Journal of Human Rights Practice, 2021, 270–290
doi: 10.1093/jhuman/huab027
Advance Access Publication Date: 6 January 2022
Article

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Article

A Glass Half Full: Critical Assessment of EU Regulation 2017/821 on Conflict Minerals

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Abstract

EU Regulation 2017/821, bound to enter into force in early 2021, is the most recent legislative initiative aiming to sever the links between minerals trade, conflict dynamics and human rights abuses. The Regulation, which is meant to complement US legislation on conflict minerals, creates requirements for direct importers of 3TG in the EU and preludes to the establishment of a list of responsible EU smelters and refiners. While marking a historic step forward in the global efforts to curb conflict minerals trade, the Regulation presents some critical aspects. These include the exact definition of its geographical scope, its limitation to the 3TG metals and minerals and, most importantly, the exemption from its binding provisions of all downstream companies. While the functioning and effectiveness of the Regulation, as well as its possible unintended social and economic consequences on producing countries, will become clearer after its entry into force, this article provides an interim assessment of its strengths and weaknesses. The article starts by putting the Regulation in the context of global efforts to curb trade in conflict minerals, and addresses the ongoing debate on the possible adverse economic and social consequences of this type of legislation (Section 2). It then analyses the contents of the Regulation, critically focusing attention, in particular, on its hybrid combination of binding and voluntary measures, and on its scope of application (Section 3). In Section 4, an interim appraisal of the Regulation is carried out by highlighting both its undeniable potential and the shortcomings that might hamper its effectiveness in achieving its stated goals. Finally, Section 5 summarizes the article's conclusions in the light of the likely adoption by the EU, in the near future, of a cross-sectoral mandatory human rights due diligence instrument.

Keywords: conflict minerals; Dodd-Frank Act; due diligence; European Union; human rights

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1. Introduction

The adoption of EU Regulation 2017/821 ('the Regulation'), which came into force on 1 January 2021, is the most recent legislative initiative aiming to sever the links between minerals trade, conflict dynamics and human rights abuses. The new EU policy, while being only the latest of a series of instruments that the international community has put in place to fight the trade in conflict minerals, constitutes one of the few existing regulatory initiatives imposing binding due diligence requirements on companies. Albeit with the limitations that this article will highlight, the Regulation constitutes a counterpart to the US legislation on conflict minerals and gives partial implementation to the human rights due diligence concept contained in the UN Guiding Principles on Business and Human Rights (UNGPs) (UN Human Rights Council 2011a).

While constituting a landmark development in global efforts to severe the links between minerals trade and conflict dynamics, the Regulation presents some critical aspects that need to be acknowledged and, where possible, addressed in its implementation. These pertain both to some points of weakness in the design of the legal instrument (e.g. the exclusion of 'downstream companies' from its binding requirements) and to the lingering risk of incentivizing business disengagement from high-risk markets, with potential 'unintended consequences' for producing countries. This article starts by putting the Regulation in the context of global efforts to curb trade in conflict minerals, and addresses the ongoing debate on the possible adverse economic and social consequences of this type of legislation (Section 2). It then analyses the contents of the Regulation, critically focusing attention, in particular, on its hybrid combination of binding and voluntary measures, and on its scope of application (Section 3). In Section 4, an interim appraisal of the Regulation is carried out by highlighting both its undeniable potential and the shortcomings that might hamper its effectiveness in achieving its stated goals. Finally, Section 5 summarizes the article's conclusions.

2. Ensuring due diligence in the 'conflict minerals' supply chain: a global challenge

The new EU policy, while being only the latest of a series of instruments that the international community has put in place to fight the trade in conflict minerals, constitutes one of the few existing regulatory initiatives imposing binding due diligence obligations on companies.

The complex challenges that companies face when operating in high-risk environments have been addressed by the mandate of the former UN Secretary General's Special Representative on Business and Human Rights, John G. Ruggie (UN Human Rights Council 2011b). The UNGPs, issued in 2011, underline that the risk of complicity in gross human rights abuses is higher in certain operating environments, and warn businesses to treat such risk as a legal compliance issue, given the 'expanding web of potential corporate legal liability' (UN Human Rights Council 2011a: GP 23). In the UNGPs, the corporate responsibility to respect human rights implies taking adequate measures for the prevention, mitigation and—where appropriate—remediation of adverse human rights impacts (ibid: GP 11), requiring companies, therefore, to undertake positive actions. This corporate responsibility to take action is embodied in the notion of 'human rights due diligence'. Guiding Principle 7 specifically refers to conflict-affected areas and calls on states to assist

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businesses in addressing human rights risks, including by passing laws that require businesses to put in place adequate forms of human rights due diligence.

Business responsibility to conduct due diligence in order to clamp down on conflict-minerals trade has been clearly affirmed by the UN Security Council, which, acting under Chapter VII of the UN Charter, has called upon states to encourage the use of due diligence processes by businesses dealing with Congolese mineral products (UN Security Council 2010a: Section 8; UN Security Council 2010b: Section IX). While the UNGPs provide little practical guidance as to how due diligence might be concretely exerted in specific contexts, in 2011 the OECD set up a voluntary instrument, the Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict Affected and High-Risk Areas (OECD 2016), last updated in 2016, to clarify how companies can identify and manage risks throughout the entire mineral supply chain, from miners, local exporters and mineral processors to the manufacturing and brand-name companies that use conflict minerals in their products (OECD 2016). The instrument has been referenced in seven resolutions adopted under Chapter VII by the UN Security Council concerning the Democratic Republic of the C ongo (DRC) and Côte d'Ivoire, and has been endorsed by the EU and by the International Conference on the Great Lakes Region (ICGLR), an intergovernmental organization composed of the 12 African Great Lakes countries (EC 2014a; ICGLR 2012).

