The EU Conflict Minerals Regulation
High Stakes, Disappointing Results

Paper on the effectiveness of European Union Regulation 2017/821

International Peace
Information Service

EDITORIAL

The EU Conflict Minerals Regulation: High Stakes, Disappointing Results

Antwerp / Goma / Utrecht, October 2023

Front cover image: Furnace in a gold smelter. © Adobestock

Authors: Lotte Hoex, Jean-Sébastien Sépulchre, Marianne Moor

Suggested citation: IPIS, PAX, *The EU Conflict Minerals Regulation: High Stakes, Disappointing Results.* Antwerp / Goma / Utrecht, October 2023.

For more information, please contact: lotte.hoex@ipisresearch.be

D/2023/4320/16

International Peace Information Service (IPIS) is an independent research institute providing tailored information, analysis, capacity enhancement and policy advice to support those actors who want to realize a vision of durable peace, sustainable development and the fulfilment of human rights.

PAX means peace. Together with people in conflict areas and concerned citizens worldwide, PAX works to build just and peaceful societies across the globe. PAX brings together people who have the courage to stand for peace. Everyone who believes in peace can contribute. We believe that all these steps, whether small or large, truly matter and will contribute to a just and peaceful world.

DISCLAIMER

This document has been produced with the financial assistance of the European Union and the Dutch Ministry of Foreign Affairs. The contents of the document are the sole responsibility of IPIS and PAX and can under no circumstances be regarded as reflecting the position of the European Union nor the Dutch Ministry of Foreign Affairs.

1. TABLE OF CONTENTS

EDITORIAL **2**

ABBREVIATIONS **4**

EXECUTIVE SUMMARY **5**

INTRODUCTION **7**

1. THE INEXTRICABLE LINK BETWEEN DUE DILIGENCE AND TRANSPARENCY **9**

The bottleneck of refiners and smelters 9

Management system obligations under the Regulation 10

Illustrations of gold trading hubs 11

The role of due diligence schemes in the Regulation 13

Disclosure obligations for importers and sub-standard reporting issues 16

Transparency at the member state level 16

Transparency on EU import data 17

2. CAN THE EU REGULATION AVOID DISENGAGEMENT? **18**

CAHRA list 20

Inclusive focus 22

Accompanying measures 23

RECOMMENDATIONS **24**

ABBREVIATIONS

3TG	Tin, Tungsten, Tantalum and Gold
ASM	Artisanal and Small-scale Mining
CAHRAs	Conflict-Affected and High-Risk Areas
CRMs	Critical Raw Materials
CSDDD	Corporate Sustainability Due Diligence Directive
CSOs	Civil Society Organization
EC	European Commission
EEAS	European External Action Service
ESG risks	Environmental, Social and Governance risks
EU Regulation	EU Regulation 2017/821 Supply chain due diligence for minerals from conflict-affected and high-risk areas
EU	European Union
LBMA	London Bullion Market Association
LSM	Large-Scale Mining
MSCAs	Member States' Competent Authorities
NGO	Non-Governmental Organization
OECD	Organisation for Economic Co-operation and Development
RMAP	Responsible Minerals Assurance Process
RMI	Responsible Minerals Initiative
RSF	Rapid Support Forces
SAF	Sudan Armed Forces
UAE	United Arab Emirates
US DFA	United States Dodd Frank Act

EXECUTIVE SUMMARY

The EU Regulation on the responsible supply of tin, tungsten, tantalum and gold (3TG) originating from conflict-affected and high-risk areas (CAHRAs) came into full force on 1 January 2021. Also known as the "Conflict Minerals" or "Responsible Minerals" Regulation, it aims to break the link between the exploitation and trade in 3TG on the one hand, and conflict financing on the other hand. The law also aims to support the development of local communities.

The Regulation is largely based on the Organisation for Economic Co-operation and Development's (OECD) Due Diligence Guidance for Responsible Supply Chains of Minerals from CAHRAs, the leading norm for responsible mineral sourcing. Its innovation lies in the fact that the Regulation makes the otherwise voluntary Guidance mandatory for EU importers. While the Regulation focuses on the 3Ts and gold originating from CAHRAs, it has broader due diligence implications for EU imports from any origin in the world. It aims to have an impact not only on EU importers but also further up the supply chain, from the EU companies' direct suppliers up to the mines of mineral origin.

The law stipulates that by 2023 and every three years thereafter, the European Commission (EC) should review its functioning and effectiveness. Within this context, the EC contracted a consortium of consultants to conduct an evaluation that will contribute to the 2023 review. In anticipation of the formal EC review, this briefing paper seeks to evaluate how the Regulation has actually played out and what the main obstacles to its effective implementation have been so far. The paper is based on an analysis of documents and interviews with stakeholders, including regulators, industry representatives, and civil society.

Disappointingly, more than six years after the Regulation was signed into law, and almost three years after the requirements for EU importers started applying, our overall assessment is that the Regulation has not achieved any notable impact along supply chains, let alone in producing countries. At the same time, the illegal trade of minerals, in particular gold, continues to play an important role in financing certain conflicts, alongside other revenue streams.

The lack of impact can be explained at several levels. Firstly, Member States' Competent Authorities (MSCAs), which are responsible for ensuring the "effective and uniform" implementation of the Regulation, often lack the necessary sector expertise and capacity to fulfill their task. Moreover, differences between the interpretation by MSCAs of the Regulation have resulted in an uneven implementation across Member States.

Secondly, many EU importers of 3TG have not (yet) sufficiently complied with the Regulation's requirements. MSCAs indicated for example that the Union importers' reporting is often not up to standard. EU importers often fail to operate adequate and complete supply chain traceability systems, and to disclose relevant information, which has prevented transparency to increase. Most Union importers source from smelters and refiners outside the EU which, in their turn, are often not fully transparent on mineral origin. Because the mine of mineral origin is often not known to Union importers, we fear that EU obligations rarely cascade to suppliers up to the level of producing countries.

This also means that heightened due diligence in the case of CAHRAs or artisanal and small-scale mining (ASM) has not been applied to date. Consequently, the Regulation does not seem to have caused a noticeable disengagement from CAHRAs/ASM. This can however, not be attributed to positive effects of the EU law.

A decade of due diligence implementation has taught us that the tension between avoiding any human rights abuse in the supply chain on the one hand, and continuing engagement in CAHRAs/ASM on the other hand, cannot be solved by markets alone. Sourcing outside CAHRAs and excluding ASM is currently a low-cost and a low-risk business decision, whereas remaining engaged in CAHRAs/ASM often entails (additional) due diligence, audit, and organizational costs.

If the EU wishes to contribute to 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 supporting progressive improvement, and by supporting upstream producers to progressively meet the EU standards. This progressive approach, that accepts imperfection, could at the same time stimulate more transparency.

In order to improve transparency, we argue that the EU should make it mandatory for Union importers to trace their imports back to the mine(s) of origin, in all cases. The EU should also widen the scope of the information that EU importers should disclose to the public. More transparency will help journalists and non-governmental organizations perform their vital role as watchdogs, and also help build confidence among the public.

