

International Trade in Conflict Minerals: Solutions for the EU Regulatory Framework¹

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Abstract

International trade in minerals, particularly tin, tungsten, wolfram, and gold, from conflict-affected or high-risk areas can have significant implications on intensifying and perpetuating the conflicts. It occurs that illegal mines are run by armed groups. As a result, minerals acquired from such sources provide financial means to armed movements and support the conflict. In this respect, several international and national regulatory frameworks for responsible sourcing have been established. The most important international initiative is the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, which provides importers with voluntary guidelines for responsible sourcing policy. In addition, the US passed the Dodd-Frank Wall Street Reform and Consumer Protection Act in 2010. Section 1502 of the Dodd-Frank Act lays down the rules for responsible sourcing that are compulsory for any company listed on the US stock exchanges. Following to these initiatives and further public consultations, the European Commission and the European External Action Service introduced a proposal for a comprehensive EU policy focused on responsible sourcing of conflict minerals. The package consists of a legislative proposal laying down rules for self-certification of responsible importers, as well as of additional measures providing for support for SMEs and incentives for importers of conflict materials. The aim of this paper is to analyse the legislative proposal and discuss its possible implications given the fact that the EU legislation should be compatible with standing frameworks.

Key words

Conflict minerals, conflict-affected areas, responsible sourcing, due diligence, regulatory framework

JEL Classification: F1, F2, F5

Introduction

International trade in minerals, particularly tin, tungsten, wolfram, and gold, from conflict-affected or high-risk areas can have significant implications on intensifying and perpetuating the conflicts. It occurs that illegal mines are run by armed groups. As a

¹ VEGA No. 1/0391/13 *The importance of third countries for the strategic development objectives of the EU in the post-crisis period (with implications for the Slovak economy).*

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result, minerals acquired from such sources provide financial means to armed movements and support the conflict.

In this respect, the European Commission (the EC) and the European External Action Service (the EEAS) published a Joint Communication on responsible sourcing of minerals originating in conflict-affected or high-risk areas (conflict minerals) in March 2014. The aim of this Communication is to set up a framework for integrated approach of the European Union (the EU) in order to break the link between purchasing such minerals and promoting the conflicts. The EU initiative is focused on responsible sourcing of tungsten, tin, tantalum and gold (3TG). Furthermore, it is based on existing international and national initiatives, such as the *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, which provides importers with voluntary guidelines for responsible sourcing policy, and shall be compatible with the *US Dodd-Frank Wall Street Reform and Consumer Protection Act* passed in 2010. Section 1502 of the Dodd-Frank Act lays down the rules for responsible sourcing that are compulsory for any company listed on any of the US stock exchanges.

The draft *Regulation setting up a Union system for supply chain due diligence self-certification of responsible importers of tin, tantalum and tungsten, their ores, and gold originating in conflict-affected and high-risk areas* is one of the corner-stones of the EU initiative. It lays down rules for self-certification of responsible importers. In addition, it is supposed to be compatible with the OECD Guidance and the US Dodd-Frank Act in order to create minimum additional administrative burden to the importers of 3GT. Furthermore, the EC has followed the example of established EU certification schemes while drafting the proposal of the Regulation, namely the Timber Regulation and the Kimberley Process Regulation.

Since the draft Regulation on self-certification of responsible importers of 3GT is currently being discussed by the Council and will soon be on the agenda of the newly elected Parliament, it is of a great importance to take a closer look on the proposal and assess its value added.

1 Methodology

This paper represents an introduction into the study of conflict minerals issue. It reflects the needs to provide an initial evaluation of the draft Regulation, which might be useful to decision-makers while negotiating the proposal in the EU regulatory bodies. The completion of this research paper is based on a variety of qualitative methods coupled with basic quantitative approaches.

In the first part of the paper, we provide an overview of the issue at stake. The overview draws on a study of existing data provided by different studies, surveys and other relevant publications of international institutions and organisations. Moreover, to achieve a well-rounded overview we provide for a basic statistical analysis of the worldwide production of conflict minerals. Production statistics are often based on estimates or private surveys of international institutions as neither exact data nor standardised statistics on the subject matter are available.

In the second part of the paper, we compare standing international initiatives for responsible sourcing with the EU draft Regulation in order to evaluate the value added of the proposal. The second part draws on qualitative methods including secondary data analysis, especially the analysis of legal texts setting up a framework for responsible sourcing of conflict minerals. Furthermore, the analysis includes a comparison of the draft Regulation and existing EU certification schemes, such as the Timber Regulation and the Kimberley Process Regulation.