Specific legislation on conflict minerals trade exists in certain jurisdictions, the most remarkable being Section 1502 of the US Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act). Through Section 1502, the Dodd-Frank Act aims to end the import of Congolese 'conflict minerals' (tin, tantalum, wolframite, and gold) by companies listed on US stock exchanges, i.e. including non-US companies (van Opijnen and Oldenziel 2015: 180). In practice, these companies are required to perform supply chain due diligence in order to become aware of the presence of conflict minerals in their products and disclose this information to the US Securities and Exchange Commission (SEC). If conflict minerals originating from the DRC or adjoining countries are present in a company's supply chain, in its annual 'Conflict Minerals Report' the company shall detail: 1. the measures taken 'to exercise due diligence on the source and chain of custody of such minerals, which measures shall include an independent private sector audit of such report'; and 2. a description of the products that are not 'conflict free', the facilities used to process the conflict minerals and the company's efforts 'to determine the mine or location of origin with the greatest possible specificity' (Dodd-Frank Act, Section 1502(b)). These supply chain transparency provisions are an important response to the international outrage at the role of conflict minerals' trade in perpetuating grave human rights abuses in the DRC. It must be noted, however, that the Act does not prohibit the use of conflict minerals, nor does it impose penalties on companies found to use them in their products (Griffin et al. 2012: 2).

There is evidence that, in the absence of binding rules, mineral-trading companies tend not to perform supply chain due diligence (Amnesty International 2016: 66; SOMO 2013), whereas binding rules can serve as catalysts for positive developments (Murry 2014). Despite the fact that in 2015, according to the UN Group of Experts on the Democratic Republic of the Congo, gold continued to fund armed groups and Congo's army (UN Security Council 2015), Section 1502 of the Dodd-Frank Act has contributed to enhanced transparency of corporate supply chains in eastern Congo, as more than 60 per cent of the world's smelters for the four concerned minerals have passed conflict-free audits (ibid; Bulzomi 2014: 7; Enough Project 2015; Gettleman 2013). At the same time, the act spurred the adoption of certification schemes that did not exist before, including the one run by the

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ICGLR which is now validating mines in eastern Congo as conflict-free (Enough Project 2015). Not only have several brands changed their sourcing practices (Murry 2014), but, as pointed out by KPMG, 'the conflict minerals reporting requirement under Section 1502 of the Dodd-Frank Act [...] has caused companies to examine their supply chains in a way they have never done before', uncovering problems and potential threats not exclusively related to conflict minerals (KPMG 2014: 2). For this reason, KPMG believes that complying with Section 1502 is not only a matter of legal compliance, but also of 'good business governance', helping the management to deepen their knowledge of a company's supply chain and 'to assess the risks holistically', ultimately also protecting the brand from operational and reputational damage (ibid: 3).

The US framework, however, has been the target of criticism both for its costs and for its alleged 'unintended consequences'. This debate reached a peak in 2017, when the Trump Administration threatened to repeal Section 1502, quoting its alleged ineffectiveness and excessive compliance costs (Compere 2017), and the SEC suspended the costliest requirements of the law, namely due diligence review and audits (Lynch 2017). Studies have documented the negative socio-economic consequences on local communities stemming from the fact that many international mineral traders rescinded their business ties to the DRC in reaction to the entry into force of Section 1502 (IPIS 2019: 18; Owen 2013). In some areas, this '*de facto* embargo' has caused a loss of livelihoods and a decline in local trade, leading miners to turn to the informal gold mining sector (IPIS 2019: 18). The EU Commission itself noted that Section 1502 had the unintended result of incentivizing the informal re-routing of the DRC's minerals through countries not covered by the regulation (EC 2014b: 29).

A 2019 IPIS report, however, stresses that both positive and negative assessments of the Dodd-Frank Act have often failed to consider the impact of this legislation in its context, one in which 'a wide range of other responsible sourcing and/or formalisation initiatives were simultaneously being implemented' (IPIS 2019: 18). The overlapping effects of such measures invite prudence when trying to come to conclusions on the impacts of the Dodd-Frank Act, which cannot be assessed in isolation (ibid). Koch and Kinsbergen (2018) also point out that the unintended consequences of Section 1502 have been exaggerated in the dominant political narrative, which has systematically overlooked the improvements that have taken place on the ground since the early years of the entry into force of the rules.

The reported unintended consequences of the US framework were fully taken into account by the EU in the impact assessment report that accompanied the proposal for the new Regulation. As pointed out by Koch and Burlyuk (2019: 6 ff.), the EU Regulation aims to avert the risk of *de facto* embargoes through three main devices. The first one is discussed in Section 3.2 below and concerns the wide geographical scope of the EU framework. Secondly, the EU Regulation adopts a risk-based approach focused on the adoption and implementation of due diligence processes, rather than a compliance-based model requiring companies to ensure that their products are conflict-free, as in the US legislation (ibid: 6–7, 17–18). Finally, through 'smart time management', the EU allowed a considerable period of time (from 2017 until early 2021) for the concerned companies to prepare for compliance with the new rules, reducing the risk of disengagement from suppliers (ibid: 17). The estimated company-level costs of the EU rules are also significantly lower than those of the implementation of Section 1502 (EC 2020: 290 ff.). As discussed in Section 4 below, however, these devices do not automatically eliminate the risks connected to the implementation of the Regulation.