The EU should equip the EC with more capacity to play a leading role in the Regulation's implementation, which should reinforce the work of MSCAs. Authorities should avoid overreliance on industry-led schemes and third-party audits, no matter how good these are, but instead use them as a useful tool among others, such as information obtained from non-governmental organizations, journalists, and affected communities themselves.

Finally, the EU should make better use of its political and economic leverage in order to strengthen its collaboration with 3TG producing countries. Sourcing more directly from CAHRAS and the ASM sector allows to shorten the supply chain and better promote practices that respect both the local communities – including artisanal miners' livelihoods – and the environment. Without these improvements, the Regulation will remain a purely technical exercise without any impacts for communities in producing countries.

INTRODUCTION

The European Union's Conflict Minerals Regulation 2017/821 (in short EU Regulation) was signed into law in June 2017 and came into full force on 1 January 2021.[1] The EU Regulation requires Union importers of tin, tantalum and tungsten, their ores, and gold to source responsibly. Also referred to as the "Responsible Minerals Regulation," this legislation aims to "help break the link" between conflict and the illegal exploitation of and trade in minerals and to "help put an end to the exploitation and abuse of local communities, including mine workers, and support local development."[2]

The Regulation is based on the leading international standard for responsible mineral sourcing: the Organisation for Economic Co-operation and Development's (OECD) Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas (hereafter the OECD Guidance).[3] The innovation lies in the fact that the Regulation makes the otherwise voluntary Guidance mandatory for EU importers. While the Regulation focuses on the 3Ts and gold ("3TG") *originating from* conflict-affected and high-risk areas (CAHRAs), its concrete implementation requires due diligence measures for EU imports from any origin in the world.

The inclusion of the OECD Guidelines was supported by many European civil society organizations that had been advocating for mandatory due diligence measures for EU importers of minerals. Nevertheless, European NGOs had objections to certain elements of the Regulation. The European NGO Coalition on Conflict Minerals published a series of briefings over the years that highlighted several shortcomings.[4] Among the main concerns is the limited mineral scope of the Regulation (only 3TG). Secondly, the Regulation does not apply to the import of manufactured goods, despite high risks in their supply chains: raw materials are rather trivial in EU trade flows with non-EU countries. The vast majority of products that contain 3TG minerals and that are consumed in the EU, are derived from imports of already manufactured goods.[5] Thirdly, the volume thresholds of metals and minerals triggering the application of the EU law, allows millions of euros worth of materials, including from CAHRAs, to enter the EU without due diligence checks. Furthermore, the NGO coalition advocated for transparency as a fundamental requirement for effective due diligence, this included the public disclosure of the names of Union importers. Finally, it also cautioned against an overreliance on industry schemes and third-party audits.[6]

That being said, the Regulation as a mandatory instrument was welcomed for its potential to pressure economic operators from one of the globe's main trading blocs to source responsibly. By doing so, the EU could provide its importers with the leverage needed to enforce changes along the supply chain, and, ultimately, at the production level.[7]

Almost three years have passed since the requirements for EU importers started applying. The law stipulates that by the 1st of January 2023 and every three years thereafter, the European Commission (EC) should review its functioning and effectiveness. Within this context, the EC has contracted a consortium

1 Regulation (EU) 2017/821 of the European Parliament and the European Council of 17 May 2017 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.

2 European Commission, *Conflict Minerals Regulation: the regulation explained*.

3 Organization for Economic Co-operation and Development (OECD), *Due Diligence Guidance on Responsible Mineral Supply Chains from Conflict-Affected and High-Risk Areas*, Version 3, 2016.

4 See previous publications from *2016*, *2018*, *2019*, *2020* and *2021*.

5 IPIS, *Regulating responsible sourcing of 3TG minerals*, in IPIS Insights on Due Diligence on Mineral Sourcing, IPIS, December 2019

6 Eurac, *Accompanying Measures to the EU Regulation on Responsible Mineral Sourcing. Towards an improved governance of the artisanal mining sector in the DRC*, March 2017; *The EU Conflict Minerals Regulation. Implementation at the EU Member State level. Review paper*, June 2021; European NGO Coalition on Conflict Minerals, *Ensuring transparency in the implementation of the European Union's Regulation on the supply of 3TG minerals*. Joint Policy Note, 2 March 2020.

7 For example, Germany was the leading EU importer of refined tin in 2021, and fourth in the global ranking of user countries. *Bundesanstalt fuer Geowissenschaften und Rohstoffe; Deutschland-Rohstofsituation* 2021; December 2022, page 52.

of consultants to conduct an evaluation that will contribute to the final 2023 review report.[8] At the time of writing, this report has not yet been published.[9]

In anticipation of the formal EC review, this paper seeks to highlight the shortcomings of the legislation and its implementation that are impeding its effectiveness. Furthermore, this paper takes into account the various due diligence bills that are currently being developed by the EU and its Member States. We are of the opinion that the experiences and insights gained during the implementation of the 3TG Regulation can enrich the democratic debate on impending legislation with substantive arguments. At the same time, innovations in new laws and proposals can also positively influence the future of the EU 3TG Regulation, including amendments to the Regulation or improvements in its implementation practices.[10] Such innovations for example relate to the inclusion of environmental risks (as in the EU Battery Regulation[11] and the Corporate Sustainability Due Diligence Directive[12] – CSDDD).

Because of the objectives explained above, this paper will primarily focus on the general effectiveness of the Regulation, rather than on the technical shortcomings of the implementation process. An additional reason for this, is that many technical details of the Regulation's implementation are gradually being leveled out thanks to consultations between the 27 Member States Competent Authorities (MSCAs) and the EC. In summary, it is more expedient at this point in time to evaluate how the Regulation has actually played out, whether the original key objectives have been met, and how they can be achieved within the foreseeable future.

This briefing paper builds on a discussion paper for which interviews were conducted with ten MSCAs between December 2022 and March 2023. We also held interviews with representatives of the EC, industry representatives, sector experts, and national authorities representing the Ministry of Mines of 15 African 3TG-producing countries. The discussion paper was presented at the OECD Minerals Forum in Paris in April 2023 in a dedicated partner session and we shared it with a wide range of stakeholders representing the EC, MSCAs, industry, and civil society, requesting feedback on our findings. This feedback has been incorporated in this paper.

Chapter 1 identifies challenges around supply chain transparency and reporting; chapter 2 discusses the Regulation's possible consequences for CAHRAs and artisanal miners. Finally, we formulate recommendations to improve the Regulation's impact, some of which are also relevant with regards to the broader EU due diligence landscape.

8 Call for tenders TRADE/2022/OP/0001, 23-3-2022, *Study to review the functioning and effectiveness of Regulation (EU) 2017/821 (due diligence obligations for importers of tin, tantalum, tungsten and gold from conflict-affected and high-risk areas)*. The EC granted the study to a Consortium led by B&S Europe in partnership with TDi Sustainability and the Responsible Sourcing Network.

9 Early October 2023.

10 On the broader EU regulatory initiatives related to business and human rights, see DIHR, *How do the pieces fit in the puzzle? Making sense of EU regulatory initiatives related to business and human rights*, August 2023.

11 *Regulation of the European Parliament and of the Council concerning batteries and waste batteries*, amending Directive 2008/98/EC and Regulation (EU) 2019/1020 and repealing Directive 2006/66/EC.

