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BLOOD MINERALS EU REGULATION 2017/821

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PLAN

I. EU regulation on conflict minerals

- 1) Introduction
- 2) Pre-Eu regulations on conflict minerals
- 3) The EU regulation on conflict minerals
- 4) Potential impacts on the DRC
- 5) Conclusion

II. The DRC act on subcontracting activities

INTRODUCTION – CONTEXT

- **What are conflict minerals?**

Particularly in politically unstable areas, **armed groups** often use **forced labour** to mine minerals, which they then sell to **fund their activities**.

Some of these ‘conflict minerals’ – also called ‘blood minerals’– are **in high demand** and can be used in everyday products (e.g. mobile phones, cars, jewellery) as well as in different industries (e.g. aerospace, industrial machinery, automotive).

INTRODUCTION – CONTEXT

▪ Where do conflict minerals come from?

➤ **Countries :**

- whose natural resources include minerals which are in high demand; **and**
- suffering from conflict, such as civil war > weakens the capacity of authorities to govern effectively.

➤ **Regions** most affected :

- West Africa
- Central Africa
- Some regions in South America and East Asia

PRE-EU REGULATION ON CONFLICT MINERALS

The OECD Due Diligence Guidance

▪ Introduction – Context

The “OECD Due Diligence Guidance For Responsible Supply Chains of Minerals From Conflict-Affected and High-Risk Areas” in short:

- First and most important initiative to date
- Largely relied upon by other actors
- Soft-law instrument
- 1st version: 2011 – 3rd (and last) version: 2016
- Developed through a multi-stakeholders process

PRE-EU REGULATION ON CONFLICT MINERALS

The OECD Due Diligence Guidance

- The **objective** is to help companies respect human rights and avoid contributing to conflict
- The guidance takes the approach of:
 - A **responsible supply chain management** of minerals by suggesting a **five-step framework for risk-based due diligence** that companies should use when reviewing their choice of suppliers and sourcing decisions, to identify and address actual or potential risks

This framework will be analyzed in more detail when going through the EU regulation since both frameworks are identical

PRE-EU REGULATION ON CONFLICT MINERALS

The OECD Due Diligence Guidance

- The OECD regulation focuses on tackling the following **adverse impacts**:
 - Serious abuses (e.g. torture, forced labour, inhuman treatment)
 - Direct or indirect support to armed groups or security forces
 - Risk of inadequate, inaccurate and fraudulent chain of custody and/or traceability information

PRE-EU REGULATION ON CONFLICT MINERALS

UN Resolution 1952 (2010)

- **The UN Resolution 1952**

A **group of experts** created by a former UN resolution (1533) has issued in 2010 a report that **endorses and relies on the OECD Due Diligence Guidance**. The UN Resolution 1952 supports taking forward this report and calls upon States to follow this guidance.

PRE-EU REGULATION ON CONFLICT MINERALS

US 2012 Dodd-Frank Act

▪ Introduction – context

- Enacted on **21st July 2010**
- The **Final Rule**, issued by the US Securities and Exchange Commission (SEC) in 2012, implements Sec. 1502 of the Dodd-Frank Act
- **Legally binding**
- **Same approach** as the one recommended by the OECD: responsible supply chain management

PRE-EU REGULATION ON CONFLICT MINERALS

US 2012 Dodd-Frank Act

▪ The Dodd-Frank Act

Principle: Any person manufacturing or contracting to manufacture products where conflict minerals are necessary to the functionality or the production of the product is **required to**:

- **annually disclose whether conflict minerals did originate from covered countries**, and, if so,
- **submit a report** including specific information

Scope of application:

What minerals? Columbite-tantalite (coltan), cassiterite, gold, wolframite (3T&G) or their derivatives and any other mineral determined by the Secretary of State

What countries? The DRC and adjoining countries (*i.e.* Central African Republic, South Sudan, Zambia, Angola, Republic of Congo, Tanzania, Burundi, Rwanda and Uganda)

PRE-EU REGULATION ON CONFLICT MINERALS

US 2012 Dodd-Frank Act

- **The Final Rule**

The Final Rule provides for a **three-steps disclosure** framework:

- Determine whether the products contain covered conflict minerals
- Determine whether the conflict minerals originated from covered countries
- Conduct due diligence and potentially provide a Conflict Minerals Report

The Final Rule **recognizes the OECD Guidance** as an international framework for due diligence measures undertaken by companies

- **Future perspectives**: the US conflict mineral rule endangered

PRE-EU REGULATION ON CONFLICT MINERALS

Chinese Due Diligence Guidelines

- Enacted in **2014** by the Chinese Chamber of Commerce for Minerals, Metals and Chemicals Importers and Exporters
- **Non-binding** guidelines
- Expressly states that it will be **aligned and consistent with the OECD Guidance** → memorandum of understanding with the OECD to cooperate

THE EU REGULATION ON CONFLICT MINERALS

- **Introduction – Context**

“Regulation (EU) 2017/821 of the European Parliament and of the 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”

Same approach than the one of the OECD Guidance: **responsible supply chain management**

THE EU REGULATION ON CONFLICT MINERALS

Objectives

- The regulation **aims to**:
 - **Curtail opportunities** for armed groups and security forces to trade in the covered minerals
 - Provide **transparency and certainty** with regard to the supply practices of EU importers, smelters and refiners (art. 1) and stop them from using conflict minerals.
 - Make things **clearer for downstream economic operators** who are often not aware of what they buy and where it comes from
 - Stop conflict minerals and metals from being **exported to the EU**
 - Stop the **abuse of mine workers**
 - Support **local development**

THE EU REGULATION ON CONFLICT MINERALS

Scope of application

- **What? (art. 1 and 2)**
 - The regulation applies to:
 - The “3T&G”: Tin, Tantalum, Tungsten and Gold (whether in the form of mineral ores, concentrates or processed metals);
 - The 3T&G, even if obtained as ‘by-products’.

THE EU REGULATION ON CONFLICT MINERALS

Scope of application

▪ Who? (art. 1)

➤ The regulation applies to:

- **EU importers** of minerals or metals with an annual import volume over determined **thresholds** set out in Annex I of the Regulation (considerations of administrative burden)
- **Smelters and refiners**, indirectly

➤ The Commission will publish a '**white list**' of global smelters and refiners proved to source responsibly

THE EU REGULATION ON CONFLICT MINERALS

Scope of application

▪ When? (art. 20)

Most articles of the regulation apply from **1 January 2021**

▪ Where? (art. 1 and 2)

Minerals coming from **conflict affected** or **high-risk areas**, namely:

- Areas in a state of armed conflict
- Fragile post-conflict areas
- Areas with weak or non-existent governance security
- Areas with widespread and systematic violations of international law, including human rights abuses

Tools in order to ensure consistency among practices:

- Non-exhaustive list of conflict affected and high-risk areas provided by external experts
- Non-binding guidelines drafted by the Commission explaining how to apply the criteria for the identification of these areas

THE EU REGULATION ON CONFLICT MINERALS Obligations

▪ Importers' obligations (art. 3 to 7)

EU-based importers shall comply with the supply chain due diligence obligations, namely by following a **five-step framework directly inspired from the OECD Guidance**:

- STEP 1: Establish a strong management system
- STEP 2: Identify and assess the risk
- STEP 3: Design and implement a strategy to respond to identified risks
- STEP 4: Carry out an independent third-party audit of supply chain
- STEP 5: Disclose information

THE EU REGULATION ON CONFLICT MINERALS Obligations

▪ Member States' obligations (art. 11 and 12)

- Establish and disclose 'competent authorities' by December 2017
- These 'competent authorities' shall carry out **ex-post checks** to ensure that companies comply with their obligations
- Records of these ex-post checks must be kept for at least 5 years

To come: The European Commission will draft non-binding guidelines detailing the steps to be followed by these competent authorities

THE EU REGULATION ON CONFLICT MINERALS

Implementation

- **Sanctions and reporting (art. 17)**
 - **Member States' competence:** each State shall lay down the rules applicable in case of infringement to the Regulation
 - If infringement is identified, the 'competent authority' shall issue a **notice of remedial action to be taken** by the Union importer
 - Each year, a **report** should be submitted to the Commission on the implementation of this Regulation (in particular on notices of remedial action issued)