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3. The new EU policy on conflict minerals

The EU is a big player in the market for the minerals most commonly associated with conflicts, accounting for a share of almost 35 per cent of global imports of tin, tantalum, tungsten, and gold ores and concentrates—the so-called '3TG' (EC 2014a). Calls for a new EU policy on conflict minerals date back to at least 2010, when the European Parliament (EP) adopted a resolution 'on failures in protection of human rights and justice in the Democratic Republic of Congo' (EP 2010). The EP welcomed the adoption of the Dodd-Frank Act and asked the European Commission and the Council to examine a legislative initiative 'along the same lines' (ibid: para. 14). The Commission itself acknowledged that the Dodd-Frank Act is 'indirectly responsible for a large share of due diligence efforts among EU downstream users' and stated that the new EU policy would be intended to complement US legislation by focusing on importers of the 3TG (EC 2014a). In September 2013, while the proposal for a new Regulation was at the drafting stage, a coalition of 59 nongovernmental organizations (NGOs) put forward specific recommendations concerning the scope and nature of the instrument, calling on the Commission to opt for legally binding obligations applying to all segments of the supply chain, as well as for a global geographical scope and a broad material scope applicable to all natural resources (Group of 59 NGOs 2013). The draft Regulation made public in March 2014, however, went in quite a different direction, creating a non-binding, opt-in, self-certification system limited to the import of the four minerals commonly known as 3TG (Draft Regulation 2014). Once the draft was sent simultaneously to the European Parliament and to the Council, the diverging positions of EU institutions started to become apparent. The Council, which started discussing the draft in September 2015 and reached a position in December, under the Luxembourg presidency, defended a purely voluntary approach, limited in scope and more in line with the Commission's original proposal (Banks 2016; De Ruyt et al. 2016). As concerns the EP, its Committee on International Trade (INTA) approved an amended version of the draft in April 2015 introducing mandatory rules only for EU smelters and refiners (Barbière 2015). However, in a May 2015 vote, the EP introduced radical amendments aiming to create binding obligations at all stages of the supply chain, and decided to enter into informal talks with EU Member States before adopting a final position (Krivade 2015). In 2016, under Dutch presidency, the so-called 'trilogue negotiations' between the three EU institutions formally started with the aim of facilitating their convergence on a final text, ultimately allowing for its adoption by the EP and the Council in the co-decision procedure (Davies and Gunn 2015). In line with the Dutch presidency's wish to conclude the discussions by the end of its term, a political understanding was reached in June 2016, marking a compromise between the EP's 2015 proposal and the prudent position of the Commission and Council (De Ruyt et al. 2016; Political Understanding 2016). The final text of Regulation 2017/821 was adopted by the European Parliament on 16 March 2017 and by the Council on 3 April 2017.

3.1 Voluntary guidelines versus binding rules: a hybrid approach

3.1.1 The legislative process

The negotiation of new rules and policies in the field of business and human rights rarely escapes the recurrent dilemma between the creation of new legally binding obligations and the politically less controversial resort to a soft-law approach. The Regulation that will enter into force in 2021 resulted from the trilogue negotiations between EU institutions, and

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constitutes in many respects a compromise between the initial proposal of the EU Commission and the amendment put forward by the European Parliament.

The 2014 proposal of the EU Commission opted for a voluntary approach, creating a self-certification system that laid down due diligence obligations solely for those companies who chose to be self-certified as responsible importers of 3TG (Draft Regulation: Article 1). Accordingly, importers willing to be certified would have to conform to due diligence requirements related to the design of a management control system, risk management and third-party audits (ibid: Articls 3–6). The draft only targeted the upstream part of the mineral supply chain, meaning from the extraction sites to the smelters or refiners (ibid: Article 2(n)).

The 2015 amendment proposal adopted by the Parliament took stock of much of the civil society criticism against the Commission's weak approach and pushed for both an expansion of the scope of the Regulation and for the adoption of legally binding rules (Cromwell & Moring LLP 2015; EP 2015). The Parliament proposed a shift from the opt-in 'self-certification' system to a mandatory 'European certification of responsibility' anchored in supply chain due diligence obligations (EP 2015: Amendment 60). The proposal affirmed that the Regulation would reflect 'the need for due diligence along the entire supply chain from the sourcing site to the final product', specifying that the related obligations would apply to 'all companies who first place covered resources, *including products that contain those resources* on the Union market' (ibid: Amendments 71, 91, 112; emphasis added). The Parliament, therefore, envisaged a system targeting both upstream and downstream companies, requiring conformity with the OECD Due Diligence Guidance (ibid: Amendment 154). It stressed the need to clearly distinguish between the roles and duties of upstream (Regulation 2017/821: para. 16) and downstream companies, as imposing similar obligations (e.g. the duty to trace the mineral back to its mine of origin) on undertakings placed at such different positions in the supply chain would risk creating market distortions (EP 2015: Amendments 76, 97, 117; NGO coalition 2015: 4). The Parliament proposed a mandatory and independent third-party audit process for 'upstream undertakings such as smelters and refiners' and a requirement on downstream companies 'to provide information on the due diligence practices they employ for responsible sourcing' (EP 2015: Amendments 14, 155). The amendment also introduced an explicit reference to the Member States' duty to establish penalties for smelters and refiners persistently failing to comply with their due diligence obligations (ibid: Amendment 43). The Parliament's proposal aimed at creating a solid counterpart for the US Dodd-Frank Act by imposing obligations on all sections of the supply chain and additional requirements on 'upstream companies' (Cromwell & Moring LLP 2015). The proposal entailed at least two benefits. First, by forcing downstream undertakings to perform due diligence checks, it potentially allowed for an increased pressure on non-EU smelters and refiners supplying those companies to source responsibly and conform to the standards set by the OECD Guidance or equivalent schemes (Douma and van der Velde 2016: 120). Second, it enhanced supply chain transparency by requiring the Commission to disclose to the public a list of 'responsible importers of minerals and metals' (and not only of refiners and smelters) within the scope of the Regulation (EP 2015: Amendment 40).

In June 2016, the trilogue negotiations between the EU institutions led to the achievement of a compromise position summarized in a 'political understanding' that mediated between the overly prudent approach of the Commission and Council and the more advanced position expressed by the Parliament.