12 *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence* and amending Directive (EU) 2019/1937.

1. THE INEXTRICABLE LINK BETWEEN DUE DILIGENCE AND TRANSPARENCY

Transparency is a key objective of the Regulation. The text states that the Regulation is "*designed to provide transparency and certainty as regards the supply practices of Union importers, and of smelters and refiners sourcing*" from CAHRAs.[13] It further notes the importance of public reporting by economic operators, which "*provides the necessary transparency to generate public confidence in the measures economic operators are taking*."[14]

Union importers of minerals and metals have to incorporate and implement the five-step framework of the OECD Guidance.[15] When downstream actors identify risks of adverse impacts, they should mitigate those risks through their leverage over suppliers and, if necessary, impose corrective action. The crux of the matter here is how much downstream companies actually get to know about adverse impacts further upstream. In practice, this depends on their efforts and capacity to acquire sufficient information from their supplier.

This chapter analyses the role of refiners, smelters and industry schemes in assuring transparency along the entire supply chain. It also provides analysis on the level of transparency in implementing the EU Regulation at Member State and European Union level.

The bottleneck of refiners and smelters

Importers of 3TG metals to a large extent rely on refiners and smelters disclosing essential information, such as the country of origin and names of the mines from which they source. The majority of smelters and refiners are located outside the EU. Most of them are located in a limited number of so-called trading hubs where the minerals and metals are transformed by either refiners (in the case of gold) or smelters (in the case of the 3Ts) before they are exported.[16]

The level of transparency of smelters and refiners is crucial. Not only are they the last link in the supply chain where it is still technically feasible to trace back the origin of minerals, but they also have (the potential) leverage to ensure responsible practices in producer countries. This explains why they are referred to as "choke points" in the supply chain. Smelters and refiners can disclose the information vital for due diligence by including it in third-party audit reporting or by supplying separate records. However, information on the country of origin, let alone the names of the mines of origin, is often not disclosed, meaning that in practice the level of transparency of smelters and refiners usually is insufficient.

For example, research published in March 2023 by the NGO SWISSAID on African gold supply chains documented that the majority of gold refineries were not willing to disclose information on their sourcing practices. This seems to be a matter of deliberate choice rather than an obligation imposed by mining companies. Seemingly, it is not that such disclosure would affect their competitive position, as some of the information is already out in the public domain. It rather appears that refiners often do not disclose their business relationships to avoid being associated with human rights abuses or other problems related to the exploitation of minerals.[17] In September 2023, all 33 members of the World Gold Council – the umbrella organization representing the majority of the global large-scale gold mining industry – committed to publishing the names and locations of their partner refineries on at least an annual basis.[18]

13 Article 1 (1) of Regulation (EU) 2017/821.

14 Recital 13 of Regulation (EU) 2017/821.

15 See articles 4 and 5 of Regulation (EU) 2017/821.

16 In the case of the 3Ts, the most important hub trading with the EU is China, while the primary trading hub for gold is Switzerland.

17 See SWISSAID, *Out of the Shadows. Business Relationships between Industrial Gold Mines in Africa and Refineries*, March 2023.

18 World Gold Council, *World Gold Council members commit to enhanced supply-chain transparency*, 18 September 2023.

SwissAid hailed this step as a "breakthrough in transparency in the gold sector", stating that it "increases the responsibility of the various players and contributes to better practices." The World Gold Council's decision might help convince more refineries, and possibly also smelters to become more transparent about their sourcing practices.[19]

The EU Regulation sought to address the insufficient level of transparency of smelters and refiners by making the disclosure of sourcing practices mandatory for EU imports, even if just part of them need to be disclosed *publicly*.

Management system obligations under the Regulation

It is the individual responsibility of each Union importer to assess the due diligence practices of its suppliers and to cascade due diligence responsibility up the supply chain. Companies are required to put in place a supply chain traceability system, defined in the Regulation as "*a record of the sequence of economic operators which have custody of minerals and metals as they move through a supply chain*."[20]

The Regulation distinguishes between the import of minerals and the import of metals, i.e., processed minerals. The traceability obligations for importers of unprocessed or concentrated minerals are far-reaching as they require to operate a chain of custody that provides information on the country of origin of the minerals. In case of identified supply chain risks, additional information needs to be provided, such as the mine of mineral origin, locations where minerals are consolidated, traded and processed, and taxes, fees and royalties paid.[21]

The majority of 3TG minerals[22] however enters the EU as a metal. The EU importers of these metals are required to provide records of third-party audit reports of the smelters and refiners, or evidence of conformity with an industry scheme that is recognized by the EC. If neither is the case, the importer has the obligation to provide information on the countries of origin of sourced minerals, which means that the smelters and refiners have to disclose this information to the importer. Where metals are based on minerals originating from CAHRAs, or other supply risks have been ascertained, the Regulation also requires the importer to provide "*additional information in accordance with the specific recommendations for downstream economic operators*" set out in the OECD Guidance.[23]

Interestingly, the newly adopted EU Regulation on Batteries and Waste Batteries[24] does not make the distinction between minerals and metals, and instead uses the broader term "raw materials". Article 49 of the said Regulation stipulates the obligation, from 18 August 2025 onwards, to provide information in all cases on the raw material's country of origin, and on the market transactions from its extraction down to the immediate supplier of the economic operator. The onus falls on the "*economic operators that place batteries on the market or put them into service*."[25] This constitutes an important development meriting consideration in the 3TG Regulation's evaluation process.

---

19 SWISSAID, *SWISSAID report provides more transparency in the gold sector*, 2 October 2023.

20 Article 2 (e) of Regulation (EU) 2017/821.

21 Article 4 (f)(v) of Regulation (EU) 2017/821.

22 The Regulation excludes 3TG minerals which come in manufactured goods, which is by far the majority of 3TG minerals that are imported into the EU.

23 See Article 4 of Regulation (EU) 2017/821.

24 Council of the EU, *Council adopts new regulation on batteries and waste batteries*, 10 July 2023.

25 See Article 48 of Regulation (EU) 2023/1542 of the European Parliament and of the Council of 12 July 2023 concerning batteries and waste batteries, amending Directive 2008/98/EC and Regulation (EU) 2019/1020 and repealing Directive 2006/66/EC.

Box 1 - Dubai's role in trading gold from Sudan

The United Arab Emirates (UAE) is home to many gold refiners and is one of the world's main gold trading hubs. Between 2016 and 2021, trade data shows that it imported about 750 tonnes of refined gold per year on average. It is a major exporter of bullion and jewelry.[26] In 2021, the UAE was the world's second exporter of gold.[27] The UAE is an infamous conflict gold transit hub and has been added to international watchlists. These lists include the Financial Action Task Force's grey list[28] and EU's own list of high-risk third countries with strategic deficiencies in their policies related to money laundering and the financing of terrorism.[29] The number one destination for UAE gold is Switzerland, which is the EU's most important gold trading partner (see box 2). The UAE imports gold from many CAHRAs, including Sudan.

