February 2016

EU RESPONSIBLE MINERAL SOURCING REGULATION:

CIVIL SOCIETY RESPONSE TO THE COUNCIL MANDATE AGREED BY COREPER ON 17 DECEMBER 2015

EU Trilogue negotiations on the draft regulation started on 1 February 2016. The European Commission, the European Parliament and the Presidency of the European Council will attempt to agree a compromise text in the coming months.

The devastating impacts of the trade in minerals linked to conflict and human rights abuses are well documented.[1] The problem has not gone away. A series of **recent reports and events** highlight the urgency of confronting this challenge and the reputational damage that companies and investors can suffer when meaningful due diligence is not carried out.

- On 20 August 2015 a **Belgian company, Kardiam**, was placed on the UN sanctions list for providing "support for armed groups in the Central African Republic ... through the illicit exploitation and trade of natural resources, including diamonds and gold".[2] Kardiam have denied the UN's allegations in communication with Global Witness.

- The **Berne Declaration** has recently published a report stating that the **world's biggest gold refiner**, based in Switzerland, "purchases gold extracted by children". The Berne Declaration state that the company declined their requests for meetings and did not respond to questions sent by email.[3]

- **Amnesty International** and **Afrewatch** have recently published a report which finds that "major electronics brands, including **Apple, Samsung and Sony**, are failing to do basic checks to ensure that cobalt mined by child labourers has not been used in their products".[4] The annex to the report summarises the companies' responses to Amnesty's findings.[5]

The Council's mandate fails to offer an effective EU response to this problem. Not only is the Council proposing a voluntary scheme and ignoring the vast majority of companies that place tin, tantalum, tungsten or gold ('3TG') on the EU market—whether in raw forms or within products like laptops and engines. **It is also significantly undermining the leading international framework previously endorsed by the EU—the OECD's Due Diligence Guidance**.[6] In doing so, the Council is **watering down the very meaning of being a responsible company**.

The OECD Due Diligence Guidance was negotiated and agreed by industry, governments and civil society. It already forms the basis of laws in other countries, and has been endorsed by 34 OECD member countries, 19 other countries and the UN Security Council.[7] It also forms the basis for new Chinese industry standards on due diligence in mineral supply chains.[8] Furthermore, it specifically

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implements in mineral supply chains the globally endorsed UN Guiding Principles on Business & Human Rights, which set out the corporate responsibility to respect human rights.[9]

EU companies are **already implementing** the OECD due diligence framework in large part due to the influence of section 1502 of the US Dodd-Frank Act (DFA 1502)–doing due diligence in conformity with the OECD standard is a legal requirement for companies filing reports under the US law.[10]

- The Commission estimates that **40 dual-listed companies** are directly subject to the requirements of DFA 1502.[11]
- Up to **17 per cent of EU companies working with 3TG** are further indirectly affected by the requirements of the US law because they supply to US customers.[12]
- Triggered by DFA 1502, **industry schemes** already assist companies—in very practical ways—to comply with OECD standards.[13]

It is therefore deeply concerning that the Council has proposed reopening and weakening this established standard in a way that is of little help to the EU companies that are already implementing it, and in a way which limits the effectiveness of the EU's response to the trade in conflict minerals.

The contrast between the Council's position and the EU's rhetoric on responsible supply chains could not be starker. Last autumn, the EU supported commitments made by the G7 to foster sustainable global supply chains.[14] Under its new trade strategy, the Commission argues the "responsible management of global supply chains is essential to align trade policy with European values". In the context of conflict minerals, it **commits to "*building on* the work of the OECD"**.[15]

The EU Regulation offers EU Member States a timely opportunity to deliver on these commitments. Governments have made efforts to make supply chains more responsible in other sectors—such as food, timber, finance and financial services. Most recently, the UK has shown leadership on modern slavery.[16] However governments have been slow to promote comparable and much needed transparency and responsibility along mineral supply chains. Of the bribery cases analysed by the OECD in 2014, the highest percentage (19%) were in the extractives sector.[17]

How is the Council undermining the international OECD standard?

The Council's mandate falls below the OECD Due Diligence Guidance in three key ways.