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3.1.2 The Regulation

The final version of the Regulation imposes mandatory due diligence checks on direct importers of 3TG (Regulation 2017/821: Articles 4–6), who must ensure that what they buy is sourced responsibly and does not contribute to conflict or other related illegal activities (EC, 'The Regulation explained '). Importers of raw materials (which excludes importers of 3TG as processed and semi-processed products) are required to perform a due diligence process that includes the establishment of company management systems, the identification and assessment of risk in the supply chain, the design and implementation of a strategy to address such risk, third-party audits, and annual reports on supply chain due diligence (OECD 2016: 36 ff.). To ensure their own compliance with the Regulation, companies can rely on supply chain due diligence schemes recognized by the Commission as equivalent to the Regulation's requirements and aligned to the specific recommendations of the OECD Due Diligence Guidance (Regulation 2017/821: Section 14). While Member States are required to conduct ex-post checks on Union importers and to lay down the rules applicable to infringements (Regulation 2017/821: Articles 11, 16), only after a first review of the effectiveness of the Regulation will the Commission assess 'whether Member State competent authorities should have competence to impose penalties upon Union importers in the event of persistent failure' to comply with the Regulation (ibid: Article 17(3)).

It is estimated that between 600 and 1,000 EU importers sourcing from conflict-affected and high-risk areas (CAHRAs) are bound by the due diligence requirements. Although the Regulation directly applies only to EU-based importers of 3TG as raw materials, the EU envisages that it will also indirectly promote the responsible sourcing of an estimated 500 smelters and refiners, including those based outside the EU (EC, 'The Regulation explained '). Annual import volume thresholds are set in order to exempt small importers from the obligations and avoid imposing an excessive burden on them (Regulation 2017/821: Article 1(3)). However, the Regulation specifies that such thresholds are established in a way that guarantees the application of importers obligations to the vast majority (no less than 95 per cent) of the total volumes imported into the Union (ibid). A list of responsible smelters and refiners, according to the Regulation, will be established and updated by the European Commission (ibid: Article 9). At the same time, however, the trilogue negotiations led to the agreement that downstream companies, namely the 880,000 firms whose products (phones, laptops, jewels, cars, etc.) contain 3TG, would not be included in the mandatory section of the Regulation (EP 2016; Ropes & Gray 2016). While importers or sellers of finished goods or manufactured components are not addressees of binding provisions under the Regulation, their due diligence practices will be facilitated by the obligations of disclosure and of third-party auditing imposed on importers, as well as by the establishment of the list of responsible smelters and refiners (Regulation 2017/821: para. 12, Articles 7(2), 9).

3.2 The scope of the Regulation: going beyond the 'usual suspects'?

One of the features that set the EU Regulation apart from the US Dodd-Frank Act is its geographical scope. The Dodd-Frank rules are limited to the DRC and to its nine adjoining countries, therefore it is, by its nature, circumscribed to the African continent.[1] The broader geographical scope of the new EU policy, which is intended to be 'global', is to be

1 Although the 'adjoining countries' are not listed in the act, the term refers to countries that share an internationally recognized border with the DRC (Dodd-Frank Act, Section 1502(e)(1)), therefore

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welcomed as an sign of important progress, as the link between minerals extraction and serious human rights abuses and conflict dynamics is not confined to the African region. The new Regulation applies, in principle, to imports of 3TG 'originating in conflict-affected and high-risk areas', namely 'areas in a state of armed conflict or fragile post-conflict as well as areas witnessing weak or non-existent governance and security, such as failed states, and widespread and systematic violations of international law, including human rights abuses' (Regulation 2017/821: Article 2(f)). This open definition would appear to allow targeting, for instance, tungsten originating in China, tin imported from Burma, or gold mined in Zimbabwe and Colombia (Appleyard 2016; Bulzomi 2014: 8). In practice, though, the relevant categories (e.g. 'conflict') are not defined in the Regulation itself. The Commission issued Recommendation 2018/1149 to clarify that the definition of CAHRAs applied in the Regulation is in line with the OECD Due Diligence Guidance (OECD 2016: 13) and includes the key concepts of 'state of armed conflict', 'fragile post-conflict' and 'failed states' (Recommendation 2018/1149: para. 3).

'Armed conflict' is defined consistently with international humanitarian law, and therefore does not encompass situations of internal disturbances and tensions, such as riots or isolated acts of violence (ibid.). Fragile post-conflict areas, while not affected by active hostilities, are characterized by a weak capacity, either at the state or regional level, 'to carry out basic governance functions' (ibid.). An area falls under this definition if 'there is either institutional weakness *or* lack of governance *and* widespread and systematic violations of international law and human rights abuses' (ibid.). The definition also includes post-conflict fragile countries characterized by sector-specific governance gaps—e.g. the absence of a formal mining licensing procedure—when these conditions are coupled with violations of international law (ibid.). The last key concept is that of 'failed state', which refers to 'an implosion of structures of power and authority, a collapse of law and order and the absence of institutions capable of representing the state' (ibid.).

In the 2016 political understanding, the Commission had announced the selection of external expertise to provide an indicative, non-exhaustive and regularly updated list of conflict-affected and high-risk areas, although Union importers sourcing from countries not included in the list would retain their due diligence obligations (Regulation 2017/821: Article 14(2)). This task was performed by RAND Europe, which, building on Recommendation 2018/1149 and on over 20 databases (Bellasio et al. 2020), in December 2020 published an 'Indicative, non-exhaustive list of Conflict-Affected and High-Risk Areas' (CAHRAs List). The list currently comprises of 27 countries, although it will be updated quarterly, and constitutes important guidance for those companies that, being bound by the mandatory part of the new policy, have to ensure compliance with specific legal obligations, but also for downstream companies that are only addressees of recommendations. The current version of the list reflects a rather expansive approach to the definition of CAHRAs, and includes country reports also detailing the risks pertaining to specific regions within a country, when relevant for the purpose of the Regulation (ibid.). For instance, countries like Colombia or India are on the list because of the presence of conflict-affected regions associated with human rights abuses (ibid.). Several Somali, Libyan, and Myanmar regions are included as either high-risk or conflict-affected areas; Zimbabwe and Afghanistan are also included on account of ongoing conflicts (ibid.).

presently including Angola, Burundi, Central African Republic, the Republic of the Congo, Rwanda, South Sudan, Tanzania, Uganda, and Zambia.