Since the start of Sudan's "gold boom" in 2009, artisanal miners produce more than 80% of the country's gold[30] while private companies – sometimes owned by armed actors – process artisanal gold tailings. Many gold sites are controlled by armed actors. These include the Sudan Armed Forces (SAF) and the Rapid Support Forces (RSF), which have been fighting each other since April 2023.[31] Competition over natural resources and trade networks is a major driver in this conflict, which has caused tremendous harm to civilians throughout the country. Political actors and gold traders engage in corrupt practices for personal gains, while the legal and regulatory frameworks governing the gold sector remain poorly implemented. Gold mining and tailings reprocessing in Sudan are also characterized by the unregulated use of hazardous chemicals, like mercury and cyanide, which affects the environment and human health.[32]

Nearly half of Sudan's gold is estimated to be smuggled out of the country, depriving the state of critical revenue.[33] Security sector companies, with ties to the RSF and SAF, are key actors behind this smuggling.[34] The vast majority of Sudan's gold ends up in the UAE through official trade[35] and smuggling. Afterwards, the UAE's weak regulatory and anti-money laundering controls allow Sudanese gold to reach global markets.

For example, Switzerland's largest gold refiner Valcambi has recently been accused of buying 'dirty' gold from UAE-based Kaloti, a refiner which has imported gold from Sudan.[36] Valcambi has rejected these accusations.[37]

---

26 Reuters, *Exclusive: From Russia with gold: UAE cashes in as sanctions bite*, 25 May 2023.

27 Global Financial Integrity, "*Analyzing Trade, Oil and Gold: Recommendations to Support Trade Integrity in Sudan*," April 2020; The Observatory of Economic Complexity, *Gold*, accessed September 2023.

28 See Financial Action Task Force (FATF), *"Black and grey" lists*, accessed September 2023; this list calls for increased monitoring for money laundering and terrorism financing risks.

29 See European Commission, *High risk third countries and the International context content of anti-money laundering and countering the financing of terrorism*, accessed September 2023.

30 See Sudan's Ministry of Minerals annual reports.

31 See International Crisis Group, *A Race against Time to Halt Sudan's Collapse*, 22 June 2023.

32 Mohamed Salah Abdelrahman, Sudan Transparency and Policy Tracker, *How Mercury is Poisoning a Nation and Gross Mismanagement is Aggravating the Problem*, October 2022.

33 Global Financial Integrity, *Analyzing Trade, Oil and Gold: Recommendations to Support Trade Integrity in Sudan*, May 2020.

34 Hiba Fageeri, Aljazeera, *How Sudan's Gold Wealth is Being Stolen*, 9 October 2019.

35 The Guardian, "Militia strike gold to cast a shadow over Sudan's hopes of prosperity," 10 February 2020, available at: https://www.theguardian.com/global-development/2020/feb/10/militia-strike-gold-to-cast-a-shadow-over-sudans-hopes-of-prosperity.

36 See the following news articles in September 2023: *Swiss info*, *RTS*, *NZZ*.

37 Swissinfo, *Valcambi refinery denies sourcing 'dirty' gold from Dubai*, 8 September 2020.

Box 2 - Trading hub Switzerland

Switzerland is an interesting example of a gold trading hub that is geographically, politically and culturally close to the EU. Switzerland processes around 70 percent of globally traded gold, with this trade amounting to nearly US $ 87 billion in 2021.[38] Almost all of this gold is imported from other countries; Switzerland refines and brands it, and then exports it to global destinations. In 2022, 66% of the gold that entered the EU came from Switzerland.[39]

In 2023, new Swiss due diligence obligations entered into force. The legislative changes affect two sets of obligations: they contain provisions on transparency of nonfinancial matters, and on due diligence and transparency regarding minerals and metals (3T and gold) from zones in conflict zones or with child labor.[40] Despite these new obligations, which include the implementation of a system by which the supply chain can be traced, there remains a lack of transparency regarding the origin of gold imported into Switzerland.

In March 2022, the Federal Administrative Court decided that trade relations are subject to tax secrecy.[41] It is now to the Swiss Supreme Court to soon decide whether Swiss refiners have to disclose their suppliers, based on the principle of freedom of information. Pending its ruling, Swiss refiners are not obliged to disclose their gold suppliers, and hence the origin of the gold.

In recent years, there have been numerous scandals linking gold refined in Switzerland to human rights abuses and conflict financing, demonstrating that the existing control measures are inadequate.[42]

In May 2022, the NGO SWISSAID raised the alarm, stating that "Swiss refiners have not been importing gold directly from Russia since February 2022 due to sanctions [imposed in response to the war of aggression against Ukraine]. At the same time, imports from the United Arab Emirates have exploded, raising fears that Russian gold may end up in Switzerland after passing through Dubai." SWISSAID fears that some of this gold is helping to finance the war.[43] Given the weak implementation of the EU Regulation, it is likely that parts of this gold flow enter the EU.

38 The Observatory of Economic Complexity, *Gold*, accessed September 2023.

39 This concerned gold starting with HS code 7108. See World Integrated Trade Solution, *European Union Gold (including gold plated with platinum) unwrought or in semi-manufactured forms, or in powder form imports by country in 2022*, accessed April 2023.

40 Fedlex, *Ordinance on Due Diligence and Transparency in relation to Minerals and Metals from Conflict-Affected Areas and Child Labour*, accessed September 2023.

41 See Swissinfo, *Swiss court rules against gold trade transparency: NGO*, 31 March 2022; GFBV, *Bundesverwaltungsgericht entscheidet gegen Transparenz im Goldhandel*, 31 March 2022.

42 See for example: GFBV, *Dirty Gold*, accessed September 2023; Global Witness, *Beneath the Shine: A Tale of Two Gold Refiners*, 16 July 2020; SWISSAID, *Golden Detour: The hidden face of the gold trade between the United Arab Emirates and Switzerland*, July 2020; Aljazeera, *Swiss gold or smuggled Zimbabwean gold? No one knows*, 6 April 2023; RTS, *Révélations: les secrets inavouables de la plus grande raffinerie d'or de Suisse*, 3 September 2023.

43 SWISSAID, *Alarming rise in gold imports from Dubai*, 17 May 2022.

The role of due diligence schemes in the Regulation

Companies, particularly refiners and smelters, often look for support to comply with due diligence obligations through participation in so-called due diligence schemes. Under the EU Regulation, these are defined as "*a combination of voluntary supply chain due diligence procedures, tools and mechanisms, including independent third-party audits, developed and overseen by governments, industry associations or groupings of interested organisations*."[44] In the case of 3TG, these initiatives have mostly been led by industry associations. According to the interviewed MSCAs, the majority of the Union importers source from refiners and smelters which are assessed by major industry schemes, such as the London Bullion Market Association (LBMA) and the already mentioned Responsible Minerals Initiative (RMI).