The aim of this paper is to provide an initial analysis of the draft Regulation setting up a Union system for supply chain due diligence self-certification of responsible importers of tin, tantalum and tungsten, their ores, and gold originating in conflict-affected and high-risk areas and further, to evaluate the value added of this proposal.

2 Results and Discussion

Minerals covered by the proposed EU Regulation, as well as the OECD Guidance are used as inputs in several industries, such as electronics and automotive. To a great extent, the reserves of these minerals can be found in countries which are affected by armed conflicts. On one hand, sourcing of these minerals can contribute to perpetuating the conflict as mines or smelters are often linked to armed groups. On the other hand, due attention must be paid to implementing certification schemes because they can result in *de facto* embargo and so harm the conflict-affected country even more.

2.1 Overview of the production of and trade in conflict minerals

Generally speaking, the 3TG minerals can be found in every industry sector. Most affected, however, are the electronics industry and the automotive industry. In respect of the *electronic industry*, tantalum, tin, tungsten and gold are used for the production of solders, capacitors, wiring, semiconductors, contacts, lithium ion batteries. Furthermore, as nanoparticles the 3TG can be found in all electronic and electrical appliances. Therefore, the production of cameras, tablet computers, notebooks, mobile phones etc. is dependent on conflict minerals. As for the automotive industry, conflict minerals are used not only in the car electronics, but also in other parts of the vehicle, such as metal alloys, glass coatings, automobile headlights, engine batteries, traction controls. With regard to the wide use of conflict minerals in the automotive industry, the issue of responsible sourcing of minerals should be of a great importance to the Slovak Republic, too. Further essential applications of 3TG occur in *aerospace* and *defence* sectors, both being vital for the competitiveness and innovation leadership of the EU (Böhme et al., 2013).

The largest reserves of *tin* can be found in China (1,500,000 t). China is also the main producer of tin in the world. In 2013 the mine production of tin in China accounted for nearly 44% of world production. Top 5 tin producing countries further include Indonesia, Peru, Bolivia and Brazil. Their cumulated mine production of tin ores amounted to 85% of world production in 2013 (Calculations based on estimates by U.S. Geological Survey, 2014, see Table 1).

Table 1 World mine production of tin by country (tons)

Country/Period	2011	2012	2013 ^e	Reserves (2013)
1. China	156,000	110,000	100,000	1,500,000
2. Indonesia	89,600	41,000	40,000	800,000
3. Peru	28,882	26,100	26,100	91,000
4. Bolivia	20,373	19,700	18,000	400,000
5. Brazil	10,725	10,800	11,900	700,000
World total (rounded)	333,000	240,000	230,000	4,700,000

Notes: e = estimates by U.S. Geological Survey, 2014

Source: U.S. Geological Survey, 2014 and K. Böhme et al., 2013, p. 99

According to the U.S. Geological Survey (2014), data on the total world reserves of *tantalum* are not available. However, it is estimated that they amount to more than 100,000 t. The resources exploration company Globe (2014) estimates that the world reserves of tantalum exceeded 153,000 t in 2011 being predominantly allocated in Brazil (87,000 t) and Australia (40,500 t), followed by China and South East Asia (7,800 t each), Central Africa (3,200 t) and other African regions (12,500 t).

Table 2 World mine production of tantalum by country (tons)

Country/Period	2011	2012	2013 ^e	Reserves (2013)
1. Rwanda	93	150	150	na
2. Brazil	180	140	140	36,000
3. Congo (D.R.)	95	100	110	na
Canada	0	100	110	na
Ethiopia	76	95	10	na
Mozambique	260	39	40	na
Nigeria	53	63	60	na
World total (rounded)	767	670	590	>100,000*

Notes: e = estimates by U.S. Geological Survey, 2014; na = data not available

* = estimates by U.S. Geological Survey, 2014 including Australia (62,000 t)

Source: U.S. Geological Survey, 2013 & 2014

Volumes of tantalum produced by individual countries vary in time, Rwanda and Brazil being the main producers followed by the Democratic Republic of Congo. While total production of tantalum in Mozambique outperformed Rwanda's and Brazil's production in 2011 amounting to 260 t, it dropped to approximately 40 t in the following two years. Furthermore, in spite of having second largest reserves of tantalum, Australia did not report any production in the period of 2011 – 2013 (See Table 2)

With regard to *tungsten*, China is the main producer as well as the country with the largest reserves of the mineral. According to U.S. Geographical Survey (2014), China's reserves in 2013 amounted to 1,900,000 t accounting for 54% of the world's total. Canada and Russia follow on the second place with reserves of 290,000 t and 250,000 t respectively. Further countries with considerable tungsten reserves are the US (140,000 t) and Bolivia (53,000 t).

