

RECOMMENDATIONS to improve the implementation of the EU Conflict Minerals Regulation

1. Capacity of the MSCAs and the EC

MSCAs and the EC play a pivotal role in ensuring consistent enforcement of the law across different EU countries. Currently, the differences between the MSCAs are substantial, both in terms of available staff and sector expertise, as in the way they interpret the law. This is very problematic as it creates differences between countries and misunderstandings at the level of importers, which could finally lead EU importers to move headquarters to another EU country.

With more EU due diligence Regulations upcoming, the pressure on MSCAs will only grow. However, without proper implementation at Member State level, any due diligence Regulation will be useless. The EC should take a leadership role to assist MSCAs in order to ensure robust implementation of due diligence Regulations.

Both MSCAs and the EC should be better equipped to monitor the implementation of Union importers, this includes:

- MSCAs should be adequately funded, staffed and trained. Training should not be limited to the technical application of the Regulation, but also focus on the wider political and economic context of responsible mineral sourcing;
- The EC should guide and assist the MSCAs and oversee the overall coherence of the implementation to help create a level playing field for companies across the EU;
- The EC should get a mandate and dedicated resources to carry out its own *ex-post* checks on EU importers and to independently investigate substantiated concerns from third parties or authorities on human rights abuses or environmental harm in 3TG supply chains. Such investigations should include determining whether minerals associated with such wrongdoings are actually imported into the EU.

2. Accompanying measures

A decade of due diligence implementation has taught us that the tension between avoiding any human rights abuses in the supply chain on the one hand, and remaining engaged in CAHRAs and/ or ASM on the other hand, cannot be left to markets alone. If the EU cares for an improved human rights situation in producing countries, including in CAHRAs, it has to actively intervene, both by encouraging downstream companies to engage in CAHRAs/ASM through allowing for progressive improvement, and by supporting upstream producers to work towards the EU standards.

1. The EU should actively intervene in market dynamics in order to encourage mid- and downstream companies to engage with the ASM sector and in CAHRAs. The EU should encourage (commercial) incentives for responsible sourcing, instead of only focusing on compliance. Measures should include:
 - Only recognize industry schemes that create and increase the supply of 3TG that are responsibly sourced from ASM/CAHRAs. Industry schemes are eager to obtain EU recognition. The EU should use this leverage and include mandatory engagement with ASM and CAHRAs while setting clear and measurable criteria. This inevitably includes accepting a certain level of imperfection while encouraging progressive improvement;
 - Publicly recognize downstream actors that create and sustain the demand of 3TG from ASM and/or CAHRAs, so as to boost their reputation. The EU can organize a campaign to inform consumers on the development potential when buying products that were responsibly sourced from ASM/CAHRAs. This could lead to consumers willing to pay a premium for responsibly sourced metals;

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- The EU is planning to specifically identify those smelters/refiners on the White list that source responsibly from conflict zones, so as to incentivize the legitimate trade. This should be implemented (once industry schemes are recognized) and also include sourcing from ASM;
 - Organize a campaign to clarify to MSCAs and companies that it is allowed and even encouraged to source responsibly from ASM/CAHRAs which should lead to abuses being addressed instead of hidden;
 - Explore how companies that disclose human rights, environmental or bribery risks in good faith and in line with international standards can benefit from better legal defenses against civil or consumer suits;
 - Publicly recognize the importance of artisanal mining to local employment and development.
 - Encourage cooperation between artisanal and industrial mining operations as a best practice and a conflict mitigation strategy if conducted in accordance with adequate safety, labor, and environmental safeguards.
2. We recommend the EU to actively intervene in market dynamics in order to prepare the ASM sector and CAHRAs to implement the standards of the Regulation to ensure EU market access. Measures should include:
- Informing (local) authorities, mining cooperatives and civil society organizations in 3TG producing countries on the EU Regulation, the OECD Guidance and Annex II risks;
 - Political dialogue with producing states on the challenges and needs related to creating an enabling environment for responsible sourcing. Such dialogue should include themes like good governance, corruption, and tax reforms;
 - Encouragement of technical support to the ASM sector for progressive improvement;
 - Support for the installation of smelters and refiners in producing countries in order to shorten the supply chains and encourage transparency.

3. CAHRA list

Many top exporting countries of 3TG pose risks for businesses to become associated with serious human rights violations. However, the majority of these countries are not included in the CAHRAs list as they are not affected by (post-) conflict nor witness weak or non-existing governance or systematic violations of international law. The EU Regulation should not only cover conflict-related risks but address all grave human rights risks along the supply chain. This means that the Regulation should encompass a broader risk-set, including environmental risks.

It is important to add new categories as we have learned that neither companies nor MSCAs have sufficient expertise on risks related to sourcing from trading hubs and transit countries. Transit countries should be added to the list because the majority of conflict and high-risk gold is exported by neighboring countries instead of producing countries. Trading hubs should be added as they are often confused by MSCAs with producing countries.

