the Commission is required to establish under Article 9.

If a metal importer claims the audit exemption, we recommend that MSCAs:

- Carry out a reasonable assessment of the quality of the metal importer's own due diligence—on paper and in practice—through the steps listed above.
- Assess whether the metal importer has provided "substantive evidence, including third-party audit reports, demonstrating that all smelters and refiners in their supply chain comply with this Regulation" (Article 6(2)).

In order to assess whether a metal importer has provided "substantive evidence", MSCAs will need to determine whether the metal importer has provided sufficient evidence for the MSCA to do its own risk-based evaluation of the **quality of the smelters' and refiners' due diligence practices.** Similar to the recommendations under Section 7(a) above, MSCAs will need to carry out a reasonable assessment not only of the **evidence provided** to the MSCA by the metal importer, but also of: (a) relevant **publicly available information**, such as audit reports, suppliers' due diligence reports, public reports by international organisations, governments, civil society, and local and international media and industry literature; (b) **other documents or records** which may be provided to the MSCA by the metal importer or by its smelters/refiners—including by conducting interviews and by taking steps to verify information received; and (c) the **quality of information published** by the metal importer and its smelters/refiners.

Member States should not demand that metal importers source exclusively from certified or compliant smelters and refiners. Neither the Regulation nor the OECD Guidance require this. A metal importer may source from a smelter or refiner who has not, for example, carried out an audit or is otherwise improving its due diligence systems in order to comply with the OECD due diligence standards—provided the metal importer itself complies with the due diligence standards in the Regulation and demonstrates that it is working with the smelter/refiner to manage this risk within a reasonable timeframe. The OECD Guidance gives companies room to improve their practices over time, but they should demonstrate "significant measurable improvement" within a reasonable timeframe when, for example, managing identified risks.[67] Assessing measurable improvement requires the company to put in place clear performance objectives and indicators in accordance with Step 3 of the OECD Guidance, and regularly report on its due diligence practices as described by Step 5 of the OECD Guidance.

Additionally, through the system of notices of remedial action under Article 16 of the Regulation, Member States have an opportunity to ensure that metal importers work with their smelters and refiners to drive improvements in their practices and impact along the supply chain, in accordance with the OECD Guidance.

(C) SUBSTANTIATED CONCERNS (ARTICLE 11(2))

The Regulation requires MSCAs to carry out ex-post checks when they are in possession of "relevant information, including on the basis of substantiated concerns by third parties, concerning the compliance of a Union importer" (Article 11(2)).

We recommend that Member States / MSCAs:

- Create an accessible, secure, and user-friendly means of submitting information, including for civil society and journalists working in producer countries.
- Acknowledge receipt of relevant information, including a substantiated concern, within a reasonable timeframe following receipt and request additional information where needed.
- Investigate companies subject to a substantiated concern within a reasonable timeframe following receipt, taking into consideration national administrative procedural rules.
- Keep complainants and informants adequately informed about the investigation/handling of the complaint within a reasonable timeframe.
- Make full use of the EU's diplomatic and foreign policy instruments to protect civil society space in producer and transit countries.
- Where an infringement is identified, or where a company's reporting is found to be fraudulent, take all appropriate enforcement measures in line with national legislation regarding implementation of the Regulation (see Section 7(d) on 'Addressing infringements' below).
- Publish substantiated concerns, and subsequent findings or determinations.

Any third party, including governments, businesses and civil society, should be able to submit a substantiated concern.

(D) ADDRESSING INFRINGEMENTS (ARTICLE 16)

Member States are required to lay down the rules applicable to infringements (Article 16). As part of this obligation, we recommend Member States agree as soon as possible on a harmonised system for penalties.

We recommend that Member States / MSCAs:

- **Harmonise any rules applicable to infringements** across the Union to avoid authority shopping.
- **Agree on a harmonised system for penalties** for: (i) instances of fraudulent reporting; (ii) where an importer fails to carry out remedial action within the proposed timeframe; and (iii) in the event of an importer's significant or persistent failure to comply with its obligations under the Regulation.
- **Take all measures necessary** to ensure that rules applicable to infringements are implemented, and ensure that penalties are effective, proportionate and dissuasive.
- **Publish notices of remediation**, and set a clear deadline for remedial action to be taken by the company.
- **Ensure any such notices address *all* infringements** of due diligence obligations under Articles 4-7 of the Regulation, including infringements of public reporting obligations (Article 7).
- **Publish companies' plans for remedial action** (or require that the company does so).

(E) DOWNSTREAM COMPANIES

The OECD Guidance and the UNGPs make clear that **all companies along the supply chain have a responsibility to carry out supply chain due diligence.** EU Member States have endorsed and committed to promote implementation of the OECD Guidance, in its entirety, including for downstream companies.

The Commission has made clear that it expects downstream companies who are not covered by the Regulation's mandatory requirements to meet its due diligence standards—otherwise, they face the possibility of mandatory rules in the future. See Section 8(f) of this note on the Commission's commitments in relation to downstream companies, including in relation to their forthcoming "transparency database" and conditions for their own public procurement contracts.

Downstream companies play an important role within the supply chain, using their leverage to influence, educate or train upstream suppliers or engage with relevant stakeholders. Downstream companies also import large volumes of minerals into the EU, connecting EU companies, investors, and consumers to risks along these supply chains. An EU trade policy cannot ignore these risks, or the commercial leverage, this trade brings.

Member States should uphold the commitments they have made in relation to the OECD Guidance, by promoting and actively monitoring the due diligence policies and practices of downstream companies.

We recommend that Member States / MSCAs:

- Identify relevant downstream companies that import minerals or products containing minerals, using, as a starting point, the 15 product sectors listed in the Commission's Impact Assessment.[68]
- Publish: (i) reasoned and substantiated estimates of the number of other downstream companies—such as retailers and manufacturers—that use or place on the EU market products containing minerals, and so should be carrying out due diligence in accordance with the OECD Guidance; (ii) reasoned and substantiated estimates of the number of companies that are meeting the OECD standards and the number that are not; and (iii) details about the practical steps the Member State is taking to close this gap.
- Encourage relevant downstream companies to carry out due diligence in accordance with Steps 1-5 of the OECD Guidance, and to register public Step 5 reports with the Commission's transparency database, once it is established.
- Follow the Commission's lead by committing to procure relevant products only from companies who: (i) demonstrate due diligence policies and practices in alignment with the OECD Guidance, including Step 5 reports; and (ii) register Step 5 reports with the Commission's transparency database, once it is established.