According to the EU Regulation, interested parties may submit industry schemes for "recognition" by the EC,[45] which entails a process aiming to increase their level of scrutiny and accountability. In January 2019, the EC adopted a Delegated Act setting out rules on the methodology and criteria related to the recognition of due diligence schemes. The central requirement for recognition is that the scheme's standards and implementation fully align with the OECD Guidance.[46] Through a contracted consultant, the EC has been working on the recognition of these submitted industry schemes for years. Nevertheless, as of September 2023, the EC had not completed the recognition process for any 3TG industry scheme, despite some progress.[47]

For Union importers, sourcing from refiners or smelters that can show conformity with an EC-recognized scheme could facilitate compliance with the Regulation. Firstly, when companies import metals from conformant smelters or refiners, their chain of custody is not required to include information about the countries of origin of minerals purchased from them, nor – when the minerals come from CAHRAs or when other supply chain risks have been identified – should it include the additional information that the OECD Guidance calls for.[48] This significantly limits the scope and the difficulty for importers to operate their chain of custody. The underlying rationale is that refiners and smelters that can show evidence of conformity with a recognized scheme already have strong due diligence systems in place, which enable them to properly collect and analyze information on the supply chain while being in a better position to do this than downstream companies. This rule also avoids the multiplication of audits upstream. Without it, every downstream company indeed would be required to individually perform upstream audits for all the metals it imports.

Moreover, smelters and refiners that participate in a recognized scheme will be more likely to be placed on the EU list of "global responsible smelters and refiners"[49] (also known as the White list), while EU metals importers that can demonstrate to be sourcing exclusively from smelters and refiners on the White list, are exempted to carry out third-party audits, which saves them time and resources.[50]

Importantly, while EU importers can use information from industry schemes to inform their due diligence process, the Regulation is clear that they retain individual responsibility for their due diligence and sourcing decisions.[51] This individual responsibility is also emphasized by the industry schemes. For example, the RMI, one of the major industry schemes, stressed that companies that engage with a scheme are required to conduct their own due diligence checks on the information provided by the scheme.[52]

---

44 See Article 2 (m) of the of the Regulation (EU) 2017/821, page 6.

45 See Article 3.3. of the of the Regulation (EU) 2017/821, page 8.

46 *Delegated Regulation (EU) 2019/429*; based on the *OECD's Methodology for the Alignment Assessment of Industry Programmes with the OECD Minerals Guidance*, Criteria on transparency: B.9 to B.24, pages 19-22.

47 This process has taken much longer than foreseen. Some progress has been made, for example, the RMI received the final alignment assessment in April 2023, which indicated that RMAP is fully aligned, but formal publication has been delayed.

48 Article 4(g)(iv)(v) Regulation (EU) 2017/821, page 8.

49 Article 9 of the Regulation (EU) 2017/821, page 12.

50 Article 4(g)(iv) Regulation (EU) 2017/821, page 8.

51 Recital 14 of the Regulation (EU) 2017/821, page 3.

52 RMI, *The RMI FAQ: Upstream Due Diligence & Use of Upstream Mechanisms*, 1 August 2023.

While some MSCAs do not plan to include the participation in an industry scheme in their selection criteria for ex-post checks, other MSCAs consider that sourcing from a recognized scheme makes selection for an ex-post check less likely.[53]

It is important to note that even the best due diligence schemes and third-party audits have inherent flaws and limitations. This has been demonstrated by civil society organizations, including Human Rights Watch, German Watch, and SOMO. They have criticized the overreliance on schemes and audits, stressing that these should only be one tool that companies and regulators use, alongside other sources of information, such as media, academic, and NGO reports.[54] Also, the MSCAs and the EC will need to allocate sufficient resources to conduct proper checks enabling them to independently assess whether imported 3TG is tainted by conflict or human rights abuses. This analysis can be partly based on information provided by schemes and audits, but should also draw on a broader range of sources, including research done at the upstream level.

Box 3 - LuNa Smelter: an example of due diligence data management by a tin metal smelter operating in the Great Lakes Region[55]

LuNa Smelter Ltd. (LuNa) is a Kigali-based tin metal smelter, operating within a European industrial group called Luma Holding Ltd. Value creation is based on the development of a stable raw materials supply chain achieved in Rwanda and the region. LuNa is the first and only tin metal smelter in Africa conformant with the RMI Responsible Minerals Assurance Process (RMAP), which assesses the smelter's due diligence systems and processes to conform with its standards.

In general, management and transfer of due diligence data, as well as maintaining immutable records, are significant challenges for minerals supply chain stakeholders, especially for the downstream sector. The LuNa Due Diligence Team sought a solution to improve the inefficiency of traditional systems through the use of emerging digital technologies. In a pilot project, a blockchain-based solution was chosen due to its key properties, such as decentralization, immutability, and transparency. LuNa works with the blockchain-based traceability platform that transmits raw material provenance data in the form of segmented digital certificates. These certificates link data collected from different supply chain participants to unique identifiers and QR-Codes, which can be physically attached to material shipments and tracked along the supply chain. Two types of certificates are generated. The entity certificate contains company-level information that does not change often, e.g., a business license, permits and certifications. The shipment certificate contains information specific to a particular shipment, such as type of material, grade, weight, chemical composition, sourcing details, and other traceability-related information.

The data is stored in three layers. The public layer is unencrypted and visible to all the users of the blockchain sharing a supply chain. The transparency layer contains data that should be visible to those participants who share a supply chain, and the private layer contains data visible only to the current and successive participants of the supply chain. This way, the confidential information is available only to the authorized recipients.

53 See Regulation (EU) 2017/821, Article 11 for more details on the ex-post checks.

54 See for example Human Rights Watch, *EU's Flawed Reliance on Audits, Certifications for Raw Materials Rules*, 24 May 2023; German Watch, *An Examination of Industry Standards in The Raw Materials Sector*, 4 July 2022; SOMO, *A piece, not a proxy*, 25 November 2022.

55 This box is based largely on written information provided in May 2023 by Aleksandra Cholewa-Domanagić, Director of Investment and Development at Luma Holding Ltd and PhD student at the University of Szczecin. While PAX and IPIS have not independently assessed this smelter's practices around the management of due diligence data, this is an interesting example of how innovative technology could be used to improve due diligence data management. Independent assessments of these innovative tools will however be important.

Disclosure obligations for importers and sub-standard reporting issues

Union importers are required to provide reports to MSCAs of third-party audits or evidence of conformity with a recognized scheme (see above). They also need to make available *to their immediate downstream purchasers "all information gained and maintained pursuant to their supply chain due diligence with due regard for business confidentiality and other competitive concerns*."[56] The importers also have the obligation to publicly report on their supply chain due diligence policies and practices for responsible sourcing; this should include a summary report of third-party audits, including the name of the auditor. Public reporting should be done on an annual basis, "*as widely as possible, including on the internet*."[57]

The feedback we received from MSCAs on the reporting by Union importers and the included audit reports of their suppliers leads us to conclude that many Union importers are not yet used to the new obligations under the Regulation. MSCAs reported that they had received a limited number of third-party audits reports, and that the available audit reports seldom meet the standards of the Regulation.[58] A common deficiency in importers' reporting is the lack of substantial evidence regarding their own sourcing practices.

Further, several MSCAs flag that reports of EU importers are often inadequate with regard to information on the origin of the sourced mineral as the data flow usually stops at the level of the smelter/refiner. In the case of 3T minerals for example, China was most often mentioned as the country of origin. Whether the materials were indeed mined in China, or whether they were only smelted there, was often not clear to the MSCAs.