Table 3 World mine production of tungsten by country (tons)

Country/Period	2011	2012	2013 ^e	Reserves (2013)
1. China	61,800	64,000	60,000	1,900,000
2. Russia	3,500	3,000	2,500	250,000
3. Canada	1,970	2,190	2,200	290,000
4. Bolivia	1,100	1,270	1,200	53,000
5. Austria	1,100	800	800	10,000
5. Portugal	820	763	800	4,200
World total (rounded)	73,100	75,700	71,000	3,500,000*

Notes: e = estimates by U.S. Geological Survey, 2014; na = data not available;

* = estimates by U.S. Geological Survey, 2014 including the US (140,000 t)

Source: U.S. Geological Survey, 2013 & 2014

China, having the world's largest reserves of tungsten, accounted for 85% of the world's production in 2013 followed by Russia and Canada (both representing approximately 3% of total production). As shown in Table 3, China has used its immense reserves becoming the most important producer of tungsten. On the other hand, the US while having fourth largest reserves of tungsten have not reported any production in the period of 2011 – 2013.

Total world's reserves of *gold* amounted to 54,000 t in 2013 according to U.S. Geological Survey (2014). The largest reserves are located in Australia accounting for 18% of the total. Australia is followed by South Africa (1.1%) and Russia (0.9%).

Table 4 World mine production of gold by country (tons)

Country/Period	2011	2012	2013 ^e	Reserves (2013)
1. China	362	403	420	1,900
2. Australia	258	250	255	9,900
3. United States	234	235	227	3,000
4. Russia	200	218	220	5,000
5. South Africa	181	160	145	6,000
World total (rounded)	2,660	2,690	2,770	54,000

Notes: e = estimates by U.S. Geological Survey, 2014

Source: U.S. Geological Survey, 2013 & 2014

In the recent years, China has been exploiting its reserves of gold with a significant intensity. While only having a fifth of Australia's reserves, China outperformed Australia by more than 60% extracting nearly 25% of its reserves in 2013 and providing for 15% of world's production. On the other hand, South Africa with the second largest reserves of gold extracted only 2.5% of its reserves in the same period, its production amounting to 145 t or 5% of the total in 2013 (See Table 4).

OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas (OECD Guidance) being the regulatory basis for most of the private or legislative initiatives on responsible sourcing of 3TG provides for a very general and loose definition of conflict-affected and high-risk areas. In this respect, it is left with companies to identify countries or regions subject to their respon-

sible sourcing policy. Companies can, however, rely on broadly recognised sources of information, such as the UN Security Council resolutions or surveys of research institutes. With regard to the latter, the Heidelberg Institute for International Conflict Research (HIICR) has been publishing an annual conflict barometer since 2002. The HIICR barometer recognises several stages of conflict from non-violent conflict (dispute) to limited war or war. Further, it distinguishes between national and international conflicts. The HIICR definition and understanding of conflict gives rise to a serious risk of most of the countries producing the 3TG minerals being labelled as conflict countries. Except for Australia, Austria, Canada and the United States, all of the above mentioned TOP5 producing countries of the individual conflict minerals are recognised by the HIICR as conflict countries (we only took into account countries with conflicts assessed as violent crises and more serious type of conflict).

On the other hand, neither an exhaustive list of countries covered by a responsible sourcing initiative is a clear advantage. In this respect, it is the US legislation (Section 1502 of the Dodd-Frank Act) that precisely defines countries covered by the act as Democratic Republic of the Congo and nine adjoining countries, namely Central Africa Republic, South Sudan, Zambia, Angola, the Republic of Congo, Tanzania, Burundi, Rwanda and Uganda. According to Manhart and Schleicher (2013, p. 27), first experience shows that companies are often challenged by their customers, who are only interested in the geographical origin of minerals rather than in a possible linkage between a mine or smelter and an armed group. This may lead to companies taking the decision not to source from conflict-affected or high-risk countries at all. Such *de facto* embargo can cause significant harm to countries subject matter.

The above indicates that introducing a responsible sourcing initiative may lead to companies avoiding conflict-affected and high-risk countries as sources of 3TG. Such behaviour creates a *de facto* embargo on imports from conflict-affected countries may the source of 3TG minerals be linked to armed groups or not. In this respect, the responsible sourcing initiatives should not cause additional damage to conflict-affected countries. Therefore, it is necessary to analyse any new proposed initiative with due care.