8. THE EUROPEAN COMMISSION'S OBLIGATIONS AND COMMITMENTS

(A) RECOGNITION OF DUE DILIGENCE SCHEMES (ARTICLE 8 AND RECITAL 14)

"Union importers retain individual responsibility to comply with the due diligence obligations set out in this Regulation. However, many existing and future supply chain due diligence schemes ('due diligence schemes') could contribute to achieving the aims of this Regulation..."

(Recital 14)

Under the Regulation, "governments, industry associations and groupings of interested organisations" with due diligence schemes in place may apply to the Commission to have their supply chain scheme(s) "recognised" (Article 8(1)). The Commission is required to adopt delegated acts setting out the methodology and criteria allowing it to assess whether such schemes "facilitate" the fulfilment of the requirements of the Regulation by economic operators (Article 8(2)). If the Commission determines that the scheme, when effectively implemented, "enables" the importer to comply with the Regulation, it shall adopt an implementing act granting the scheme a "recognition of equivalence" (Article 8(3)).

The Regulation makes clear that, in order to be recognised by the Commission as "equivalent" to the Regulation's requirements, schemes should be fully aligned with the standards and principles under the OECD Guidance (bold added):

> *"Such schemes should incorporate the overarching due diligence principles,* ***ensure that scheme requirements are aligned to the specific standards in the OECD Due Diligence Guidance*** *and meet the procedural requirements such as stakeholders' engagement, grievance mechanisms and responsiveness".* **(Recital 14)**

Both the Regulation, and the OECD Guidance on which it is based, recognise that **industry schemes can play an important role in facilitating company due diligence.**[69] They can provide companies with information, training, template policies, supplier questionnaires and contract clauses, as well as other tools to help companies in their due diligence efforts. Industry schemes can also help coordinate, facilitate, and multiply joint efforts of a supply chain or industry e.g. by helping to exercise leverage over shared suppliers.

Companies have an individual responsibility to meet the due diligence requirements, and Member States are responsible for ensuring that they do. Transferring either of these responsibilities to a small number of selective, paid-for industry schemes, and effectively allowing them to self-police, is not envisaged under the law or the underlying Guidance. **It is therefore important that schemes are not moved beyond the appropriate role envisioned for them under the OECD Guidance and the EU Regulation.** However, if robust standards are not upheld, the Commission's recognition of schemes risks doing just this.

The recognition can thereby impact, and potentially undermine, the effectiveness of the Regulation, in several ways. For example:

- **The Commission's recognition will have a significant impact on the degree of scrutiny and oversight to which companies that are members of those schemes will be subject.** Although under the Regulation importers who are members of recognised schemes retain individual responsibility for their due diligence and remain subject to ex-post checks, they will be seen as less risky than non-members. Member States, the Commission and downstream customers will likely presume that individual companies are managing risks in their supply chains effectively while they remain a member. As Member States are using a risk-based approach, this will impact on the level of scrutiny and oversight—even for an otherwise high-risk supply chain. The same is true of downstream companies, whose scrutiny and pressure on their suppliers is crucial to translating due diligence into positive impact on supply chains.

- **The recognition of schemes will also have a direct impact on the make-up of the list of global responsible smelters and refiners** developed under Article 9, which will in turn influence oversight of companies sourcing exclusively from this list—again, by both Member States and downstream companies. It also impacts the audit exemption under Article 6(2). See Section 8(b) on the list of global responsible smelters and refiners.

The recognition also risks effectively compelling companies—including small to medium sized enterprises (SMEs)—to become a member of an industry scheme, and affording excessive advantages to members of private, selective, and paid industry-led schemes. Membership of a scheme is not a condition of doing effective due diligence in accordance with the OECD Guidance or the Regulation, and the Commission and Member States should make this clear both in principle and practice.

As noted in Section 7(a), **the Commission cannot simply assume that individual members of recognised schemes meet the full requirements of that scheme by virtue of their membership alone.** Industry schemes may include among their members, for some time, non-compliant companies, or companies that are subject only to private reviews or assessments. Some schemes do not monitor their members' due diligence practices or enforce their own standards. Others may claim to enforce their standards, for example via private audits or corrective action plans until the next audit, but continue to witness due diligence failings that have gone unaddressed. Audit cycles can be as long as three years which means these failings could be unaddressed for some time.

For these reasons, it is critical that the Commission recognises only those industry schemes: (i) whose requirements are fully aligned with the standards in the Regulation and the OECD Guidance; and (ii) that properly enforce their requirements and police their members. If the Commission accredits schemes whose requirements fall below these standards—or schemes who do not carry out robust, regular, ongoing and transparent enforcement of their requirements—it risks undermining the effectiveness of the Regulation. Non-aligned companies may use membership as an easy response to questions from downstream buyers, investors and governments who might otherwise put pressure on the company to tackle problems.

The Commission's assessment must therefore include a **thorough review of the due diligence policies and practices of a representative sample of member companies** of each scheme. It should also involve **thorough and regular re-assessments** of the scheme, its enforcement mechanisms and of member companies' due diligence practices.