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Of course, minerals extraction is often linked to human rights abuses that do not necessarily occur in the framework of a violent conflict (Regulation 2017/821: para. 2) or in a post-conflict fragile state. As pointed out by Maplecroft, the majority of countries that are top exporters of 3TG pose extreme risks for businesses of association with serious human rights violations, such as child labour and forced labour (Maplecroft 2016). To take but one example, in Ghana, the world's seventh largest gold producer, there is documented evidence of widespread child labour employment in hazardous work in the gold mining industry and of insufficient due diligence undertaken by foreign corporations sourcing from the country (Human Rights Watch 2015). However, Ghana is not currently affected by a conflict, nor is it a fragile post-conflict state unable to perform basic governance functions, and it is certainly not a failed state. It is probably for these reasons that, notwithstanding the high likelihood that businesses sourcing from the country might be benefitting from hazardous child labour, Ghana is not present in the CAHRAs list, at the moment. In spite of the (current) absence of some countries whose mining sector poses serious concerns for its link to human rights abuses (Maplecroft 2017), the list—which, it is worth recalling, is 'indicative'—ensures a geographical scope that extends well beyond the Great Lakes region and touches upon all continents. Therefore, it has the potential to create, as in the aspirations of the Commission, 'a level playing field for conflict and non-conflict regions' (EC 2014b: 49), contributing to avert the risk of market distortions (Global Witness 2016; Scheele and ten Kate 2015: 13).

As concerns the material scope of the Regulation, this is clearly limited to the 3TG. The exclusive focus on these minerals and metals has attracted criticism from civil society, in that it leaves out other minerals—for instance, gems from Burma, diamonds from the Central African Republic, chromite from Afghanistan—linked to conflict dynamics and human rights abuses (Barbière 2015; Bulzomi 2014: 7–8). In a 2016 report, Amnesty International denounced the failure of companies along the cobalt supply chain—including global electronics brands—to conduct adequate human rights due diligence to ensure that the cobalt they trade and use in their products does not come from DRC artisanal mines in which children and adults work in hazardous conditions (Amnesty International 2016). SOMO pointed out that copper is the main mineral extracted in 11 countries in which violent conflict is linked to minerals trade (Scheele and ten Kate 2015: 5), and that in 2013 violent conflicts associated with non-3TG minerals were located in 13 countries worldwide (ibid: 6; Bulzomi 2014: 8–9). While there are strong arguments to advocate for due diligence rules targeting a broader range of minerals and metals, the Commission's choice to focus on the 3TG can be explained, first of all, by its stated aim to complement the US legislation on conflict minerals, which targets the 3TG. Secondly, the Regulation—not unlike the US Dodd-Frank Act—greatly relies on the OECD Due Diligence Guidance to identify the supply chain responsibilities of companies, referencing Annex II of that instrument to define the standards for the 'model supply chain policy' that enterprises shall adopt (Draft Regulation: Article 4; OECD 2011). In this respect, the OECD Guidance, in its Supplements, provides specific guidelines tailored to the supply chains of only four minerals and metals, which are those defined as 3TG (Bulzomi 2014: 9). The Commission's choice to limit the material scope, which might be justified by the willingness to make implementation of the Regulation more realistic, is not necessarily a flaw, if the narrow focus can help design and test an advanced piece of legislation capable of becoming, in the near future, a model for the adoption of norms targeting a broader range of commodities. To draw a parallel with the US legislation, whereas Section 1502 of the Dodd-Frank Act also targets

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3TG, its definition of conflict minerals leaves the door ajar to an expansion of the material scope, including 'any other mineral or its derivatives determined by the Secretary of State to be financing conflict' in the geographical region of applicability of that legislation (Dodd-Frank Act, Section 1502(e)(4)).

4. Interim appraisal of the new EU policy

The Regulation marks a historic step forward in the struggle against conflict minerals, as one of the major global market players, the EU, establishes binding due diligence and disclosure obligations for direct importers of 3TG for the first time. Importers now need to collect information about their supply chains and make sure they have the resources, policies and procedures in place to comply with the new rules (Thomas and Economides 2017). While presenting several positive features, the Regulation also has limitations that have prompted some critics to define it as a missed opportunity (CIDSE 2017; Gibb 2016; Stringer 2016). This section carries out a preliminary appraisal of the new policy, looking at its internal consistency and assessing it against the human rights due diligence standard established by the UNGPs.

4.1 A step in the right direction

The Regulation, generally speaking, constitutes a positive development both in an EU law perspective and from the point of view of the implementation of the UNGPs. It was adopted on the basis of Article 207 TFEU, the Common Commercial Policy (CCP). The EU has a treaty-based responsibility to conduct its CCP in the context of the principles and objectives of the Union's external action, including peace, respect for human rights, and the commitment to sustainable development (Article 21 TUE and Article 207 TFEU). Its institutions are also bound by the EU Charter on Fundamental Rights wherever they operate, and must at the very least ensure that EU policies and actions will not facilitate human rights abuses and/or curb the ability of third states to realize human rights (Macchi 2020). The preamble to the Regulation stresses how 'consumers are indirectly linked to conflicts that have severe impacts on human rights' due to the presence of conflict minerals in consumer products (Regulation 2017/821: Preamble, para. 10). Whereas this has led Union citizens to request, through petition, a legislative intervention by the Commission, what should be emphasized is that severing the link between EU policies and human rights abuses is not simply a matter of policy goals or consumer protection, but first and foremost a fundamental rights imperative binding EU institutions and EU Member States in the implementation of EU law (Macchi 2020). The Regulation responds to these EU law principles and obligations, as well as to the UNGPs' call on states to assist businesses in addressing human rights risks when operating in conflict-affected areas, including by passing laws mandating adequate forms of human rights due diligence (UN Human Rights Council 2011a: GP 7).

