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Agreement in Principle Announced for an EU Regime on Conflict Minerals

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Conflict Minerals

In a so called "trilogue" meeting on June 16, the European Parliament, the Council of Ministers, and the European Commission reached a "political" agreement on the key elements of a regulation that would implement a due diligence and reporting regime for conflict minerals imported in the EU.

It has taken more than three years since the first consultations by the European Commission to reach this tentative result. The final texts will only be presented in the fall when the "technical" part of the regime will have been approved. But this agreement in principle is noteworthy because it reconciles what had previously been very divergent views of the participants in the "trilogue."

As we reported previously (see *Covington Alerts* on March 11 and June 6, 2014), the original proposal of the European Commission presented in March 2014, was rather careful and less far reaching than the U.S. legislation, in Section 1502 of the Dodd Frank Act. In the original European legislation, only the "upstream" importers were targeted, not the "downstream operators," and no mandatory requirements would have been imposed—only a voluntary implementation of the OECD due diligence guidance, encouraged by various incentives. The products were the same as in Section 1502 of the Dodd Frank Act (the 3 T—tin, tantalum, tungsten—and gold) but the geographical scope of the legislation was wider: not just the Great Lakes region of Central Africa but all "conflict affected and high-risk areas" in the world.

The 2014 proposal of the European Commission was, as is the case for most EU legislative instruments, sent simultaneously to the Council of Ministers and the European Parliament, with the aim of arriving at a common agreement in "first reading" affording both bodies the opportunity to formalize their own positions, and thus making it more difficult to reach a compromise.

The European Parliament concluded its deliberation in May 2015, having introduced very radical amendments to the European Commission proposal on the last day of the debate in plenary (see *Covington Alert* of May 22, 2015): reporting would be mandatory and would include all "downstream" users of the minerals.

The Council of Ministers only started very discreet consideration of the texts in September 2015, careful not to give the impression of being less concerned than the European Parliament with the harm caused by the mining of the identified minerals in conflict-affected areas, but keen to avoid the huge burden which the implementation of the European Parliament's position would have caused to the 800,000 companies concerned in the "downstream" side of the trade.

The Dutch presidency of the Council of Ministers, which started on January 1, 2016, was determined to conclude the discussion before the end of its term. The Netherlands has been very committed for many years at the national level to the issue of conflict minerals. In fact, their "conflict-free tin initiative" and other actions were promoted and managed at the level of the royal family. But the first meetings with the delegation of the European Parliament were very difficult. NGOs and civil society strongly supported the mandatory character of the European Parliament's regime, and industry was not keen to lobby openly against these proposals, due to the sensitivities of the issue. Because of this, a result could only come in the last month of the Dutch Presidency, with substantive as well as discreet support by the EU Commission.

What Are the Terms of the Deal?

No new texts have been presented at this stage, but according to the participants and the press release, the following principles have been accepted by all three parties participating in the trilogue:

- **Direct importers** of tin, tungsten, tantalum, and gold and their ores in the EU **will be required to conduct due diligence** when they import them from conflict-affected and high-risk areas. This due diligence obligation will also apply to the **smelters and refiners** processing such minerals. Affected importers, smelters, and refiners would also be required to report on the results of their due diligence. Only "the smallest importers" (e.g. for dentistry) will be exempted. Recycled metals, existing EU stocks, and by-products will be exempted from the regulation. To be noted: the European Commission had proposed a voluntary "supply chain due diligence self-certification of responsible importers" and "an annual list of smelters and refiners considered responsible supplier*s*." Most of these—around 400 companies and 20 smelters—will now be required to report on the sourcing of the minerals they import or refine.
- There will be **no obligation for manufacturers, importers and sellers of finished products**, the so-called "downstream chain." However, large EU firms making or selling goods containing conflict minerals,—i.e., those "subject to the EU Directive on 'non-financial reporting'" (with more than 500 employees) - will be "encouraged" to report (voluntarily) on their sourcing practices based on a new set of performance indicators to be developed by the EU Commission. They will also be "able to join" a registry to be set up by the commission. As mentioned above, the compromise does not retain the amendment introduced in the plenary meeting of the European Parliament requiring "downstream companies to (…) provide information on the due diligence practices they employ for responsible supply chains."
- The **geographical scope** is the one proposed by the commission, and is identified as all "conflict affected and high risk areas" in the world. The regulation will include a general principles-based definition and, according to the political understanding, the commission will select experts via a tender procedure to draw up an "indicative and not exhaustive" list of areas, which will be included in a "handbook for the operators" it will also develop.
- **A review clause** will be included, requiring the commission to report "in a couple of years'" on the "effectiveness of the regulation, taking into account both its impact on the ground and compliance by EU firms." If the conclusions are negative, the EU should "consider additional mandatory measures."

Important technical work remains to be done in order to finalize the texts of the regulation and its annexes. As announced in the press conference, this work will continue during the Slovak

presidency and an agreed text is meant to be available "in a few months," which will then need to be approved by the Council of Ministers and the European Parliament. If all goes well, we can thus expect the legislation to be in place in the fall, with probably a two years' transition period before compliance is required.

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