We recommend that the Commission:

- Ensures that both its assessment and regular re-assessments of due diligence schemes include:
  - A thorough analysis of a schemes' paper-based requirements; and
  - A thorough analysis of whether those requirements are being monitored and enforced effectively against its member companies, including through a thorough assessment of audit practices, programme mechanisms and the due diligence practices of a representative, context-based sample of member companies in order to determine the degree to which member companies are likely aligned with the requirements of the relevant scheme.
- **Recognises** only those schemes whose standards are fully aligned with the OECD Guidance, including full and detailed public reporting requirements in line with Step 5 of the Guidance (see Section 5(d) of this note on public reporting).
- **Ensures** that the delegated act sets out a clear methodology and criteria for the Commission to:
  - **Regularly verify and re-assess** recognised schemes, their enforcement mechanisms and the due diligence of individual members against the OECD Guidance and the Regulation, identify deficiencies in schemes and define a reasonable timeframe for schemes to remedy deficiencies (Articles 8(4), 8(6) and 8(7));
  - **Effectively assess and recognise new schemes,** to avoid any risk that delays in assessments distort the market, reduce competitiveness or negatively impact the supply chain from conflict-affected and high-risk areas; and
  - **Publish** the Commission's assessments and re-assessments, and any notices received from the owner of a scheme under Article 8(5).
- **Consults** with the OECD Secretariat prior to adopting an implementing act granting a scheme recognition of equivalence (Article 8(3)).
- **Clarifies publicly** that companies can and should carry out due diligence, and remain individually responsible for their own due diligence, where they opt not to join a scheme for cost or other reasons.

(B) THE LIST OF GLOBAL RESPONSIBLE SMELTERS AND REFINERS (ARTICLE 9)

The Regulation requires the Commission to establish an up to date, public list of "global responsible smelters and refiners" (Article 9). The aim of the list is to "provide transparency and certainty to downstream economic operators as regards supply chain due diligence practices" (Recital 16).

The list, which is effectively framed as a list of EU certified smelters and refiners, gives the smelters and refiners on the list an EU stamp of approval—they are "deemed to fulfil the requirements of this Regulation". In practice, however, the list risks weakening the due diligence standards the Regulation intends to introduce. For example, Member States will limit their scrutiny and enforcement efforts where an importer is on the list. Article 6(2) exempts metal importers who source exclusively from the list from the audit requirements, thereby reducing scrutiny and oversight over those companies. Similarly, because downstream companies are effectively encouraged to source from companies on the list, it encourages them to rely on the list rather than their own individual due diligence efforts.

Further, the way the list is populated under the Regulation privileges members of recognised industry schemes. The proposed list is therefore an important route through which the recognition of industry schemes may impact, and potentially undermine, the effectiveness of the Regulation. It will likely also have a significant influence on the market.

As discussed above (see Section 8(a)), membership of an industry scheme alone does not automatically signal that a company complies with the due diligence standards of the Regulation and the OECD Guidance.

Unless the due diligence practices of listed companies are properly and regularly monitored individually, the list therefore risks giving an EU rubber stamp to companies who are not actually compliant with the Regulation. This is a particular risk with respect to industry scheme members who do not supply into the EU, and so have no reporting obligation to any competent authority. This, in turn, risks undermining the Regulation's underlying objectives—including the specific aim of providing downstream companies and Member State authorities with sufficient transparency and certainty on the quality of smelter and refiner due diligence.

Given these practical implications, it is critical that the Commission avoids relying exclusively on scheme membership when drawing up the list. The Commission should also take into account information submitted by Member States under Article 17(1) (Article 9(1)), and carry out its own thorough assessments of the due diligence practices of smelters and refiners before adding them to the list. The list needs to be populated by smelters and refiners whose due diligence practices the Commission decides <u>are</u> meeting the Regulation's standards.

We recommend that the Commission ensures that:

- The due diligence practices of EU and non-EU smelters and refiners are subject to a thorough independent assessment before they are added to the list.
- There is a process in place for ongoing monitoring of members of the list, whether EU or non-EU companies, including mechanisms for whistleblowing, spot checks and making use of information from media, civil society and industry bodies.
- If the Commission finds a case of non-compliance with the Regulation by a smelter or refiner on the list, it has a procedure in place to immediately remove or suspend the company. This procedure needs to be independent of the Commission's obligation to examine whether repeated or significant cases of non-alignment indicate deficiencies in a recognised due diligence scheme (Article 8(6)) and the potential withdrawal of recognition (Article 8(7)).

(C) HANDBOOK FOR COMPETENT AUTHORITIES (ARTICLE 11)

The forthcoming handbook for competent authorities (Article 11(5)), which provides guidelines for the assessment of companies' due diligence, will be important for how competent authorities interpret and enforce the Regulation, whether they do so in a uniform way, the scope of their ex post checks and how they explain the Regulation to companies and industry.

It will be important for MSCAs to include in their ex-post checks a reasonable and risk-based analysis of a *wide range of documentation and evidence* on a company's due diligence practices. MSCAs have a broad obligation under the Regulation, to assess at a minimum:

- Union importers' **implementation** of their obligations;
- Documents and records that **"demonstrate the proper compliance"** with those obligations; and
- Audit obligations.

As such, the Commission should explain to Member States the risks of relying exclusively on, for example, a company's audit or membership of a recognised scheme. **As we explain in Sections 5(c) and 8(a) of this note, it cannot be assumed that companies meet the Regulation's standards only because they have been audited, or are members of recognised schemes.**

In order to draw conclusions about due diligence *practices and implementation of the Regulation*, MSCAs will need to draw on diverse sources of information—including public reports by international organisations, governments, civil society, and local and international media, and industry literature. They will also need to carry out site visits and interviews. See Section 7 for detailed recommendations to Member States.

We recommend that the Commission's handbook:

- Emphasises the core principles and underlying objectives of due diligence under the Regulation and the OECD Guidance, including its role as a tool that aims to facilitate responsible sourcing from higher-risk locations, rather than encourage irresponsible disengagement.
- Sets out a methodology for Member States to carry out appropriate and harmonised ex-post checks under Article 11(1), including guidance on:
  - How to determine the features that make a supply chain or company higher risk for the purposes of "risk based" checks; and
  - Substantiated concerns: see our comments on substantiated concerns under Section 7(c) of this note.
- Highlights why a thorough assessment of the quality of due diligence processes and practices is crucial, and the risks of relying exclusively on a company's audit or membership of a recognised scheme.
- Sets out a list of criteria for how Member States should address infringements, including penalties.

