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Practice Group(s):
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Mining and Metals

Proposed EU Legislation on Conflict Minerals Published

By Vanessa Edwards and James Green

On 5 March, the European Commission (“the Commission”) published its long-awaited draft legislation on conflict minerals.

The *proposal for a regulation setting up a Union system for supply chain due diligence self-certification of responsible importers of tin, tantalum and tungsten, their ores, and gold originating in conflict-affected and high-risk areas* (“the Proposal”) establishes a voluntary system whereby importers may choose to self-certify as “responsible importers”. Such importers must then comply with certain ongoing obligations or risk losing their “responsible importer” status.

Material scope

The Proposal covers minerals and metals containing or consisting of tin, tantalum, tungsten and gold. Although its title implies a slightly narrower scope, it is clear from the text that it includes ores and concentrates of all four metals, tungsten oxides, hydroxides and carbides, and tantalum carbides. Such minerals and metals are referred to in this alert as “conflict minerals”.

These are the same four minerals as those targeted by the US Dodd-Frank Act, section 1502 (“Section 1502”).

Geographical scope

The Proposal covers importers of conflict minerals sourced from “conflict-affected and high-risk areas”. These are defined as “areas in a state of armed conflict, fragile post-conflict as well as areas witnessing weak or non-existent governance and security, such as failed states, and widespread and systematic violations of international law, including human rights abuses”.

Section 1502 covers conflict minerals originating in the Democratic Republic of Congo and adjoining countries. The Proposal is not so limited. The Commission explains in its Frequently Asked Questions on the Proposal that it decided not to present a specific list of countries because the situation in a given territory is by definition fluid and unstable. In addition, a closed list would provide an easy way for companies disengaging from a listed region to comply with the legislation. The impact assessment which the Commission carried out in connection with the Proposal provides some examples of regions that could currently qualify as “conflict-affected and high-risk areas”, including the Great Lakes Region of Africa, Colombia, Mali, Sudan and Côte d’Ivoire (Ivory Coast).

Personal scope

The Proposal focuses on importers of conflict minerals rather than on manufacturers, importers or sellers of finished products. The Commission estimates that there are more than 400 such importers, comprising some 300 traders, 20 smelters and refiners and over 100 component manufacturers.

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Self-certification

The Proposal provides that any importer of conflict minerals may self-certify as a “responsible importer” by declaring to a Member State competent authority that it adheres to the supply chain due-diligence obligations set out in the Regulation.

Due-diligence obligations

The preamble to the Proposal explains that supply chain due diligence is an on-going, proactive and reactive process through which business operators monitor and administer their purchases and sales with a view to ensuring that they do not contribute to conflict and adverse impacts thereof. The Proposal defines the concept as the obligations of responsible importers of conflict minerals in relation to their management systems, risk management, third-party audits and disclosure of information with a view to identifying and addressing actual and potential risks linked to conflict-affected and high risk areas to prevent or mitigate adverse impacts associated with their sourcing activities. The Proposal lists a number of detailed obligations under these broad heads. Those covering management systems and risk management reflect the Due Diligence Guidance adopted by the OECD in 2011 (second edition adopted in 2013).

List of responsible smelters and refiners

The Proposal requires the Commission to publish a list of responsible smelters and refiners of conflict minerals.

Enforcement and sanctions

The Proposal requires Member State competent authorities to carry out appropriate ex-post checks on self-certified responsible importers to verify their compliance with the ongoing requirements of the legislation. These checks must include:

- Examination of the responsible importer’s implementation of supply chain due-diligence obligations
- Examination of documentation and records demonstrating compliance with such obligations
- On-the-spot inspections, including field audits.

As is normally the case with EU legislation, each Member State is required to lay down rules applicable to infringements of the Regulation. Sanctions, however, are (unusually) prescribed in the Regulation rather than left to the discretion of the Member States. In case of an infringement, the relevant competent authority is to issue a notice of remedial action to be taken by the responsible importer. If the responsible importer takes inadequate remedial action, the competent authority is to issue a notice of non-recognition of its responsible importer certificate.

Reporting and review

The Proposal requires Member States to submit to the Commission an annual report on implementation of the Regulation, including the following information which responsible importers will have provided as part of their due-diligence obligations:

- Contact details of each responsible importer

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- Audited documentation for each responsible importer regarding the proportion of conflict minerals relative to the total amount of minerals purchased for the previous year
- Details of all smelters and refiners in each responsible importer's supply chain
- The proportion of conflict minerals relative to the total amount of minerals purchased by each such smelter or refiner, as confirmed by audit.

On the basis of this information, the Commission must draw up a report to be submitted to the European Parliament ("the Parliament") and the Council of the EU ("the Council") (the two arms of the EU legislature) every three years.

Three years after entry into force of the Regulation and every six years thereafter, the Commission must review its functioning and effectiveness, and submit a review report to the Parliament and Council. The report may be accompanied by a proposal for mandatory legislative measures if the Commission considers this to be necessary.

Next steps

The Commission hopes that the Regulation will be adopted in September and enter into force in 2015.

This may be ambitious. Both the Commission and the Parliament have major changes of members this year, which affects legislative priorities and scheduling. Moreover there are many in the Parliament who would prefer more stringent, mandatory measures, which may make it difficult for the two co-legislators to agree a common text. K&L Gates' conflict minerals team will continue to monitor and report developments.

Related initiatives

On the same day as it published the Proposal, the Commission also published a Communication to the Parliament and Council on Responsible sourcing of minerals originating in conflict-affected and high-risk areas. The Communication sets out an integrated approach in the EU to conflict minerals. One aspect of that approach is the Proposal. Other measures mentioned in the Communication include:

- Public procurement incentives: the Commission will promote the uptake of self-certification as responsible importer and the list of responsible smelters and refiners through performance clauses in its own public procurement/government contracts.
- Letter of intent: the Commission will take action to provide visibility to the efforts of companies that provide letters of intent announcing relevant commitments.
- Foreign policy: various steps vis-à-vis third countries.

Authors:

Vanessa Edwards
vanessa.edwards@klgates.com
+44.(0)20.7360.8293

James Green
james.green@klgates.com
+44.(0)20.7360.8105

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