- We recommend that the Regulation shifts its scope from conflict-related risks to environmental, social and governance (ESG) risks, beyond conflict settings. This entails abandoning the CAHRA list and focusing on the identification of risks, including red flags, as included in the OECD Due Diligence Guidance.
- If the EU would decide to keep the CAHRA list, we suggest to add a new list next to the CAHRA list: high-risk transit and trade countries (e.g., UAE, Uganda). These categories can be indicated

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for example in a different color on top of the world map with CAHRAs on the CAHRA list website. 'High-risk' in this context would mean countries with a negative track record in issues such as anti-money laundering, fraud, truthful reporting, and corruption, as well as countries where legislation and practices are not supporting high levels of transparency.

4. Management system obligations

There is a significant risk that refiners or smelters (especially in countries with weak safeguards) provide false information about the country of mineral origin – for example, Congolese gold being falsely labeled as Ugandan gold. MSCAs have, understandably, a lot of trouble noticing this. Given the pervasiveness of fraud in this sector, MSCAs should not take information in EU importers' supply chain traceability systems about countries of mineral origin at face value. Making it mandatory to include the mine of mineral origin in all supply chain traceability systems and supplying that information to MSCAs would facilitate independent checks.

In order to fight fraud, the EU should amend Article 4 of the Regulation as to:

- require Union importers to provide in their supply chain traceability system the name of the mine of mineral origin in all cases, no matter whether the minerals originate from previously identified CAHRAs or whether other supply chain risks, as listed in the OECD Due Diligence Guidance, have been ascertained.

5. Role of industry schemes and audits

- The EC should require thorough and transparent criteria regarding the use of industry schemes and audits. Special attention should be paid to participation of civil society and affected communities in audits, corrective action plans, development of standards, grievance mechanisms, and governance structures;
- The EU should avoid overreliance on third-party audits and industry schemes. These should be used as just one tool in a kit designed to verify compliance with responsible sourcing obligations. The EU should include non-industry actors, including NGOs, in risk assessment processes.

6. Public reporting and transparency on the implementation of the Regulation

More transparency on the implementation of the Regulation is crucial for third parties to evaluate the effectiveness and learn from its weaknesses to improve impact. This is vital to the success of the 3TG Regulation, but also very relevant for other due diligence Regulations that include many similar clauses.

We recommend the EU and the MSCAs to improve their public reporting, more specifically, we recommend the EU and MSCAs to:

- Improve public communication about the Regulation's implementation and effectiveness, including for example the recognition process of industry schemes, by providing more frequent updates;
- Encourage MSCAs to publicly disclose the list of Union importers under the Regulation as a best practice;
- Ensure that the annual due diligence reports of all importers subject to the due diligence obligations of the Regulation are publicly available and easily accessible;

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- Take steps to make the following information more easily accessible to the public: mines of mineral origin, and locations where minerals are consolidated, traded and processed. This would help journalists and NGOs to perform their role of watchdogs. In this perspective, the “transparency platform for downstream companies” announced by the EC is a welcome development;
- Provide a public disaggregated dataset on 3TG imports into the EU.

7. Rules applicable to infringement and penalties

Without serious consequences for EU importers in case of non-compliance with the EU Regulation, the effects in the entire supply chain will likely remain minimal.

To this end, we recommend the EU to:

- Harmonize the rules applicable to infringements of the Regulation across the EU to avoid shopping between MSCAs. Rules applicable to infringements can include (temporary) import bans, fines, and “naming and shaming” methods (publicly name companies that do not comply with the Regulation);
- Ensure (conditional) fines are effective by fixing significant minimum fines (e.g., 50,000 EUR).

The EU Regulation states that, based on the findings of the ongoing review, the EC “shall assess whether MSCAs should have competences to impose penalties upon Union importers in the event of persistent failure to comply with the obligations set out in this Regulation”. We recommend the EC to:

- Submit a legislative proposal to the European Parliament and to the Council to grant MSCAs competence to impose uniform and dissuasive penalties upon EU importers who persistently fail to comply with the Regulation.

8. Alignment between the different EU due diligence regulations

There remain points of (potential) misalignment and overlap between all of the EU due diligence initiatives. On top of that, there are points of misalignment between international and EU due diligence initiatives. This creates a very confusing situation for EU companies and actors in producing countries. On the one hand, we recommend the EU 3TG Regulation to at least include the more recent developments (e.g., in the light of the green transition) integrated in other regulations. On the other hand, due diligence Regulations currently in the drafting process should take lessons learned from the 3TG Regulation into account.

There is a need for EU due diligence policy coherence, acknowledging that each initiative is at a different stage in the legislative or implementation process. For the EU 3TG Regulation, it is necessary to align at least with:

- The EU Battery Regulation and Corporate Sustainability Due Diligence Directive: The pertaining legal texts require companies to also manage negative environmental impacts, and place more emphasis on remediation and reparation;
- The Corporate Sustainability Reporting Directive: This legislative act will require large companies to conduct due diligence, identify, publicly report, and counteract actual and potential adverse human rights impacts along the entire supply chain.