(D) HANDBOOK FOR ECONOMIC OPERATORS AND THE INDICATIVE LIST OF CONFLICT-AFFECTED AND HIGH-RISK AREAS (ARTICLE 14)

The Regulation requires the Commission, in consultation with the European External Action Service and the OECD, to:

- Prepare "non-binding guidelines in the form of a handbook for economic operators, explaining how best to apply the criteria for the identification of conflict-affected and high-risk areas". The handbook must be based on the definition of conflict-affected and high-risk areas in the Regulation and take into account the OECD Guidance (Article 14(1)). It should recognise, for example, that sourcing from conflict-affected and high-risk areas is only one of several red flags under the Regulation and the OECD Guidance.
- Provide an "indicative, non-exhaustive, regularly updated list of conflict-affected and high-risk areas" in accordance with Article 14(2).

We recommend that the Commission makes clear that:

- Sourcing from a conflict-affected and high-risk area is just one of several red-flags identified by the Regulation and OECD Guidance.
- Responsibility for identifying red flags in the supply chain, including the existence of conflict-affected or high-risk areas and other 'red flag locations', rests with the importer.
- Any list of conflict-affected and high-risk areas is indicative, non-exhaustive and for guidance only, as defined in the Regulation.
- Due diligence is designed to *promote and facilitate* engagement with conflict-affected and high-risk areas.

(E) VOLUME THRESHOLDS (ARTICLE 1 AND ANNEX I)

Union importers whose annual import volumes for each mineral or metal fall below specific volume thresholds (Article 1(3) and Annex I) are exempted from the Regulation's mandatory requirements. These thresholds—and the gold threshold in particular—pose a significant risk to the effectiveness of the Regulation.[70] They:

- Allow companies bringing minerals worth millions of euros into the EU to evade any checks—even if they buy directly from a conflict-affected or a high-risk area or other red flag location or supplier; and

- Risk an increase in the number of companies importing 3TG in amounts below the thresholds, which might indicate that companies are exploiting them to circumvent their due diligence obligations.

By exempting these companies from the Regulation's due diligence requirements, the Regulation allows importers to place significant volumes of minerals on the EU market, even if sourced through very high risk supply chains, without scrutiny or transparency. Companies further downstream will either be discouraged from buying from these importers or face unnecessary challenges when doing their own due diligence.

As part of its responsibility to amend the volume thresholds via delegated acts by no later than 1 July 2020 (Article 1(4)), the Commission:

- **Has committed to** *"take due account of the objectives of this regulation notably as set out in recitals (1), [(5a), (8) and (13a)]" and, in particular, to "consider the specific risks associated with the operation of upstream gold supply chains in conflict affected and high risk areas", including "the position of Union micro and small enterprises importing gold in the EU".*[71]
- **Is required to** carry out "appropriate consultations" during its preparatory work, including at expert level and in accordance with the Interinstitutional Agreement on Better Law-Making (Recital 19). In order to "ensure equal participation" in the preparation of delegated acts, the Commission is also required to make sure that the European Parliament and the Council receive all documents at the same time as Member States' experts, and their experts systematically have access to meetings of Commission expert groups (Recital 19).

Given the Regulation's stated objectives, which include breaking the nexus between conflict and illegal exploitation of minerals, **the aim of the thresholds cannot be simply capturing the majority of EU trade. To ensure that the Regulation is effective, the Commission must make sure that riskiest imports and transactions are subject to checks.**

We therefore recommend that the Commission, in order to assess the effectiveness of the volume thresholds against the Regulation's objectives, meets its commitments mentioned above and specifically:

- **Monitors** the following:
  – The annual import data it receives from Member States under Article 18 and amends the thresholds accordingly to reflect up-to-date data;

- The annual import volumes of 3TG imports below the volume thresholds;
- The number of companies importing volumes greater than the relevant threshold for each mineral, and the number of companies importing volumes less than the threshold (including the number of newly established companies doing so); and
- The sourcing country for imports falling below the relevant thresholds.

- **Engages** with companies directly to determine whether the exemptions created by the thresholds are complicating the due diligence efforts of those EU companies which fall within the scope of the Regulation.

(F) DOWNSTREAM COMPANIES

The OECD Guidance and the UNGPs make clear that all companies along the supply chain have a responsibility to carry out supply chain due diligence. The EU has repeatedly committed to promoting the OECD Guidance, in its entirety, including for downstream companies.

Downstream companies play an important role within the supply chain, using their leverage to influence, educate or train upstream suppliers or engage with relevant stakeholders. Downstream companies also import large volumes of minerals into the EU, connecting EU companies, investors, and consumers to risks along these supply chains. An EU trade policy cannot ignore these risks, or the commercial leverage, this trade brings.

The Commission has made important commitments in relation to downstream companies—such as reporting tools and standards to promote due diligence, a new transparency database, and making respect for the OECD Guidance a condition for its public procurement contracts. These commitments provide an **opportunity to send a clear signal that OECD aligned due diligence has been, and remains, the expectation for EU companies along the mineral supply chain.**

We recommend that the Commission prepares to meet its commitments in relation to downstream companies, while ensuring that any additional measures or initiatives set a clear expectation that companies carry out due diligence consistent with the internationally endorsed OECD Guidance.

