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Conflict Minerals: The European Parliament Aims to Introduce an EU Mandatory Regime

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Conflict Minerals

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 (INTA) in April, which included a mandatory certification only at the level of smelters and refiners.

As Covington signalled in a previous alert, there were strong voices in the Parliament in favour of Europe adopting a mandatory regime similar to Dodd Frank 1502 in the United States. However, those who supported a voluntary regime managed to prevail until now, with two main arguments: the excessive burden for the industry, notably small and medium enterprises; 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 debate in Strasbourg was very animated and the amendments reversing the regime initially 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 the amendments with the Socialist and Democrats, and the Green parties in order to obtain a majority. These key amendments passed with 378 votes in favour, 300 against 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 it is in 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 in INTA), 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 non-existent governance or security, such as failed states characterised 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. A more substantive debate over the modalities might still demonstrate that the careful and pragmatic approach of the Commission had better chances to bring positive effects for the local population than a regime too difficult to implement and equivalent in practice to an embargo.

Covington has been following these proposals since the beginning and will continue to follow closely the upcoming negotiation. If you have any questions concerning the developments discussed in this client alert, please contact the following members of our conflict minerals team:

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