In the UNGPs, the corporate responsibility to respect human rights implies taking adequate measures for the prevention, mitigation and—where appropriate—remediation of adverse human rights impacts (ibid: GP 11), requiring companies to undertake positive actions (Muchlinski 2012: 148). The process of human rights due diligence is a composite one and entails 'assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed' (UN Human Rights Council 2011a: GP 17). Although the Regulation does not create a fully-fledged due diligence framework requiring companies to prevent the abuses and/or provide

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remediation to victims, it undoubtedly goes one step further than existing transparency legislation such as the modern slavery acts adopted in the UK and in Australia (Australia MSA; UK MSA) or the EU Non-Financial Reporting Directive (EU NFRD). Under the modern slavery legislations, for instance, target companies are essentially required to disclose the steps they are taking to ensure that slavery and human trafficking are not present in their supply chains, and, in the case of Australia, how the effectiveness of such actions is assessed (Macchi and Bright 2020: 222–9). Companies are not bound by specific due diligence requirements, to the point that, under the UK law, they can simply declare in their statement that they have taken no such steps (UK MSA: 54(4)(b)). The EU NFRD requires certain companies to report on risks, policies and outcomes concerning certain non-financial matters (including human rights and the environment), as well as to disclose the due diligence processes put in place to tackle identified risks. Under these schemes, compliance essentially coincides with reporting, which constitutes only one—albeit important—element of the UNGPs' concept of human rights due diligence (Buhmann 2018: 7; Macchi and Bright 2020: 240).

Under Regulation 2017/821, instead, an EU importer's obligations are articulated in:

i. Supply chain due diligence obligations, to be carried out in conformity with a supply chain due diligence scheme recognized by the Commission;
ii. Management system obligations, ensuring the proper allocation of responsibility within the company, communication of the policy to suppliers, supply chain traceability and the establishment of a grievance mechanism;
iii. Risk-management obligations, to identify and address the risks;
iv. Third-party audit obligations regarding the activities and processes of the importer and of its supply chain; *and*
v. Disclosure obligations towards the Member State competent authorities, the immediate downstream purchasers and the general public.

These provisions, which are consistent with the OECD Guidance (OECD Guidance, 36 ff.), require setting up due diligence processes that are largely aligned with the UNGPs. Positive features include the requirement for third-party audits for importers (Regulation 2017/821: Article 6) and the duty of the responsible importer 'to make available to its immediate downstream purchasers all information gained and maintained pursuant to its supply chain due diligence' (ibid: Article 7(2)). These features enhance supply chain transparency and the credibility of due diligence processes.

As mentioned in Section 2 above, the broad geographical scope of the Regulation is a commendable feature that can potentially neutralize the risk of unintended consequences for the local economies of producing countries as well as rules circumvention through informal re-routing of exports. Another positive aspect is that the Regulation will be complemented by some accompanying measures (Regulation 2017/821: para. 25), including capacity building for local actors, financial support for SMEs willing to obtain the voluntary certification, and engagement with countries that host the majority of the world's smelters/refiners, namely China, Malaysia, Indonesia, Thailand, and Russia (EC 2014c: para. 2.2). These accompanying measures were strongly advocated for by civil society organizations, which repeatedly stressed the need to consider the impact of the new rules on mining communities and engage them in the proper implementation of the policy (Cuvelier 2017: 3). One of the most notable of measures foreseen in the Joint Communication concerns the use of public procurement incentives, through which the Commission purports to promote

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the uptake of supply chain due diligence processes in line with the OECD Guidance. This aim will be pursued through the inclusion of performance clauses in the Commission's own public procurement contracts, to the effect that only companies certified as responsible importers or on the list of responsible smelters/refiners will be able to conclude public procurement contracts with the Commission for the supply of products containing 3TG (ibid). This measure can significantly influence the conduct of companies and it is to be hoped that Member States will adopt similar public procurement conditionalities (Bulzomi 2014: 5; Commission Justice et Paix 2014: 2). It must be noted, however, that the accompanying measures have not been included in the Regulation, but in a non-binding commitment that will require an adequate allocation of resources in order to be fulfilled (Cuvelier 2017: 6). The Regulation leaves the door ajar to a revision by 1 January 2023 (Williams 2020). Although this is likely to face political resistance, the revision could open the way to a toughening of the Regulation through 'an extension of obligations, proportionate penalties and, potentially, an expansion in scope to include other minerals in addition to 3TG' (ibid).

Finally, if meaningfully implemented, the Regulation might usefully complement the cross-sectoral EU mandatory human rights and environmental due diligence legislation that the Commission has committed to proposing in the next few months. It is still too early to predict what the scope of the new directive will be, although the European Parliament proposed an instrument binding all big undertakings, as well as publicly listed SMEs and high-risk SMEs (EP 2021). This might require a large number of companies, including downstream companies using 3TG in their finished or semi-finished products, to monitor their supply chains to identify and address risks of involvement in human rights and environmental abuses. This would also entail taking steps to avoid contributing to the human rights violations connected to conflict minerals. In this perspective, the more consistent and precise the implementation of the EU Conflict Minerals Regulation, the stronger the legal guidance for companies subjected to the new cross-sectoral rules. Even those downstream companies that are addressees of mere recommendations under the Regulation could benefit from those rules in two ways: directly, by using the Regulation and the OECD Guidance as references for the development of internal processes, and indirectly by being able to source from certified responsible importers.