The Commission's **commitments** include:

- Carrying out a number of additional measures targeting downstream companies, including "the development of **reporting tools and standards** to further boost due diligence in the supply chain" and the setting up of a "**transparency database.**"[72]
- **Gathering information on and assessing** whether: (a) "the aggregate efforts of the EU market on the responsible global supply chain of minerals are insufficient to leverage responsible supply behaviour in producer countries" and (b) the buy-in of downstream operators that have in place supply chain due diligence systems in line with the OECD Guidance is "insufficient".[73] If so, considering making additional legislative proposals targeted at EU companies with products containing 3TG in their supply chain.[74]
- **Developing guidelines** to encourage companies with more than 500 employees that are required to disclose non-financial information under Directive 2014/95/EU to disclose specific information in relation to products containing 3TG.[75]
- Making respect for the OECD Guidance or equivalent due diligence schemes a condition for its **own public procurement contracts.**[76]
- Developing **recommendations and guidance** to encourage Member States to foster the uptake of the OECD Guidance through performance clauses of procurement contracts.[77]

(G) REVIEW OF THE REGULATION (ARTICLE 17)

The Commission's review is an important tool to assess whether the Regulation meets its underlying aims and objectives. It is important that the Commission takes proactive steps to address any gaps, including through legislative proposals or draft amendments to the Regulation, as appropriate. It is also important, however, that the Commission acknowledges during its review that conflict and instability in fragile areas are complex problems that resist simple solutions. As the Joint Communication recognises, creating conditions for security and stability requires an integrated approach and sustained commitment. Building a transparent and responsible minerals trade that offers local communities a route to development—rather than funding corruption or providing armed groups with the incentive and means to fight—is just one part of the solution.

We recommend that the Commission develop and publish a clear and thorough methodology in order to prepare for assessing the functioning and effectiveness of the Regulation—to take place every three years from 1 January 2023 (Article 17). This methodology should take into account the stated objectives of the Regulation and include appropriate tools, including independent assessments, to monitor, evaluate and gather information on the following:

- The impact of the Regulation and accompanying measures on artisanal livelihoods and mining communities in producing countries (Article 17).
- The estimated levels of implementation and promotion of responsible sourcing of minerals within producing countries (Article 17) and key trading and transport hubs.
- The estimated cost of responsible sourcing for importers and other Union businesses, including SMEs (Article 17 and Recital 15).
- The estimated leverage of the total Union market on the global supply chain of minerals (Article 17(2)).
- The effectiveness of the volume thresholds (see Section 8(e) of this note).
- The estimated number of downstream operators in the EU with tin, tantalum, tungsten and gold in their supply chains, and the proportion of these operators that have due diligence systems in place that meet the OECD standards for downstream operators, via an independent assessment (Article 17(2)).
- The effectiveness of exclusions and exemptions, such as the exclusion of importers of other minerals and the exemption for recycled metals under Article 1(2b). For example, the Commission should: (i) consider carrying out an impact assessment in relation to minerals currently outside scope; (ii) monitor volumes of imports of recycled and scrap sources, and importers of these sources, in order to ensure that the reduced due diligence requirements for recycled materials do not undermine the Regulation's impact.

(H) ACCOMPANYING MEASURES AND THE JOINT COMMUNICATION

The Regulation aims to contribute to breaking the link between conflict, human rights abuses and the extraction and trade of minerals—a complex problem that cannot effectively be addressed through trade policy alone. In their Joint Communication of 5 March 2014, the Commission and the High Representative committed to "an integrated EU approach to promote the responsible sourcing from conflict-affected and high-risk areas".[78] The Regulation must therefore be complemented by substantive and coordinated development, governance, and diplomatic initiatives. A number of accompanying measures aim to encourage the responsible sourcing of minerals, among them:

- Incentives for EU companies to promote responsible sourcing, e.g. through funding; uptake of due diligence requirements and the respect of the OECD Due Diligence Guidance in performance clauses in the Commission's public procurement contracts; or actions to provide visibility to companies who source responsibly (see Section 8(f) on the Commission's commitment to establish a public "transparency database" for responsibly sourcing downstream companies).

- Making use of policy dialogues with third countries and other stakeholders to promote a common understanding of, and a common approach to, responsible sourcing at bilateral and multilateral levels.
- Making responsible sourcing part of its development cooperation aims, for instance by promoting national mandatory due diligence legislation and building capacity on due diligence.

In the Joint Communication, the Commission and the European External Action Service commit to act as a strong promoter of responsible sourcing at home and in their raw materials diplomacy, and they encourage EU Member States to do the same within their jurisdiction. The Commission has also committed to develop recommendations and implementing guidance for Member States in relation to the uptake of OECD Guidance standards through performance clauses of procurement contracts by national authorities.

The accompanying measures provide an important opportunity for the EU to drive change beyond the immediate scope of the Regulation. They allow engagement with a further range of actors, such as downstream companies, third country governments or affected communities, as well as the use of a wide range of instruments. As much as the variety of instruments and actors increases the probability of change, it requires policy coherence. The Commission and the External Action Service should therefore regularly report to the European Parliament and the Council on the implementation and effectiveness of the accompanying measures. They should also ensure that existing instruments take the due diligence requirements of the Regulation into account, in particular where these instruments promote the involvement of the private sector as an implementing agent or a source of finance.[79]

We urge the Commission and High Representative to honour these statements and commitments, and publish updates on their implementation and effectiveness on a regular basis. As initial steps, **we recommend that the Commission and European External Action Service:**

- Ensure policy coherence.
- Engage with downstream companies on due diligence and their role in the supply chain to ensure that downstream companies using and trading minerals, metals or products containing minerals or metals implement the OECD Guidance.
- Develop recommendations and implementing guidance to Member States on the uptake of OECD due diligence standards in procurement contracts.
- Ensure that development cooperation measures not only address business' capacity to carry out due diligence and to create an enabling environment for responsible sourcing, but also strengthen governments' capacity for governance and protection of human rights, and ensure access to remedy in case of harm.
- Ensure that their development cooperation measures include measures that address development needs arising in the artisanal mining sector.
- Make responsible sourcing a standing agenda point of the EU's raw materials dialogues. These dialogues should include structured dialogue with civil society, including affected communities.