2.2 EU draft Regulation – sensitive issues, improvements and value added

The Commission proposal for a regulation is supposed to set up a voluntary system of self-certification of responsible importers of tantalum, tin, tungsten and gold. It is aimed at the first importer of products covered by the regulation on the common market of the EU. The product scope includes the ores, as well as certain semi-processed goods (such as metals). Such *definition of product scope* gives rise to an uneven position of two hypothetical companies – one being an importer of metal from a third country (outside of the EU) and the other one acquiring the same product from an EU based smelter. The first company would be understood as an importer as defined by the draft Regulation while the second one would not. Is it an advantage or a disadvantage for company not being covered by the Regulation? On one hand, a company not covered by the Regulation avoids the administrative burden imposed by the Regulation on companies taking part in the proposed EU scheme. On the other hand, the Commission intends to provide preferential treatment to companies with responsible sourcing policy regarding its own public procurement (Joint Statement, 2014, p.

11). However, any company having a responsible sourcing policy based on OECD Guidance can benefit from such preferential treatment. Therefore, it can be concluded that the integrated approach of the EU to responsible sourcing of conflict minerals does not provide for any particular incentives, which would motivate companies to make use of the Regulation as a legal basis for their responsible sourcing policy.

Nevertheless, the exact *list of products* covered by the Regulation is an obvious improvement in comparison to the OECD Guidance, as well as to the US Dodd-Frank Act, both providing for a less precise definition of the product scope. The OECD Guidance applies to all companies in the mineral supply chain that supply or use tin, tantalum, tungsten and their ores or mineral derivatives and gold sourced from conflict-affected or high-risk areas (OECD Guidance, 2013, p. 15). The US Dodd-Frank Act defines conflict minerals as cassiterite, columbite-tantalite, gold and wolframite, as well as their derivatives and other minerals that the US Secretary of State may designate in the future (Ernst & Young, 2012, p. 1). Cassiterite, columbite-tantalite, and wolframite are ores from which tin, tantalum, and tungsten are extracted.

While drafting the proposal for the Regulation, the Commission has drawn on the experience from two established certification schemes, namely the Kimberley Process Regulation (Regulation No 2368/2002) and the Timber Regulation (Regulation No 995/2010). However, it seems that none of the above schemes can be understood as absolutely suitable solution for the integrated approach of the EU to responsible sourcing of conflict minerals.

Table 5 Comparison of EU certification schemes for diamonds, timber and conflict minerals

Regulations:	Diamonds	Timber	Conflict minerals
Nature of the scheme	compulsory	compulsory	voluntary
Object of certification	product*	company	company
Nature of the competent authority	voluntary, established on the national level	compulsory, established on the national level	compulsory, established on the national level
Sanctions	yes	yes	no

Notes: * = Secondary aim of the Regulation is to establish a list of responsible traders which have introduced a system of warranties and industry self-regulation based on the Kimberley Process Certification Scheme.

Source: based on an analysis of Council Regulation (EC) No 2368/2002 implementing the Kimberley Process certification scheme for the international trade in rough diamonds, Regulation (EU) No 995/2010 of the European Parliament and of the Council laying down the obligations of operators who place timber and timber products on the market, and the proposal for a Regulation (EU) of the European Parliament and of the Council setting up a Union system for supply chain due diligence self-certification of responsible importers of tin, tantalum and tungsten, their ores, and gold originating in conflict-affected and high-risk areas

As shown in Table 5, both schemes (diamonds and timber) are compulsory. In such case, it is only sensible to create a competent authority which is entitled to monitor the implementation of the schemes and the compliance of importers and traders with the respective regulation. Voluntary nature of the conflict minerals schemes gives rise to a question of the purpose and powers of a national competent authority. Responsible sourcing of conflict minerals is an integral part of company's corporate social

responsibility (CSR). Any of the policies integrated in the CSR represents voluntary engagement of the company in a matter or a cause. It is left with the company to decide whether or not it will engage in socially responsible business behaviour. Therefore, the existence of an authority – whether national or supranational – is not necessary. In our opinion, it is up to the company to choose its position regarding CSR and up to the market to assess whether the customers acknowledge its responsible behaviour or not.

Under the Kimberley Process Regulation, the national authority is entitled to detain the shipment if the imported diamonds are not accompanied by required certificates. Under the Timber Regulation the Member States lay down rules on penalties to infringements of the Regulation. These may include fines, seizure of the timber and timber products, and immediate suspension of authorisation to trade. The proposed Regulation on conflict minerals, however, does not fill the powers of the competent authority with any law enforcement instruments. In case of non-compliance with the provisions of the Regulation, competent authority shall issue a notice of non-recognition. However, since the proposed EU scheme is voluntary and based on the broadly recognised OECD Guidance, the company may continue declaring responsible sourcing of conflict minerals under own sourcing policy based directly on the OECD Guidance while withdrawing from the EU scheme established by the Regulation.