The quality of audits and the technical competences of auditors are another issue of major concern. In this regard, some industry schemes have played a positive role by developing trainings and tools for auditors. For the effective implementation of the EU Regulation, it is important that auditors, who are located in all parts of the world, receive high quality training in order to ensure that they carry out their audits in adherence to the highest standards.

Finally, Union importers of metals purportedly tried to make use of the exemption pursuant to Article 6 (2), which exonerates them from conducting third-party audits if they prove that all their smelters and refiners are compliant with the Regulation. However, they did so without sending substantive evidence, such as third-party audit reports, which the Regulation clearly calls for. Where audits needed to be examined by an MSCA, for example in the course of ex-post checks, the audit reports of Union importers in many cases appeared to be unavailable. MSCAs explained that since companies had expected that the major industry schemes would have been recognized by 2021, they did not timely organize their audits.

Transparency at the member state level

According to the Regulation, the MSCAs have to conduct checks when they are "*in possession of relevant information, including on the basis of substantiated concerns provided by third parties, concerning the compliance by a Union importer with this Regulation*".[59] These third parties are likely to be journalists, NGOs and other civil society groups, fulfilling their role as watchdogs. The problem is that these parties can only share their substantiated concerns directly with the MSCAs if they can prove the link between affected minerals and EU imports. To date, however, third parties denouncing abuses in producing countries have to our knowledge not yet been able to link human rights violations to Union importers, for the simple reason that they have no access to information about mineral imports.

---

56 Article 7(2) of Regulation (EU) 2017/82.

57 Article 7(3) of Regulation (EU) 2017/82.

58 Some of the competent authorities we interviewed were still in the preliminary phase of the post-check process and could not yet answer this question. Those who already received a considerable number of reports, stated that the provided information usually stops at the level of the refiner or smelter, and that the information of the smelters or refiners, if included in the report, does often not meet the expected quality standards.

59 See article 11(2) of Regulation (EU) 2017/82.

Several NGOs[60], therefore, have advocated the disclosure of the list of Union importers under the Regulation, but the EC left the decision to the MSCAs, and their approaches vary. Austria will publish the names of importers, the Czech Republic will publish the names of importers subject to ex-post checks, and the Netherlands will publish the companies' due diligence reports on a dedicated website. So far, however, it seems that most other MSCAs will not publish the names of importers that fall under the Regulation. They generally invoke reasons of corporate confidentiality and data protection, despite the fact that Article 12(1) of the Union Customs Code explicitly mentions the possibility of exceptions to confidentiality rules with regards to information held by Customs.[61] Of particular interest in this context is the initiative of the French NGO Sherpa, which, in August 2020, initiated a proceeding with the Paris Administrative Court requiring the authorities to disclose the list of companies under the Regulation.[62] The Court, in November 2022, ruled that the names of the companies should be disclosed as they are not covered by neither business nor customs secrecy. The ruling also stressed that these companies had a "duty of transparency."[63]

Transparency on EU import data

The EC does not provide a public disaggregated dataset on 3TG imports into the EU. The available public data is grouped per importing and exporting country and/or trading bloc but does not specify the numbers or the names of unique importers nor their respective import volumes. Without this data, it is impossible to assess the number of importers that fall above/below mineral volume thresholds triggering the application of the Regulation, nor is it possible to determine where exempted materials are imported from.[64] This is very relevant information because literature on the trade in illegal and conflict-affected 3TG clearly illustrates that much of this trade takes place in quantities that are below the thresholds.[65] Hence, there is a risk that the current thresholds exempt importers of some of the highest-risk materials entering the EU from due diligence obligations. Again, without disaggregated data, it is not possible to verify this risk and hence adequately assess the effectiveness of the Regulation.

---

60 See previous publications from the NGO coalition on Conflict Minerals: *2016*, *2018*, *2019*, *2020* and *2021.*

61 Article 12(1), *Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code*. Such information may, however, be disclosed without permission where the customs authorities are obliged or authorized to do so pursuant to the provisions in force, particularly in respect of data protection, or in connection with legal proceedings.

62 Sherpa, *Mining with Meaning: Protecting Human Rights and the Environment in the shift to clean energy*, 29 October 2020, page 27.

63 Mediapart, *Minerais de Guerre: La Justice écarte le « secret des affaires » invoqué par l'exécutif*, 21 November 2022.

64 Article 1(2) of the Regulation specifies that the requirements of the Regulation will apply to the import of the minerals and metals specified by use of Combined Nomenclature (CN) in its Annex 1. Article 1(3) qualifies this by adding that importers that fall below the annual volume thresholds also specified in Annex 1 will not be subject to these requirements.

65 See for example the following articles: The Sentry, *Golden Laundromat*, October 2018; OECD, *Where does Colombian gold go*, 2018; UN, *http://www.undocs.org/S/2020/482*.

2. CAN THE EU REGULATION AVOID DISENGAGEMENT?

When the EU Regulation was drafted, putting in place measures to avoid de-risking by EU importers was high on the agenda.[66] De-risking is when a company chooses to avoid sourcing from CAHRAs and/or artisanal and small-scale mining (ASM) altogether, rather than considering engagement in due diligence and adopting nuanced risk assessment measures. The negative consequences of the US "Dodd Frank Act" (US DFA), namely the so-called *de facto* embargo hitting the DRC and its neighbors in 2011, figured prominently in the EU debates.[67]

Sourcing from CAHRAs and/or from ASM entails significant due diligence, audit and organizational costs while sourcing from LSM outside CAHRAs is often a low-risk business decision (see box 4). Moreover, the existence of due diligence does not (yet) appear to positively affect value downstream.[68] On top of this, there is a fear of reputational risk when doing business in CAHRAs and/ or with ASM. In short, there are few incentives for companies to actually engage with ASM/CAHRAs and the trend to raise the bar in terms of sourcing standards has exacerbated this reluctance. We should add here that companies tend to look for a binary answer to the question: is this supplier clean or is he not? Yet, this lack of nuance in supplier risk scores, ratings and certifications stimulates de-risking and contravenes the spirit of the OECD Guidance on which most of these standards are built. The Guidance indeed is conceived to stimulate a process of continuous and progressive improvement, which so far has been overshadowed by a prioritization of (simplified) compliance.

De-risking has had many far-reaching implications for CAHRAs and for the ASM sector with risk-aversive business decisions leading the mineral trade to go further underground. Even if regulated mid- and downstream companies are reluctant to buy from CAHRAs/ ASM, there will always be enough buyers, either unregulated or illegal. At best, disengagement is at odds with the premise of the Regulation that responsible behavior by companies operating in CAHRAs can stimulate positive socio-economic development. At worst, regulating mineral sourcing from CAHRAs encourages informal and/or illegal trade.[69]

For these reasons, the design of the Regulation was meant to minimize the risk of a *de facto* boycott of CAHRAs and/or ASM.[70] By way of precaution, EU legislators included a global CAHRA list, stressed an inclusive focus, and foresaw accompanying measures.

66 See for example: *EC Delegated Regulation 2019/429 of 11 January 2019*, Supplementing Regulation (EU) 2017/821 of the European Parliament and of the Council as regards the methodology and criteria for the assessment and recognition of supply chain due diligence schemes concerning tin, tantalum, tungsten and gold.