ANNEX

How responsible sourcing works under the EU Regulation

UPSTREAM COMPANIES

SUCH AS SMELTERS/REFINERS, AND THEIR SUPPLIERS

Smelters and refiners work with their suppliers to trace supply chains back to their origin, in order to find and manage risks along the way, including at mine sites, along transportation routes, and in trading centres

DOWNSTREAM COMPANIES

SUCH AS COMPANIES WHO SOURCE FROM SMELTERS AND REFINERS, AND THEIR CUSTOMERS

Companies contact their suppliers and work together to trace their supply chains back to smelters/refiners, in order to ensure they are sourcing responsibly in line with the Regulation and OECD Guidance

UPSTREAM COMPANIES

1 GOOD MANAGEMENT SYSTEMS (Article 4)

PUT IN PLACE GOOD SYSTEMS, INCLUDING:

- A supply chain policy that sets out your commitments to managing risks (e.g. of support to armed groups, torture, forced labour and other gross human rights violations, bribery and money laundering). The policy must be consistent with the model policy in the OECD Guidance
- Incorporate this policy into your supplier relations and contracts
- Put in place a chain of custody or supply chain traceability system, and a mechanism for voicing concerns
- All this can be done with help from an **industry scheme,** but cannot be outsourced entirely

See Step 1 of the OECD Guidance

2 MANAGING RISKS IN YOUR SUPPLY CHAIN (Article 5)

- Review information gathered against your policy and the OECD Guidance
- Which risks arise in your supply chain?
- How are you dealing with them?
- Implement a strategy to manage and respond to risks consistent with the OECD Guidance and the Regulation

See Steps 2 and 3 of the OECD Guidance

3 INDEPENDENT AUDITS (ARTICLE 6)

- Smelters, refiners and importers who are upstream should carry out and publish independent audits on their due diligence
- This can be done with help from industry schemes

See Step 4 of the OECD Guidance

4 DISCLOSURE OBLIGATIONS (Article 7)

- Submit documentation on due diligence to competent authority
- Make information on due diligence available to customers, and publicly report as widely as possible on actions you have taken under Articles 4, 5 and 6, in line with Step 5 of the OECD Guidance

See Step 5 of the OECD Guidance

DOWNSTREAM COMPANIES

1 GOOD MANAGEMENT SYSTEMS (Article 4)

PUT IN PLACE GOOD SYSTEMS, INCLUDING:

- A supply chain policy that sets out your commitments to managing risks (e.g. of support to armed groups, torture, forced labour and other gross human rights violations, bribery and money laundering). The policy must be consistent with the model policy in the OECD Guidance
- Incorporate this policy into your supplier relations and contracts
- Put in place a chain of custody or supply chain traceability system to identify smelters and refiners, and a mechanism for voicing concerns
- All this can be done with help from an **industry scheme,** but cannot be outsourced entirely

See Step 1 of the OECD Guidance

2 MANAGING RISKS IN YOUR SUPPLY CHAIN (Article 5)

- Review information gathered, such as audits, against your policy and the OECD Guidance
- Take reasonable steps to identify **smelters/refiners** in your supply chain and assess their due diligence
- Is there a reasonable risk that a smelter/refiner is non-resposible?
- Implement a strategy to manage and respond to risks you find, consistent with the OECD Guidance and the Regulation

See Steps 2 and 3 of the OECD Guidance

3 INDEPENDENT AUDITS (ARTICLE 6)

- Metal importers should carry out and publish **independent audits** on their due diligence
- This can be done with help from industry schemes

4 DISCLOSURE OBLIGATIONS (Article 7)

- Submit documentation on due diligence to competent authority
- Publicity report, as widely as possible, on the actions you have taken under Articles 4, 5 and 6, in line with Step 5 of the OECD Guidance

See Step 5 of the OECD Guidance

ENDNOTES

1. The text of the Regulation and related documents can be found at: http://ec.europa.eu/trade/policy/in-focus/conflict-minerals-regulation/legal-texts-and-documents/

2. Organisation for Economic Cooperation and Development (OECD), Due Diligence Guidance on Responsible Mineral Supply Chains from Conflict-Affected and High-Risk Areas, Version 3, 2016, http://www.oecd.org/corporate/mne/mining.htm

3. See for example: European Commission Statement 1, Annex to the Legislative Resolution by the European Parliament dated 16 March 2017, http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P8-TA-2017-0090+0+DOC+XML+V0//EN; Cecilia Malmstrom, Press release, 'Big step against conflict minerals', 16 June 2016, https://ec.europa.eu/commission/commissioners/2014-2019/malmstrom/blog/big-step-against-conflict-minerals_en; European Commission and High Representative of the EU for Foreign Affairs and Security Policy, 'Joint Communication to the European Parliament and the Council', 5 March 2014, http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152228.pdf. For more detail on the Commission's commitments in relation to downstream companies see Section 8(f) of this note. The EU and its Member States endorsed and committed to promoting the OECD Guidance in 2011, thereby expecting *all companies along mineral supply chains* to carry out supply chain due diligence in line with its standards.

4. See for example: Recital 25 of the Regulation; Joint Communication, 5 March 2014; OECD Guidance, 2016, Introduction, p.12; OECD, Global Forum on Responsible Business Conduct, 'Session Note on Responsible Disengagement', http://mneguidelines.oecd.org/global-forum/2017-GFRBC-Session-Note-Responsible-Disengagement.pdf

5. For example: DG Trade, 'The Regulation Explained', http://ec.europa.eu/trade/policy/in-focus/conflict-minerals-regulation/regulation-explained/

6. Global Initiative Against Transnational Organised Crime, 'Organized Crime and Illegally Mined Gold in Latin America', 9 April 2016, http://globalinitiative.net/documents/organized-crime-and-illegally-mined-gold-in-latin-america/

7. Global Witness, 'War in the Treasury of the People: Afghanistan, lapis lazuli and the battle for mineral wealth', 5 June 2016, https://www.globalwitness.org/en/reports/war-treasury-people-afghanistan-lapis-lazuli-and-battle-mineral-wealth/

8. Global Witness, 'Jade: Myanmar's "Big State Secret"', 23 October 2015, https://www.globalwitness.org/en-gb/campaigns/oil-gas-and-mining/myanmarjade/

9. Human Rights Watch, 'Ghana: Child Labor Taints Gold Supply Chain', 10 June 2015, https://www.hrw.org/news/2015/06/10/ghana-child-labor-taints-gold-supply-chain