4.2 Missing links

While being a step in the right direction, the Regulation, as pointed out by Judith Sargentini (an MEP and the Parliament's rapporteur on promoting development through responsible business practices), only constitutes a partial response, in that it establishes binding rules only for a portion of the supply chain (The Greens/European Free Alliance Group 2016). One problematic aspect is the potentially excessive volume thresholds established in order to identify the companies that are subjected to the binding provisions of the new policies. Referring to the exemption for gold imports lower than 100 kg, Eurometaux's director general defined this threshold as 'an invitation for circumvention', as a much lower threshold would have been enough to achieve the intended aim of protecting the smallest importers (e.g. dentists) from an excessive regulatory burden (Eurometaux 2017). NGOs have noted that excluding companies that import just below 100 kgs of gold, a quantity that might be worth about 3 million euros, is not consistent with the aim of limiting the financing of armed groups and human rights violations, and might exempt from binding due diligence requirements 90 per cent of importers of gold into the EU (EurAc 2016: 3). IPIS pointed

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out that it is difficult to anticipate which portion of imports from the countries on the CAHRAs list will meet the thresholds, as the volumes and origin of 3TG associated with individual EU importers are not known. However, there is some evidence, based on the value of imports, that many will fall below (IPIS 2021).

Other concerns derive from the choice of a hybrid approach excluding downstream companies from mandatory requirements. There are good arguments to support the need to impose mandatory due diligence checks on all segments of the supply chain, including downstream companies. While recognizing that due diligence requirements may vary according to a company's size, sector, context of operations and position in the supply chain, the UNGPs apply to all corporations (UN Human Rights Council 2011a: GPs 11, 14, 23). The UNGPs also affirm that businesses should 'treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate' (ibid: GP 23(c)), a risk that is obviously heightened in the context of conflict-affected countries (ibid: GP 7). Considering that the EU has an EU-law duty to shape its CCP consistently with its own fundamental rights obligations (Macchi 2020), and that the new Regulation's geographical scope includes countries where the risk of corporate complicity in egregious human rights abuses is relatively high, the EU could and should have given a stronger signal as regards the due diligence duties of brands that market consumer products potentially containing conflict minerals (Amnesty International 2014; Douma and van der Velde 2016: 121).

As recalled earlier, the Regulation, according to the Commission, directly binds 600 to 1,000 EU-based importers, as well as 19 EU-based smelters/refiners (EC 2014b: Section 2.3), while it aims to indirectly influence around 500 non-EU smelters/refiners. This approach is based on the recognition that smelters and refiners represent 'choke points' of the 3TG supply chain, namely a small number of key actors that are best placed to track the material back to its origin (Young et al. 2019: 4). The OECD, indeed, refers to these actors as 'control points' in the supply chain, as most of the supply chain material passes through them (OECD 2019, 'An introduction to the OECD Due Diligence Guidance': 11). The ratio nale of the EU's approach is to target these key actors (alongside other EU-based importers of raw materials) in order to reach most 3TG imports without imposing on downstream companies administrative requirements that, as the US example shows, can raise much controversy (EC 2014b). The EU envisages that, as EU-based importers are required to engage with their suppliers, including through contractual clauses, in order to ensure their responsible sourcing (Regulation: Article 4(d)), pressure will be exerted on non-EU smelters and refiners to enhance their practices.

However, this approach raises two critical issues. One is that, as noted earlier, a few hundred smelters and refiners, most of which are based outside the EU and are therefore not bound by mandatory due diligence checks under the Regulation, supply the entire global market. This dominant positioning bestows a bargaining power upon them that casts doubts on the actual ability of EU importers to exert effective leverage over their practices and spur meaningful change (Van der Velde 2017: 7). The second problem is that the companies bound by mandatory due diligence checks, all located in the upstream part of the supply chain, only account for around 0.05 per cent of EU-based companies trading or using 3TG (Amnesty International 2014). In addition, the majority of EU imports from non-EU countries are constituted by manufactured goods (69 per cent), including machinery and vehicles (33 per cent), whereas raw materials account for a mere 4 per cent of total imports (Eurostat 2020: Figure 7). As stated above, importers of 3TG in the form of semi-

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processed or finished products are not subject to mandatory requirements (Cuvelier 2017: 4). Whereas it is true that, by binding EU importers, smelters and refiners with mandatory requirements, the Regulation indirectly promotes responsible sourcing also on the part of downstream companies, it must be noted that nothing prevents the latter from importing into the EU finished or semi-finished goods that were produced outside of the EU with 3TG sourced from non-EU smelters and refiners. It is hoped that most non-EU upstream companies will voluntarily abide by due diligence schemes recognized under the Regulation and, therefore, be included in the list of global responsible smelters and refiners. However, the Commission itself recognized in its 2014 Impact Assessment that, notwithstanding the voluntary application by companies of the OECD Guidance, there was still widespread disregard, on the part of Asian smelters and refiners, for ethical concerns linked to conflict minerals (EC 2014b: 26).

