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The European Parliament's New Conflict Mineral Regime

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On May 20, 2015, in a plenary meeting in Strasbourg, the European Parliament decided, after a heated debate, to establish a mandatory reporting regime for "all Union importers" — that is, all downstream companies — of conflict minerals from conflict zones in the world.

The plenary thus substantially modified the proposal of the commission for a voluntary "self-certification" regime as well as the text adopted by the parliament's international trade committee in April, which included a mandatory certification only at the level of smelters and refiners.

A key feature of the commission's original proposal in March 2014 was that it relied on a voluntary commitment by importers and did not impose mandatory reporting requirements, in contrast to the reporting regime under section 1502 of the Dodd-Frank law in the United States.

The commission's draft regulation suggested a voluntary "self-certification" system for importers of tin, tantalum, tungsten (the "3T") and gold who would choose to import "responsibly" into the European Union, by implementing the Organisation for Economic Cooperation and Development due diligence guidance. This scheme would have only applied to upstream supply chain operators, approximately 400 importers of these minerals, not the downstream users; for these, the commission only proposed a few incentives to encourage them to source responsibly.

As soon as the commission's proposal was launched, nongovernmental organizations and the Socialist and Green groups in the European Parliament expressed strong criticism, claiming that Europe should adopt a regime similar to Dodd-Frank 1502 in the United States, which imposes mandatory reporting by U.S. publicly traded companies.

Nevertheless, those who supported a voluntary regime managed to prevail in the debate of the international trade committee of the parliament, with two main arguments: the excessive burden for the industry, notably small and medium size enterprises (SMEs), and the risk, because of this burden, that importers will be discouraged from sourcing their minerals in Eastern Congo, with damaging effects for the local economy, as many have argued following the implementation of Dodd-Frank. The international trade committee only slightly modified the commission proposal by adding an obligation for smelters and refiners to certify the origin of the minerals they processed.

In the weeks before the plenary debate in Strasbourg however, the support for a mandatory regime gained ground. Numerous testimonies and reporting on the Great Lakes conflict presented in the parliament reinforced the argument that a "strong" action was needed and that it should be as tough as

the American regime.

In Strasbourg, before the vote, the debate was very animated. Amendments reversing the regime proposed by the commission were adopted at the last minute thanks to the support of isolated members of the European People's Party (EPP) and Alliance of Liberals and Democrats for Europe (ALDE) parties who negotiated compromise amendments with the Socialist and Democrats and the Green parties in order to obtain a majority. These key amendments passed with 378 votes against 300 and 11 abstentions.

An unwritten part of this compromise was also that the parliament would not have a final vote on the entire text but would first negotiate with the council, in order to arrive at an agreement in "first reading." The regulation has to be adopted in co-decision by the parliament and the council and the informal negotiation between the two institutions and the European Commission (in "trilogue") might make the end result less stringent — and more precise — than what was decided on May 20.

What are the main changes in the text as compared with the commission's proposal?

Article 1 paragraph 2 of the commission proposal stated that : "*this regulation lays down the supply chain due diligence obligations of Union importers who choose to be self-certified as responsible importers of minerals or metals containing or consisting of tin, tantalum, tungsten and gold*." The new text says: "*(…) obligations of all Union importers who source minerals and metals falling within the scope of this regulation in accordance with the OECD Due Diligence Guidance ...*"

Article 1 paragraph 2 d (new) adds " (…) *downstream companies shall take all reasonable steps to identify and address any risks arising in their supply chains for minerals and metals coming within the scope of this regulation. In this connection, they shall be required to provide information on the due diligence practices they employ for responsible supply chains.*"

What makes this obligation even more demanding is that the geographical scope of the regulation is not limited to the Great Lakes Area, as is Dodd-Frank 1502. The EU regime will be applicable for minerals originating from all "conflict affected and high risk areas" in the world, a concept difficult to define. The definition proposed by the commission is rather broad and too vague and generated a long and inconclusive debate in a council working group. In the parliament text (voted on by the international trade committee) the definition is more limited and precise: "*areas in a state of armed conflict, with presence of widespread violence, collapse of civil infrastructure, fragile post conflict areas as well as areas of weak or nonexistent governance or security such as failed states characterized by widespread and systematic violations of human rights as established under international law.*"

Member states have not yet reached a common position on the text in the council, preferring to wait for the result of the debate in the parliament. Some member states have already let it be known that they would rather have supported the original proposal from the commission. However, the end result is still unpredictable — as the cause for a mandatory regime for all downstream users has strong backing from NGOs as well as public support in most member states. It is questionable whether the majority of national governments will be able to resist this wave of support.

Even if the pro-mandatory approach is difficult to counter directly, significant work needs to be done in order to make this regulation applicable in practice. Indeed, the last minute amendments voted by the parliament are not self-supporting. If the political will prevails to impose reporting obligations on end users, detailed modalities will need to be added on how to put them in place. The current text, except

for the amendments reproduced above, only deals with the modalities for “self-certification” by importers and with the obligations for the smelters added by the international trade committee.

It will also be necessary for the regulation to define more precisely the downstream users that will be subject to the new reporting requirements. One reference to these downstream users can be found in the preparatory work for the commission proposal: the “impact study” published together with the proposal presents them as those companies “trading and processing” the 3T and gold in the EU. The commission estimates their number as 880,000, with most of them being SMEs. If this concept is carried through in the final regulation, the scope of the EU regime would be much wider than the Dodd-Frank regime, which only applies to companies already required to file reports with the U.S. Securities and Exchange Commission.

A more substantive debate over the modalities might still demonstrate that the careful and pragmatic approach of the commission has better chances to bring positive effects for the local population than a regime too difficult to implement and equivalent in practice to an embargo.

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