10. Amnesty International, 'Chains of Abuse: The Case of Diamonds from the Central African Republic and the Global Diamond Supply Chain', 30 September 2015, https://www.amnesty.org/en/documents/afr19/2494/2015/en/; Global Witness, 'A Game of Stones', https://www.globalwitness.org/en/campaigns/central-african-republic-car/game-of-stones/#chapter-0/section-0

11. Amnesty International, '"This Is What We Die For": Human Rights Abuses in the Democratic Republic of the Congo Power the Global Trade in Cobalt', 19 January 2016, https://www.amnesty.org/en/documents/afr62/3183/2016/en/; Global Witness, 'River of Gold', 5 July 2016, https://www.globalwitness.org/en/campaigns/conflict-minerals/river-of-gold-drc/

12. OECD, Due Diligence Guidance on Responsible Mineral Supply Chains from Conflict-Affected and High-Risk Areas, Version 3, 2016, http://www.oecd.org/corporate/mne/mining.htm

13. UN Guiding Principles on Business and Human Rights, 2011, http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf and OECD, Guidelines for Multinational Enterprises, 2011, http://www.oecd.org/corporate/mne/

14. Section 1502 of the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act requires, among other things, U.S.-listed companies to undertake due diligence to check if certain minerals in their products – tin, tungsten, tantalum and gold – are funding armed groups or fuelling human rights abuses in Congo and its neighbouring countries. In 2015 Global Witness and Amnesty International analysed 100 reports filed by companies with the Securities and Exchange Commission (SEC) under Section 1502 of the Dodd-Frank Act. See Global Witness and Amnesty International, 2015, 'Digging for Transparency', https://www.globalwitness.org/en/campaigns/conflict-minerals/digging-transparency/

15. See 'Arrêté ministériel no. 0057 CAB.MIN/MINES/01/2012 du 29 février 2012' in Congo, and 'Ministerial Regulations No. 002//2012/MINIRENA of 28/03/2012 on the Regional Certification Mechanism for Minerals' in Rwanda (available at: http://www.minirena.gov.rw/fileadmin/Mining_Subsector/Laws__Policies_and_Programmes/Laws/5.Ministerial_Regulation___Regional_Certification_Mechanism_for_Minerals.pdf).

16. China Chamber of Commerce of Metals, Minerals and Chemicals Importers & Exporters (CCCMC), 'Guidelines for Social Responsibility in Outbound Mining Investments', 2015, http://www.globalwitness.org/sites/default/files/library/CCCMC%20Guidelines%20for%20Social%20Resposibility%20in%20Outbound%20Mining%20Investments%20Oct%202014%20CH-EN.pdf

17. See OECD website: http://www.oecd.org/corporate/mne/mining.htm

18. OECD Guidance, 2016, Introduction, p.13.

19. See the Regulation, Article 7(3) and OECD Guidance, 2016, Annex I, Annex III and the Supplements.

20. See OECD, 30 June 2017, 'Session Note on Responsible Disengagement' on the OECD MNE Guidelines, which the OECD Guidance puts into practice for the minerals sector: http://mneguidelines.oecd.org/global-forum/2017-GFRBC-Session-Note-Responsible-Disengagement.pdf

21. For example, see OECD Guidance, 2016, Introduction, p. 15.

22. For example, see OECD Guidance, 2016, Supplement on Tin, Tantalum and Tungsten, Step 2, p.41 and Step 3, p.44.

23. Metal importers who are smelters or refiners are considered 'upstream', unless they source from other smelters or refiners (in which case they act as both upstream and downstream companies). See the definitions of "upstream" and "downstream" in the Supplements to the OECD Guidance.

24. See Michael Gibb, 'Global Witness: Conflict mineral import loopholes would pay for 6,000 AK-47s', Euractiv, 8 November 2016, https://www.euractiv.com/section/development-policy/opinion/global-witness-conflict-mineral-import-loopholes-would-pay-for-6000-ak-47s/

25. Step 1 of the OECD Guidance, 2016 sets out more detail on the standards expected of companies.

26. OECD Guidance, 2016, Annex II, p.20-24.

27. See the definitions of "upstream", "upstream company" and "upstream supply chain" in the Supplements to the OECD Guidance. See also the diagram on page 5.

28. See the definitions of "downstream", "downstream company" and "downstream supply chain" in the Supplements to the OECD Guidance. See also the diagram on page 5.

29. For example, see OECD Guidance, 2016, the Supplement on Gold, Step 2, Section I, paragraph A, p.78; and Section II, paragraphs A and C, p.86 and 89.

30. See the Regulation, Article 5(1)(a) for mineral importers and Article 5(4) for metal importers.

31. See the Regulation, Articles 5(1)(b), 5(2), 5(3) for mineral importers and Article 5(5) for metal importers.

32. See the standards for upstream companies in the OECD Guidance, 2016, Step 2. For example, see Supplement on Tin, Tantalum and Tungsten, Step 2, Section I – Upstream Companies, paragraphs A and B, p.41. Note these standards apply to mineral importers and also to metal importers acting as upstream companies as defined in the OECD Guidance (ie. supplying to smelters or refiners).

33. See OECD Guidance, 2016, Supplement on Tin, Tantalum and Tungsten, Step 2, Section I – Upstream Companies, paragraph B, p. 41 and Appendix, p.114.

34. See the standards for downstream companies in the OECD Guidance, 2016, Step 2. Note that some metal importers may be upstream companies under the OECD Guidance—e.g. if they are smelters or refiners or supply to smelters and refiners—in which case the upstream standards in the OECD Guidance apply.

35. See for example Supplement on Tin, Tantalum and Tungsten, Step 2, Section II – Downstream Companies, paragraph A, p.43.

36. See Box 1 and OECD Guidance, 2016, Annex II, p.20-24 on specific risks.

37. See for example OECD Guidance, 2016, Supplement on Tin, Tantalum and Tungsten, Step 2, Section I – Upstream Companies, paragraph C, p.42.

38. See OECD Guidance, 2016, Supplement on Gold, Step 2, Section III – Risk assessment for downstream companies, paragraph C.3, p. 98.