67 For example, in its Impact assessment of the Regulation (SWD(2014) 53 final), the EU wrote in 2014: "… the US DFA has created an incentive to avoid sourcing from the region, and in particular from DRC. Sourcing outside the region is therefore a low-cost and a low-risk business decision whereas remaining engaged entails significant due diligence, audit and organisational costs." See also: Joint Communication to the EU Parliament and the Council */* JOIN/2014/08 final*.

68 OECD (2021), *Cost and Value of Due Diligence in Mineral Supply Chains*, OECD Position Paper.

69 Joint Communication to the EU Parliament and the Council */* JOIN/2014/08 final*.

70 Koch, Dirk Jan & Olga Burlyuk (2019) *Bounded policy learning? EU efforts to anticipate unintended consequences in conflict minerals legislation*, Journal of European Public Policy.

Box 4 - Why is it important not to exclude ASM?

The ASM sector is estimated to produce 26% of tantalum, 25% of tin, 6% of tungsten, and 25% of primary gold worldwide.[71] Moreover, it provides a livelihood to people in many producing countries: the World Bank estimates that 44,670,000 people are employed in ASM globally[72], while the number of people depending on the sector is much higher. Besides the huge potential for socio-economic development, there can also be commercial reasons to source from ASM. These include securing diverse and new sources of supply while taking into account that both tantalum and tungsten are EU-listed Critical Raw Materials (CRMs).[73] Moreover, sourcing from ASM can respond to an increasing consumer interest in materials and products that benefit producer communities.[74]

However, as is the case for CAHRAs, due diligence costs may be higher when sourcing from ASM. Moreover, the ASM sector has a bad reputation as smaller upstream actors, often working informally in a fragile environment, are more vulnerable to the risks listed in the OECD Guidance's Annex II.[75] In addition, most sourcing requirements are beyond the reach of ASM actors. The consequence of all this is the phenomenon of 'de-risking' by mineral traders and their clients, which in turn pushes the ASM sector into a downward spiral. *De facto embargoes* exacerbate the stigma associated with ASM, and drive it toward informal or secondary markets with less vigorous sourcing practices.[76]

71 Occupational Knowledge International, see: http://www.okinternational.org/mining.

72 Delve Platform, https://delvedatabase.org/data, visited on 28 September 2023.

73 EC Study on the Critical Raw Materials for the EU, 2023, *Final Report*.

74 OECD, Anti-corruption and integrity hub, Sourcing gold from ASM miners. Available at: https://www.oecd.org/corruption-integrity/checklists/sourcing-gold-from-artisanal-and-small-scale-gold-miners-aci.html

75 OECD (2021), *Cost and Value of Due Diligence in Mineral Supply Chains*, OECD Position Paper.

76 For example, the LBMA concluded in its 2021 annual report that artisanally mined gold currently accounts for less than 1% of the throughput of LBMA refiners, and has dropped 16% since 2019 (LBMA, *Responsible Sourcing Report* 2021).

CAHRA list

In order to support importing companies, the EU compiled a public list of CAHRAs[77] that allows for new countries and regions to be added or removed over time. According to article 2(f), conflict-affected and high-risk areas are "*areas in a state of armed conflict or 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*".[78] With 28 countries on the list at the time of writing[79], the risk of a boycott of one country or region is reduced, but companies may still decide to refrain from doing business with any country listed. In short, the list risks stigmatizing a whole area's mineral production, thus leading buyers to exclude regions that are in need of responsible investments and trade.[80]

The CAHRA list is non-exhaustive and indicative in the sense that, under the Regulation, EU importers are not relieved from due diligence obligations when sourcing from countries that are not included.[81] It is, however, doubtful that all companies and MSCAs use the list in the nuanced way it is supposed to be handled. The interpretation of the list varies per MSCA: some have announced it will not impact its risk assessments while others have indicated it will play an important role in their risk assessments with regards to ex-post checks.[82]

Civil society organizations from producing countries have criticized the CAHRA list for not being complete as it does not include transit and trading countries. For example, Congolese civil society representatives argue that the CAHRA list discriminates against their country and contributes to mineral smuggling: the non-inclusion of Rwanda and Uganda confers these countries a safe status, which encourages mineral smuggling through their territories.[83] It is a fact indeed that the majority of conflict and high-risk gold is not officially exported by producing countries but by their neighbors.[84]

77 See: https://www.cahraslist.net. The EC contracted consulting company RAND Europe to draft the CAHRA list.

78 Article 2(f) Regulation (EU) 2017/821.

79 October 2023.

80 OECD on the level: Due diligence in mineral supply chains and the quest for a list of conflict-affected and high-risk areas, Available at: https://oecdonthelevel.com/2020/05/29/due-diligence-in-mineral-supply-chains-and-the-quest-for-a-list-of-conflict-affected-and-high-risk-areas/.

81 See: https://www.cahraslist.net

82 Interviews held with MSCAs between December 2022 and March 2023.

83 EurAc, German Watch, IPIS. *The European Regulation on Responsible Mineral Sourcing: what are the lessons learned so far?* September 2022.

84 IPIS, *Regulating responsible sourcing of 3TG minerals*, in IPIS Insights on Due Diligence on Mineral Sourcing, IPIS, December 2019. Another example is South Sudan, see: Global Initiative against transnational organized crime, *Tarnished Hope*, May 2023.

Box 5 - Conflict Minerals versus Responsible Minerals

Over the past years, the concept of conflict minerals has become the subject of intense public and academic debate.[85] The link between 'mining' and 'conflict' can be complex and indirect, while CAHRAs often suffer from outdated and oversimplified views that tarnish the reputation of their entire natural resources sector.[86] Moreover, the extraction of minerals is frequently linked to human rights abuses that do not necessarily occur in the framework of violent conflict. In fact, in many top producing countries of 3TGs serious human rights violations such as child labor occur, while they are not affected by (post-) conflict, weak or non-existing governance or systematic violations of international law[87], and thus are not listed as CAHRAs.[88]

It is, therefore, important that due diligence legislation covers risks beyond 'conflict' by encompassing a broader range of thematic areas, including environmental, social and governance risks (ESG). The EU law proposal for a Directive on Corporate Sustainability Due Diligence[89] confirms this trend toward widening the focus on ESGs.[90]

The trend to cover risks beyond CAHRAs has also influenced the conceptual interpretation of the 3TG Regulation. Over the last years, the (unofficial) title of the Regulation was changed by many, including the European External Action Service (EEAS), from Conflict Minerals Regulation to Responsible Minerals Regulation. Although there has never been an official communication on this, consulting company Levin Sources suggests that "*the discourse of mineral supply chains has evolved and today customers and civil society urge companies to respect human rights as well as environmental standards when sourcing minerals.*"[91] Levin Sources argues that by continuing to refer to the Regulation as the 'Conflict Minerals Regulation' we are setting too low a bar for companies.[92] Obviously, semantics alone will not do the job without mandatory requirements following suit. In summary, as long as the focus solely remains on conflict-related risks, the Regulation does not deserve the Responsible Mineral Regulation stamp.

