

Conflict Minerals - What role for European business? Event summary

The European Commission's conflict minerals proposal – a voluntary scheme, for now

Developing countries are endowed with natural resources and the extraction and trade of those minerals is vital to their continued development. Legislation and texts governing the trade in minerals from conflict areas have two main objectives: to avoid fuelling conflict through the trade of minerals; and nevertheless maintain the trade of minerals from conflict areas, as it is often the only source of income for the local population. FTI Consulting and McGuireWoods hosted a joint event on 3 April 2014, to debate and discuss the impact on European businesses of the European Commission's recent proposal on conflict minerals¹. This gave the opportunity to the Commission to present and explain its proposal, and to businesses and NGOs to raise their concerns and provide their preliminary comments on it.

Main themes and key points

A number of themes were drawn out and explored that illustrated the difficulties of legislating in this area, the perceived problems with other jurisdictions' approaches, notably Dodd Frank, and the overriding need to act responsibly.

- *Predicated on OECD guidelines – covers upstream and downstream*

The Commission's proposal builds upon existing initiatives and primarily the OECD's Due-Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, and the conflict minerals provisions of the U.S. Dodd-Frank Wall Street Reform and Consumer Protection Act. Like the OECD Guidance and Dodd Frank, it covers only four minerals: tin, tantalum, tungsten and gold. Like the OECD Guidance, but unlike Dodd Frank, it is not limited to the Democratic Republic of Congo and its neighbours, but would apply to all conflict-affected areas. The Commission put forward its own preferred policy options after extensive

¹ Proposal for a REGULATION 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 2014/0059 (COD)

consultation, impact assessment, and consultations with the OECD, business, civil society, as well as with institutions in producer countries. Although the lead Directorate General in the European Commission is DG Trade, the European External Action Service made an important contribution in formulating the policy and in getting the proposal to the table, and will continue to play a role moving forward. The crucial point is that the proposal provides for a certification scheme available to the upstream part of the supply chain (smelters and refiners, as well as importers of minerals and ore), while providing incentives for the downstream part of the chain, i.e. manufacturers incorporating the metals in their products.

- ***Voluntary scheme... for the first three years***

It's all carrot for now, with no stick; and the carrot is not all that big. The scheme is a voluntary one, and the incentives are still quite moderate. However, the proposed framework, if and when adopted, will be reviewed after no more than three years and then the voluntary nature of the scheme as well as the incentives would be part of the review. Whether the scheme would then have to be revised (mandatory, more incentives?) would depend on how well the industry responds to the supply chain due diligence required by the initial text.

- ***Impact on importers***

It has been estimated that the largest importers of tin, tantalum, tungsten and gold will be affected by the proposal and encouraged to act responsibly so that legitimate trading channels may be reinforced.

Industry could foresee a number of challenges, but the legislation is designed to make it easier to establish the bona fides of the supplier companies/artisanal miners and it would be incumbent upon companies to align their own systems to the Commission proposal. In general, this move was considered positive since the unwanted consequences of the Dodd-Frank Act incentivized a number of companies to move out of Africa altogether, introduced red tape and consequently impacting the level playing field. Event participants explained that the legislation should help importers who do not have the means to force compliance on downstream business units. The extent to which it should be extended to other industry sectors was questioned.

- ***Sits alongside existing schemes – but should it have more teeth?***

The main perceived strengths of the Commission's proposal were that it is fully in line with existing schemes and will not impact adversely on systems that are already in place; and that it

targets smelters and refiners. The question of the adequacy of the incentives outlined in the proposal was raised, especially since sanctions for non-compliance are not included.

The debate during the event picked up many of these points and also questioned whether the approach should have been mandatory from the outset. While the three year voluntary approach might be viewed by some as giving industry time to prepare, its main drawback is that it may mean that the industry or sections of it will take more time to change their practices, further delaying the responsible sourcing of minerals from conflict areas.

- *Next steps – another two to three years of Co-Decision process*

The Commission's proposal is now in the hands of the EU's co-legislators: the Council of the EU and the European Parliament. The proposal is likely to be tabled before a newly elected European Parliament in June/July 2014 as a first step in the co-decision procedure. Whether the text will be adopted by the legislators as it stands - or at all - and if so, with what amendments is unclear at this time. One thing is for sure: there is a broad consensus in Europe that something ought to be done about trade in conflict minerals, and this is bound to impact the supply chains of all companies trading in, or using tin, tantalum, tungsten or gold. Beyond the interest of European processors and users, other parties most affected by this proposed legislation are the artisanal miners and local populations, so often in developing countries, whose fate and livelihood should not be adversely affected by an inadequate text.

Now is the right time to pay attention to the issue.

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