It is also doubtful whether the new Regulation will create a level playing field for EU-based companies (Gibb 2016). The binding requirements of the Dodd-Frank Act apply to all US-listed 'issuers' that manufacture or contract to manufacture products where 'conflict minerals are necessary to the functionality or production' of these products (Section 1502(p)(2)). This means that, notwithstanding the geographically limited scope of the Act, its requirements extend to an estimated 6,000 companies in industries such as electronics and communications, aerospace, automotive, jewellery, and industrial products (Ernst & Young LLP 2012). According to a Commission estimate, while in Europe there is a limited number (40) of dual-listed downstream companies that are directly bound by Section 1502 of the Dodd-Frank Act, between 150,000 and 200,000 downstream companies 'need to take action' on conflict minerals due to pressure from their US clients who are required to comply with US legislation (EC 2014b: 24). Being able to disclose the origin of minerals in their supply chains is vital for these businesses to avoid their clients switching to other suppliers (ibid). While the new EU Regulation will make it easier for EU downstream companies to identify responsible smelters and refiners (Fried, Frank, Harris, Shriver & Jacobson LLP 2014), it does not level the playing field by requiring all EU-based downstream companies to undertake due diligence, as had been proposed by the EP and some NGOs (NGO coalition 2015). Moreover, nothing prevents a downstream undertaking from sourcing from a non-EU smelter/refiner not performing due diligence checks in accordance with EU rules (van der Velde 2017: 7).

Finally, the obligations set out in the Regulation are, at present, connected to a rather weak system of enforcement, whereby Member States shall issue a notice of remedial action in cases of infringements, but are not required to impose penalties. In case of non-compliance, notices of remedial action will have to be enforced through court proceedings, making it more difficult to influence the laggards' conduct in a timely manner (IPIS 2019: 22). Only with the first review of the Regulation will the Commission assess 'whether Member State competent authorities should have competence to impose penalties upon Union importers' in cases of persistent failure to comply (Regulation 2017/821: Article 17(3)). In the domestic implementation of the Regulation, Member States are adopting measures allowing the competent authority to issue notice of remedial action and, in some cases, sanctions for non-compliance with the order. This is the case, for instance, in Germany (with fines up to 50,000 euros), Italy (up to 20,000 euros) and in the Netherlands (Dutch Government 2021; Heuking Kühn Lüer Wojtek 2020; Italian Government 2020). Under the 'Conflict Minerals (Compliance) (Northern Ireland) (EU Exit) Regulations 2020', the Regulation is implemented in respect of Northern Ireland and includes financial

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penalties for failure to comply with a notice (UK Government 2020). It is not to be excluded, of course, that measures adopted at the national level might to some extent strengthen the Regulation's implementation. For instance, the implementation instrument adopted in Denmark requires the submission of third-party audit reports on an annual basis, being, in this respect, more specific than Article 6 of the Regulation, which does not specify the frequency of audits (Danish Government 2020: Article 2). Also, civil society might play an important role in monitoring the conduct of individual companies, provided they can access relevant information. In France, the NGO Sherpa appealed to the administrative tribunal to obtain disclosure by the competent authority (the Ministry of the Ecological Transition) of the list of French companies bound by the Regulation (Sherpa 2020).

Finally, the ability of the Regulation to avert the so-called 'unintended consequences' will depend on how effective the accompanying measures will be in advancing the understanding of the new rules in producing countries, particularly in the artisanal mining sector (IPIS 2019: 20). In this respect, IPIS warns that awareness of the new Regulation and the level of preparedness are still low in many producing countries, which creates a risk of economic disengagement by actors bound by the new rules (IPIS 2021). This unintended consequence, in turn, would have the effect of making these producers more dependent on less transparent importers, smelters and refiners (ibid).

5. Conclusions

The EU conflict minerals policy confirms the growing international attention towards the problem, also testified by the fact that China has, for the first time in 2016, adopted its own voluntary guidelines on conflict minerals (Chynoweth 2016). Being the result of a negotiation process in which the EP, a supporter of legally binding obligations for all sections of the 3TG supply chain, had to make concessions to the prudent approach of the European Commission and of the Member States, the Conflict Minerals Regulation is a compromise that presents elements of weakness. By failing to impose binding requirements on downstream companies, the Regulation leaves outside of its scope a large number of manufacturing companies that could *de facto* be selling to European consumers products containing conflict minerals. This might in turn hamper the creation of a level playing field in the European market, especially in regard to those downstream companies that are under pressure from their US clients, bound by Section 1502, to eradicate conflict minerals from their supply chains. It also arguably weakens the Regulation's potential to influence the conduct non-EU upstream companies. As explained above, the Regulation's approach, resting on the 'choke points' theory, might not be enough to spur meaningful change in the practice of powerful non-EU smelters and refiners that are not bound by the Regulation and over which EU-based importers might not have sufficient leverage. Some doubts also persist as to the volume thresholds set by the Regulation to identify the importers bound the new rules, as these levels might be excessive and therefore exclude relevant imports from the scope of the mandatory due diligence checks. The new rules are not connected to a strong enforcement mechanism, nor to performance indicators, and therefore do not completely avert the risk of giving rise to a box-ticking approach failing to concretely incentivize responsible sourcing (IPIS 2019: 8). In part, this risk might be mitigated through the adoption by Member States of effective implementation measures at the domestic level and through the first revision of the Regulation to be performed by 2023.

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In spite of its limitations, the Regulation marks an important milestone in the global efforts to curb conflict minerals trade, putting in place mandatory due diligence requirements that, while falling short of a fully-fledged due diligence process including prevention of harms and remedial actions, goes beyond the limited scope of supply chain transparency legislation. The effort to promote a wide geographical scope of application, abandoning the narrow focus on the Great Lakes region, is commendable. A system of incentives and guidance will have to be put in place through carefully crafted accompanying measures, taking into consideration the lingering risk of unintended consequences for the economies and livelihoods of producing countries. Finally, should the EU adopt, as envisaged, a cross-sectoral directive mandating human rights and environmental due diligence for companies operating in the EU market, the Regulation might ease compliance with said directive by downstream companies in the 3TG supply chain, both directly, as guidance for the development of effective internal due diligence processes, and indirectly, by facilitating the identification of responsible importers of 3TG.

FUNDING STATEMENT

The publication of this article has been supported by funding from the European Union's Horizon 2020 research and innovation programme under the Marie Skłodowska-Curie grant agreement no. 843115-BHR_EU.

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