POTENTIAL IMPACTS OF THE EU REGULATION ON THE DRC

- **Indirect impacts on DRC-based smelters and refiners**

As EU-based importers will need to make sure they source responsibly, the regulation affects them

- **'White list'** of global smelters and refiners - recognition of upstream operators by the EU Commission
- Government and industry association to have their DD scheme validated by the EU Commission

POTENTIAL IMPACTS OF THE EU REGULATION ON THE DRC

- **Economical impacts?**

- **Voluntary or mandatory EU regulation?** Fear of the impacts of the Dodd-Frank Act – embargo on DRC.
- ICGLR Initiative against the Illegal Exploitation of Natural Resources (“**RINR**”)

POTENTIAL IMPACTS OF THE EU REGULATION ON THE DRC

The ICGLR and the Lusaka Declaration

- **The Lusaka Declaration (Dec 2010)**
 - Endorses the OECD Due Diligence Guidance
 - Approves **six tools** designed to break the link between mineral revenues and rebel financing:
 - ✓ **Regional Certification Mechanism (“RCM”)**;
 - ✓ Harmonization of National Legislation;
 - ✓ Regional Database on Mineral Flows;
 - ✓ Formalization of the Artisanal Mining Sector;
 - ✓ Promotion of the Extractive Industry Transparency Initiative (“EITI”); and
 - ✓ Whistle Blowing mechanism.

POTENTIAL IMPACTS OF THE EU REGULATION ON THE DRC

The ICGLR and the Lusaka Declaration

▪ Implementation of the RCM (I)

- **Certification manual** has been developed, in accordance with the OECD Due Diligence Guidance, consisting in a practical guide for the implementation of the RCM. The implementation of this scheme relies on four elements:
 - (i) chain of custody tracking from mine site to export, entrusted to national governments before export;
 - (ii) regional tracking of mineral flows via ICGLR database;
 - (iii) regular independent third-party audits;
 - (iv) an Independent Mineral Chain Auditor.
- RCM not implemented in all member States yet (DRC and Rwanda only) but is at an advanced development stage

POTENTIAL IMPACTS OF THE EU REGULATION ON THE DRC

The ICGLR and the Lusaka Declaration

▪ Implementation of the RCM (II)

- **ICGLR certificate in DRC** – Ministerial Decree n°0057/CAB.MIN/MINES/01/2012

Concerns 3T&G but also other minerals as determined by Minister of the mines.

- **Future role in the EU Regulation** as part of the recognised due diligence scheme by the EU Commission or in the « white list » of smelters and refiners sourcing responsibly?

POTENTIAL IMPACTS OF THE EU REGULATION ON THE DRC

Consequences of the implementation of the RCM

- **ICGLR declaration on Section 1502 of the US Dodd-Frank Act (February 14, 2017)**
 - Implementation of the RCM in DRC allows for trade on the US market
 - Repeal of Section 1502 would weaken the ICGLR RCM and this might contribute to the resurgence of armed groups controlling and exploiting minerals

POTENTIAL IMPACTS OF THE EU REGULATION ON THE DRC

Conclusion

Positive impact of a EU regulation on the DRC, especially bearing in mind the objective of restoring peace and security in the Great Lakes area

The DRC act on subcontracting activities

The DRC act on subcontracting activities

- Weaknesses
 - The Act contains **vaguely defined** key concepts

- The Act imposes many obligations for companies wishing to outsource activities
 - **Administrative obligations**
 - Activities can only be subcontracted to Congolese-owned companies promoted by Congolese nationals
 - Companies may not subcontract more than forty percent of the value of a contract
 - Companies established in the DRC must publish annually the turnover achieved with, and the list of, their subcontractors
 - The use of a call for tenders is mandatory for contracts of a value equal to or exceeding one hundred million Congolese francs (USD 75,000) with precise rules regarding publicity

The DRC act on subcontracting activities

- Transitional regime of the Act. Before 17 March 2018
 - Foreign companies holding subcontracting contracts must be incorporated under Congolese law for the purpose of completing the performance of such contracts; and
 - Congolese companies with valid subcontracting contracts must submit these contracts to and comply with the provisions of the Act.

Thank you for your attention!