1. **It is proposing specific due diligence steps that fall well below the OECD standard (Articles 4 and 5 of the draft EU Regulation). By asking less of certain companies—such as manufacturers and traders—the mandate presents them as "responsible" even if they fail to comply with the OECD standard.** For example:

   > **The Council significantly reduces the supply chain risk assessment expected of manufacturers and metal traders ("metal importers")**. It limits the information these companies are expected to look at just to "available audits", thus leaving out other available information in a company's possession (such as supplier policies and information on the countries that smelters source from) or in the public domain (such as UN and NGO reports). As well as falling below the OECD standard, this also has practical implications. A company can comply with the Regulation and so be considered as "responsible" if it reviews the audit reports of the smelters in its supply chains and decides that, on the basis of the audit reports alone, the smelters are responsible. It is free to ignore all other information, even if it *knows* that a smelter has behaved irresponsibly, for example by not properly checking for conflict financing or human rights abuses in its supply chain.

   > **In the event that a smelter audit is not available, the Council expects metal importers only to carry out ad hoc risk assessments**. The OECD standard makes clear that companies should put in place ongoing individual risk management processes so that they can respond to risks whenever and wherever they arise in their supply chain.

   > **The Council removes references to the OECD Guidance as the due diligence standard that metal importers should meet when they identify, assess or mitigate risks in their supply chains**. They therefore have no obligation to assess or manage risk in accordance with any particular standard, and Member State authorities have no meaningful standard to assess their practices against.

We understand that the reduced due diligence standards have been driven in part by concerns for small and medium enterprises (SMEs). However SMEs play an important role in mineral supply chains and are capable of meeting the OECD standards, with the right tools and guidance. Due diligence is designed to give SMEs the flexibility they need—standards are tailored to a company's size, position in the supply chain and leverage over suppliers. A recent survey in the timber sector found that company size "is not necessarily important when it comes to managing risk within supply chains ... the very smallest companies are capable of implementing a system that works for them".[18]

2. **The mandate fails to cover a meaningful number of downstream companies, by ignoring those that *first place products containing* 3TG on the EU market**.

   The OECD Guidance makes clear that due diligence is designed to engage a far greater portion of the downstream sector than the metal importers covered by the Council mandate. Doing so creates more transparent and resilient supply chains in which companies can work together to share information, apply joint pressure over suppliers (including those outside of the EU), and develop industry-wide schemes and best practices. Downstream companies play a unique role—they can be some of the most powerful and profitable companies in the world, have significant leverage over upstream suppliers and be key drivers behind industry-wide initiatives. By focusing on 300-400 importers, Member States are therefore missing an important opportunity to make use of much greater commercial leverage.

3. **The mandate fails to reflect the flexible and progressive nature of due diligence as developed in the OECD Due Diligence Guidance** (see Recital 9(a) and Article 1, paragraphs 2(b) and (d)) of the EP position).

   > **Due diligence is proportionate—it is not a 'one size fits all' approach**. It gives companies the flexibility they need to tailor their due diligence to their own circumstances, such as their capacity, size and position in the supply chain.

   > **Due diligence is not a one-off compliance exercise**. It asks companies to engage proactively and on an ongoing and *individual* basis when identifying and managing risk in their supply chains, and to show progress over time.

   These core principles have been reflected in existing EU and national laws. Entities are expected to take "**appropriate**" steps to identify, assess and manage **money laundering and terrorist financing** risks "**proportionate** to the nature and size of the entity".[19] The UK Bribery Act expects organisations to put in place procedures to prevent **bribery** that are **proportionate** to the risks they face in practice, and to the nature, scale and complexity of the organisation's individual activities. Companies should monitor and make **improvements** to these procedures.[20]

Our coalition of over 80 civil society organisations hope Member States will take this opportunity to show leadership and engage in a constructive dialogue that makes it clear to companies, investors, consumers, and those affected by the trade in conflict minerals, that the EU is firm in its commitment to more responsible and transparent supply chains. This means showing a genuine commitment to building on progress that is already too slow for the victims of this deadly trade, not seeking shortcuts that lead only backwards.

We recommend that Member States revisit their positions and:

1. **Show leadership** on this issue by supporting **mandatory due diligence requirements** for covered companies

2. **Support** a Regulation that **aligns with** the OECD Due Diligence Guidance, by:

   > **Ensuring** that all due diligence obligations are consistent with the OECD standard

   > **Engaging** companies downstream of metal importers, in particular companies that place products containing covered minerals on the EU market

   > **Including** language that reflects the flexible and progressive nature of due diligence

ENDNOTES

1 For example, see previous briefings by members of our coalition: https://www.globalwitness.org/documents/18087/NGO_Coalition_Briefing_-_EU_Regulation_on_Responsible_Mineral_Sourcing.pdf and https://www.globalwitness.org/documents/18059/Breaking_the_Links_-_Joint_NGO_Position_Paper_ENG.pdf. See also http://business-humanrights.org/en/background-conflict-minerals-eu-responsible-mineral-sourcing-regulation