39. For example, see OECD Guidance, 2016, Supplement on Gold, Step 2, Section III – Risk assessment for downstream companies, p. 97-98. If the importer is a refiner, see also Supplement on Gold, Step 2, Section II – Risk assessment for local exporters, recyclers, international traders of mined/recyclable gold and refiners, p.86-97.

40. See the Regulation, Recital 11(b), Articles 5(1)(b), 5(2) and 5(3) for mineral importers, and Article 5(5) for metal importers.

41. See OECD, Global Forum on Responsible Business Conduct, 'Session Note on Responsible Disengagement', 30 June 2017, http://mneguidelines.oecd.org/global-forum/2017-GFRBC-Session-Note-Responsible-Disengagement.pdf

42. See OECD Guidance, 2016, Supplements and Annexes II and III.

43. For more detail, see the Supplements to the OECD Guidance, 2016.

44. For example, see OECD Guidance, 2016, Supplement on Tin, Tantalum and Tungsten, Step 3, Section B and Supplement on Gold, Step 3, Section I – Risk Management for Upstream Companies, Section C.

45. For example, see OECD Guidance, 2016, Supplement on Gold, Step 3, Section I – Risk Management for Upstream Companies, D, p.102 and Supplement on Tin, Tantalum and Tungsten, Step 3, paragraphs B and C, p.44-46.

46. For example, see OECD Guidance, 2016, Supplement on Gold, Step 3, Section I – Risk Management for Upstream Companies, paragraph E, p.102 and Section II – Risk Management for Downstream Companies, paragraph E, p.105; and Supplement on Tin, Tantalum and Tungsten, Step 3, paragraph D, p. 46.

47. See OECD Guidance, 2016, Supplement on Gold, Step 3, Section II – Risk Management for Downstream Companies, paragraph C.1, p.103.

48. For example, see OECD Guidance, 2016, Supplement on Gold, Step 3, Section I – Risk Management for Upstream Companies, p.99-102.

49. For example, see OECD Guidance, 2016, Supplement on Gold, Step 3, Section II – Risk Management for Downstream Companies, paragraph C.2(b), p. 104.

50. UN Guiding Principles on Business and Human Rights, 2011, Guiding Principle 22 http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf; OECD, Guidelines for Multinational Enterprises, 2011, http://www.oecd.org/corporate/mne/. In May 2018 the OECD will release its general Due Diligence Guidance for Responsible Business Conduct, which is intended to provide practical support to companies implementing the OECD's Guidelines for Multinational Enterprises. While that general Guidance is not intended to replace or modify the sector-specific OECD Guidance on minerals, it should prove a useful supplement to the minerals Guidance by providing additional information and practical examples of how companies can exercise due diligence throughout their supply chains, including in preventing and mitigating the risk of actual and potential adverse impacts.

51. Global Initiative Against Transnational Organised Crime, 'Organized Crime and Illegally Mined Gold in Latin America', 9 April 2016, http://globalinitiative.net/documents/organized-crime-and-illegally-mined-gold-in-latin-america/

52. See Bloomberg Business Week, 'How to become an International gold smuggler', 9 March 2017, https://www.bloomberg.com/news/features/2017-03-09/how-to-become-an-international-gold-smuggler; LBMA, List of LBMA refiners on the former Good Delivery list : http://www.lbma.org.uk/refiners-gold-former; The Conflict-Free Sourcing Initiative, now re-branded as the Responsible Minerals Initiative: http://www.responsiblemineralsinitiative.org/

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55. Miami Herald, 'How drug lords make billions smuggling gold to Miami for your jewelry and phones', 16 January 2018, http://www.miamiherald.com/news/local/community/miami-dade/article194187699.html; South Florida Business Journal, '4 indicted in alleged multibillion-dollar gold scheme involving South Florida company', 10 January 2018, https://www.bizjournals.com/southflorida/news/2018/01/10/4-indicted-in-gold-scheme.html; Miami Herald, 'Illegal gold dealer weeps as he's sent to prison for money laundering', 31 January 2018, http://www.miamiherald.com/news/local/article197636559.html; Department of Justice, South District of Florida, 'U.S. Gold Refinery Pleads Guilty to Charge of Failure to Maintain Adequate Anti-Money Laundering Program', 16 March 2018, https://www.justice.gov/usao-sdfl/pr/us-gold-refinery-pleads-guilty-charge-failure-maintain-adequate-anti-money-laundering; Washington Post, 'Gold refinery agrees to $15M fine after money laundering', 16 March 2018, https://www.washingtonpost.com/business/gold-refinery-agrees-to-15m-fine-after-money-laundering/2018/03/16/142ccc56-2961-11e8-a227-fd2b009466bc_story.html?utm_term=.5ba0414280cf; Miami Herald, 'Firm behind gold-fueled, Miami-based money-laundering racket fined $15 million', 16 March 2018, http://www.miamiherald.com/news/local/article205503659.html

56. Public Eye, 'A Golden Racket—The True Source of Switzerland's "Togolese" Gold', 9 September 2015, 9 September 2015, https://www.publiceye.ch/en/campaigns/agoldenracket/

57. See the Regulation, Recital 13, and OECD Guidance, 2016, Supplements, Step 5, p. 52 and p. 111.

58. OECD Guidance, 2016, Annex I, Step 5, p. 19; Supplement on Tin, Tantalum and Tungsten, Step 5, p.52-53; and Supplement on Gold, Step 5, p.111-113.

59. OECD Guidance, 2016, Supplement on Tin, Tantalum and Tungsten, Step 5, p. 52, footnote 34 and Supplement on Gold, Step 5, p. 111, footnote 59.

60. For example, see OECD Guidance, 2016, Supplement on Tin, Tantalum and Tungsten, Step 5, paragraph A.1, p.52 and Step 3, paragraph B.2(b)(i), p.45. See also the diagram on page 5 of this note.

61. For example, see OECD Guidance, 2016, Supplement on Gold, Step 5, paragraph A.1(3), p.112 and Step 5, paragraph A.2, p.112 of the Supplement on Gold.

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