85 See for example: Christoph Vogel, Conflict Minerals Inc: War, Profit and White Saviourism in Eastern Congo, Hurst & Co., London, 2022. He argues that the concept 'conflict minerals' relies on colonial frames to drive change and that it has led to policies that have perpetuated structural violence.

86 See for example: Matthysen, K. & Gobbers, E., *Armed conflict, insecurity, and mining in eastern DRC: Reflections on the nexus between natural resources and armed conflict*, (IPIS, Antwerp, 2022), 40p.

87 See: *EC Conflict Minerals Regulation explained*

88 Maplecroft, *Tech supply chains risk links human rights abuses outside 'conflict minerals' hotspots*. April 2017

89 *Proposal for a directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU)* 2019/1937, February 23, 2023.

90 Loch, Mthembu-Salter, Schaap, Loch, *Conflict Minerals – Over a Decade of Effort and Impact*, Friedrich-Naumann-Stiftung, March 2023.

91 Estelle Levin-Nally, *The 'Conflict Minerals Regulation' or the 'Regulation on Responsible Sourcing Minerals'*; Evolving purpose and terminology, 22 February 2022.

92 Estelle Levin-Nally, *The 'Conflict Minerals Regulation' or the 'Regulation on Responsible Sourcing Minerals'*; Evolving purpose and terminology, 22 February 2022.

Inclusive focus

Unlike the US DFA, the EU Regulation's risk-based approach does not require European companies to claim that their products are 'conflict free', but expects them to show that they have a due diligence system in place. While this more inclusive focus is meant to avoid that companies disengage from challenging environments,[93] the question remains whether it fulfils the intention.

Union importers are legally allowed to import metals and minerals derived from ASM sources and/or originating from CAHRAs. The Regulation, however, urges importers to perform a number of additional checks when they import minerals originating from CAHRAs.[94] In case they import metals, which constitute the majority of imports under the Regulation, Union importers need to provide records of the third-party audit reports of the supplying smelters and refiners, or evidence of conformity with a supply chain due diligence scheme (see chapter 1). As this engenders additional duties and thus higher costs for smelters and refiners, there is a theoretical risk that they will disengage from CAHRAs altogether.

We have, however, not observed any systematic disengagement from ASM or CAHRAs since the Regulation entered into force.[95] Unfortunately, there is no evidence allowing us to conclude that smelters/refiners are constructively engaging with CAHRAs/ASM while observing the EU Regulation. On the contrary, smelters and refiners outside the EU rarely disclose the origin of their minerals and do not apply enhanced due diligence when they source from CAHRAs/ASM (see chapter 1).

The recognition of industry schemes by the EU could change this situation. As mentioned in chapter 1, individual companies often rely on industry schemes, and both the MSCAs and EU importers are eagerly waiting for them to be recognized. At the same time, industry schemes are desperate for this to happen as they feel pressure from their members. This poses a dilemma because it could lead to industry schemes raising the bar of their internal standards and with that, widening the gap between realities on the ground and downstream standards, which in turn can cause de-risking and exclusion of ASM/CAHRAs. Logic wills that unattainable standards lead to CAHRA/ASM exclusion from legal markets, unless smelters/refiners continue to maintain the current lack of transparency on the origin of their raw materials.

This potential problem was already flagged by the OECD in 2018 when it called for refiner and smelter-level programs to do more to discourage the nowadays still common default position of smelters and refiners to disengage from ASM or higher risk areas.[96] Progress has been made in this regard, for example both the LBMA and RMI are increasingly encouraging progressive and continuous improvement, e.g., by recognizing the CRAFT Code.[97] For the effectiveness of the EU Regulation, it is fundamental that the EU, through its recognition of industry schemes, keeps encouraging this progressive approach.

93 IPIS, *Regulating responsible sourcing of 3TG minerals, IPIS Insights on Due Diligence on Mineral Sourcing*, IPIS, December 2019.

94 Article 4(f)(v) Regulation (EU) 2017/821.

95 In the case of the US DFA, it was very clear that companies stopped sourcing from the DRC as soon as the Act entered into force. This has, however, not happened since 2021. Neither have we observed an increased interest or private sector commitment to upstream due diligence programs (e.g. iTSCi).

96 OECD 2018, *Highlights Alignment Assessment of Industry programs with the OECD minerals guidance*.

97 See for more information these articles on *LBMA and Craft Code* and *RMI and Craft Code* and the *Craft Code explained*.

Accompanying measures

The EU created a special fund for accompanying measures to promote responsibly sourced minerals from conflict-affected and high-risk areas. In its Joint Communication of 5 March 2014, the EC committed to the implementation of such measures, with the aim of reaching a high level of participation by economic operators and of ensuring that a global, coherent and comprehensive approach was taken to promote responsible sourcing from CAHRAs.[98] Well-designed measures have the potential to promote a positive socio-economic impact of the Regulation on local communities in producing countries. To achieve that, a concerted effort is needed to support producing countries in specific domains, like good governance, ASM formalization, and the fight against corruption, and to reduce the cost at the upstream level of certification mechanisms necessary for due diligence.

To date, however, there has been no systematic effort to inform producing, transit and trading countries about the new rules in the EU market and the changes that their EU-based buyers (often many tiers further) require.[99] To illustrate this, when we consulted geological services in charge of ASM mining from 15 African countries, five of which are on the CAHRA list, it appeared that only the DRC had ever heard of the Regulation while our interlocutors from the other countries had never heard about it.[100] Additionally, rights holders have not been consulted nor informed.[101] Obviously, to prepare producing countries to meet the EU requirements, especially in the light of disengagement, it is vital to create awareness and enhance monitoring capacities.

We reiterate here that the EC does not provide a public disaggregated dataset on 3TG imports (see chapter 1). It is hence not possible to know which producing regions are affected by the Regulation. This in turn makes it difficult for civil society organizations to design on-the-ground programs to support its implementation and/or mitigate adverse impacts on certain communities, such as those of artisanal miners.

If the accompanying measures are truly intended to be a lever of action to meet the challenges of producing countries, their potential is undeniably under-exploited as of today. While many of the measures adopted so far are indeed aimed at supporting artisanal mining and reinforcing state structures[102], interventions remain disconnected from each other. We see a need for more political engagement by the EU in producing countries, without which financial support is ineffective.

98 Regulation (EU) 2017/821.

99 NGOs have taken some initiatives to inform civil society organizations in producing countries. The EPRM has also made some efforts to inform producing countries and recently the EU Delegation in the DRC has drawn up a questionnaire on the awareness of the EU Regulation in the country (see e.g. Workshops EurAc, German Watch, IPIS (*The European Regulation on Responsible Mineral Sourcing: what are the lessons learned so far?*); Workshop RMI/GIZ.

100 The geological services consulted during this study were based in the following countries: Algeria, Burundi, Cameroon, Comoros, Djibouti, the Republic of Congo, Gabon, Equatorial Guinea, Madagascar, Morocco, Mauritania, the Democratic Republic of Congo, the Central African Republic, Chad, and Tunisia.

101 See for example: *UA Working Paper 2023/04*.

102 For example, see the *EPRM projects*.

RECOMMENDATIONS

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 indusnumtry 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;

RECOMMENDATIONS

- 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

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;

- 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.

IPIS

PAX