2 See https://www.un.org/sc/suborg/en/sanctions/2127/materials/summaries/entity/bureau-d%27achat-de-diamant-en-centrafrique/kardiam

3 Berne Declaration, 10 September 2015, 'Largest Swiss refinery purchases gold extracted by children', https://www.bernedeclaration.ch/media/press-release/largest_swiss_refinery_purchases_gold_extracted_by_children/

4 Amnesty International, 19 January 2016, Press release: 'Exposed: Child labour behind smart phone and electric car batteries', https://www.amnesty.org/en/latest/news/2016/01/Child-labour-behind-smart-phone-and-electric-car-batteries/

5 The responses of the companies can be found in the annex to the English language report from Page 75 onwards, available at: https://www.amnesty.org/download/Documents/AFR6231832016ENGLISH.PDF

6 Organisation for Economic Cooperation and Development (OECD), 2013, 'OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas', available at: http://www.oecd.org/fr/daf/inv/mne/mining.htm

7 The OECD Guidance has been endorsed by 34 OECD member countries, plus Romania, Lithuania, Latvia, Brazil, Argentina, Peru, Morocco, the twelve member states of the International Conference of the Great Lakes Region (ICGLR) and the UN Security Council. Nine non-Members, namely Argentina, Brazil, Colombia, Costa Rica, Latvia, Lithuania, Morocco, Peru and Romania, who are all Adherents to the Declaration on International Investment and Multinational Enterprises, have adhered to the OECD Council Recommendation, available at: http://webnet.oecd.org/OECDACTS/Instruments/ShowInstrumentView.aspx?InstrumentID=268&InstrumentPID=302&Lang=en&Book=False

8 Global Witness, 2 December 2015, 'Global Witness welcomes progressive new Chinese mineral supply chain guidelines', https://www.globalwitness.org/en/press-releases/global-witness-welcomes-progressive-new-chinese-mineral-supply-chain-guidelines/

9 UN Office of the High Commissioner for Human Rights, 2011, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' UN Doc HR/PUB/11/04, available at www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

10 For example, Vodafone recently admitted to Amnesty International that they only do OECD level due diligence for tin, tantalum, tungsten and gold because it is legally required under DFA 1502. Vodafone stated that: "it is important to note that cobalt is not one of the minerals included in the [legally required] Conflict Minerals report and therefore [not] subject to the same level of due diligence as the other minerals noted above [tantalum, tin, tungsten or gold]." See Amnesty International, 19 January 2016, 'This is what we die for: Human rights abuses in the Democratic Republic of the Congo power the global trade in cobalt', Annex, p.81, available at https://www.amnesty.org/en/documents/afr62/3183/2016/en/

11 European Commission, 5 March 2014, Impact Assessment, p.23, http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152229.pdf

12 European Commission, 5 March 2014, Impact Assessment, p.13, p.19, p.23, and p.36.

13 For example, see http://www.lbma.org.uk/responsible-gold and http://www.gold.org/sites/default/files/documents/Conflict_Free_Gold_Standard_English.pdf

14 European Commission, 12 October 2015, 'EU announces plans to improve workplace safety and labour practices in producing countries', http://europa.eu/rapid/press-release_IP-15-5823_en.htm

15 European Commission, October 2015, 'Trade for all: Towards a more responsible trade and investment policy', p. 7, p.24 and p.25, http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf

16 UK Modern Slavery Act 2015, available at: http://www.legislation.gov.uk/ukpga/2015/30/contents

17 OECD, 2 December 2014, 'OECD Foreign Bribery Report', available at: http://www.oecd.org/newsroom/scale-of-international-bribery-laid-bare-by-new-oecd-report.htm

18 Global Timber Forum, 22 July 2015,'Survey on due diligence finds SMEs to be performing well', available at: http://gtf-info.com/content/news/market-legality-requirements/gtf-survey-on-due-diligence-finds-smes-to-be-performing-well-979. See also the Timber Trade Federation website: http://www.ttf.co.uk/sustainability/eutr.aspx

19 EU Anti-Money Laundering Directive, Article 8, paragraphs 1 and 3.

20 UK Ministry of Justice, March 2011, 'Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing (section 9 of the Bribery Act 2010)', Principles 1 and 6, p. 21 and p.31, available at: http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf

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