The Commission intends to provide responsible importers with advantageous treatment with regard to public procurement. This could be used as an incentive for importers who decide to certify their responsible sourcing policy under the proposed Regulation. Despite the Commission declared such intention in the Joint Communication; the advantageous treatment will apply to any importer certified under any responsible sourcing scheme based on the OECD Guidance.

Following the above analysis, we believe that at this stage the draft Regulation can be understood as a mere political statement, rather than a strong trade instrument. However, there is a statement of an utmost significance incorporated in the Joint Communication (2014, p. 10): "The scheme will be evaluated after three years, or before in case available information will allow it, and the results will be used for decision-making needs on the future of the EU approach and for amendments to the regulatory framework, making it mandatory, if appropriate and on the basis of a further impact assessment."

The future perspective of a mandatory approach to the self-certification scheme sheds light on the purpose and value added of the draft Regulation. In this respect, the Member States should not underestimate the on-going negotiations in the Council and up-coming discussions in the European Parliament. On the contrary, they should pay due attention to the Commission's proposal in order to create a solid basis for future mandatory self-certification scheme and its functioning. Furthermore, the institutions, while discussing the proposal, should bear in mind that there are certain limitations to be taken into account. Firstly, the Regulation should create no or as little as possible additional administrative burden to the importers. First step in the right direction has been done as the proposal is based on the OECD Guidance, which is the basis for the most private and national responsible sourcing initiatives. However, due attention must also be paid to further rules that may create additional red tapes, such as the form of responsible importer's declaration, self-certification procedures for companies which operate in several member states. Furthermore, if the scheme is going to be mandatory some day in the future, the Member States and EU institutions should

discuss possible future penalties to infringements of the Regulation. Secondly, neither should the Regulation burden the Member States with new tasks, which are inevitably connected to increased costs and further budgetary needs.

Conclusion

Following the above analysis, we would like to highlight the following issues, to which due attention must be paid, as well as propose some initial solutions to those issues.

Firstly, the proposed Regulation establishing an EU self-certification scheme of responsible importers of conflict minerals can only be seen as serious trade instrument when the Commission clearly expresses its intention to make it mandatory in the future. This intention is stated in the Joint Communication. Nevertheless, we propose to incorporate it in the text of the Regulation, as well.

Secondly, an indisputable improvement in comparison to the existing initiatives is the precisely defined product scope. However, similar precision should be used with regard to identifying the conflict-affected and high-risk areas. Providing a list of countries certainly is a sensitive diplomatic issue. Furthermore, it decreases the level of company's engagement in the cause. Nevertheless, clear definition of geographical scope of the Regulation is vital to ensure comparable level of implementation in various Member States, as well as to provide the small and medium-sized enterprises (SMEs) with necessary assistance. As an alternative to a list of countries, the Commission could elaborate a handbook for importers with a list of relevant resources, which would incorporate explanations on interpretation of these resources.

Thirdly, the EU institutions should consider appointing a single European authority, which would be entitled to receive the declarations of responsible importers and carry out ex-post checks. Alternatively, the final wording of the Regulation could draw on the principle of a voluntary national authority as introduced by the Kimberley Process Regulation. Such approach might provide for a solution to the problem of companies operating in several Member States. It would enable them to submit the declaration of responsible importer in one country into the hands of one national authority.

Finally, to ensure effective implementation of the Regulation, especially with regard to the possible future mandatory nature of the scheme, the discussion on the Regulation itself should be accompanied by a discussion on penalties. Since the scheme is meant to be voluntary at first, the EU institutions should examine the possibilities for effective implementation of the Regulation under voluntary approach.

The initiative of the EU for responsible sourcing of conflict minerals is indisputably an important issue, which is aimed at breaking the linkage between sourcing of 3TG and financing of armed groups. Doing so, it will contribute to the solution to armed conflicts in various regions of the world, particularly in the Great Lakes region of Africa. The voluntary nature of the scheme proposed by the Commission threatens to diminish the value added and the effectiveness of the proposed self-certification scheme. The Member States as well as the EU institutions taking part in the decision-making process shall pay due attention to resolving the questions, which have arisen, and doing

so create a solid basis for future mandatory self-certification scheme. It is, however, questionable whether the self-certification of responsible importers should become mandatory in the future as it is a part of company's CSR – a policy that reflects different levels of engagement of companies in society.

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