On 16 June 2016, the European Union (EU) agreed on a framework for an EU regulation to stop the financing of armed conflict and human rights abuses through trade in minerals and metals from conflict zones. Following years of negotiations between the Council of the European Union, the European Parliament and the European Commission (and input from industry stakeholders and human rights campaigners) as to the scope and stringency of the proposed legislation and, in particular, whether it should impose mandatory or voluntary trade rules, a compromise position has been reached. Companies operating in the EU which are mining, refining or importing tungsten, tantalum, tin and/or gold (3TG) will be under a mandatory obligation to perform due diligence checks on their suppliers and certify that their supply chains are free from minerals which have caused or financed violence within conflict-affected and high-risk areas anywhere in the world. However, after much debate, it has been agreed that the mandatory scheme will not extend to imports of finished products containing 3TG.

The text of the legislation is yet to be finalised but is expected to incorporate OECD diligence and self-certification guidelines, requiring EU smelters, refiners and importers of 3TG to (1) establish strong company management systems; (2) identify and assess risk in the supply chain; (3) design and implement a strategy to respond to identified risks; (4) carry out independent third party audits of the supply chain due diligence at identified points in the supply chain; and (5) report on supply chain due diligence. EU member states’ competent authorities will be responsible for ensuring compliance and for determining penalties for non-compliance, to be monitored by the European Commission. Furthermore, the European Commission proposes to publish a list of ‘responsible importers’ to be available to the public – a first of its kind.

Small volume importers of 3TG (e.g. for dentistry) will, at least initially, be exempt from the mandatory scheme so as to avoid encumbering their businesses with unreasonable administrative obligations, and there will be no requirements for end-users or investors in impacted sectors. Recycled metals, existing EU stocks of 3TG and by-products will also be excluded from the legislation. Perhaps fortunately for many EU-incorporated companies, who will have been keen to avoid the administrative burden and cost of the mandatory diligence and reporting requirements, the legislation will not extend to imports of finished products containing 3TG, notwithstanding that the majority of 3TG is imported into the EU within finished products, such as inside mobile phones, lightbulbs and laptop computers. Human rights organisation Amnesty International has expressed a concern that this legislative gap allowing companies that import 3TG in their products to escape the requirements significantly diminishes the usefulness of the regulation and defeats its intended purpose. However, it is expected that larger EU manufacturers and sellers of such products will be “encouraged” to comply voluntarily with the due diligence requirements of the regulation and to report on their sourcing practices based on a new set of performance indicators to be developed by the EU Commission, and the EU Commission has asserted that it remains committed to evaluating periodically whether this voluntary system is adequate and if not, potentially extending the scope of the legislation.

The new regulation will push the EU to the forefront of the fight against conflict minerals. As compared with the United States’ 2011 offering - Section 1502 of the Dodd-Frank Act, which applies similar mandatory rules to importers of 3TG sourced from the Democratic Republic of the Congo (DRC) and nine neighbouring countries - the proposed EU regulation
will apply in respect of 3TG imported from conflict-affected and high-risk areas worldwide. Where the US rules have been criticised for diverting trade away from the DRC region, with companies avoiding that region entirely in favour of other areas where they are not subject to the supplementary obligations resulting in more problems in an already poverty-stricken region – the proposed EU regulation could be commended for applying the rules so widely that companies cannot easily divert their operations to alternative regions solely to avoid complying with these obligations. Such is the global reach of the legislation that, while the European Commission will publish within a “Handbook for Operators” an indicative list of such areas designated as such by a panel of experts, companies sourcing from areas not on the list which might objectively fall within the principles-based definition of “conflict-affected and high-risk areas” will nonetheless be required to comply with the legislation.

Informal legislative negotiations are expected to be concluded in the coming months, with finalisation of the legislative text to follow. Once adopted by the EU Council and the European Parliament and published in the EU’s Official Journal, the EU regulation will be directly applicable in all EU member states. While the EU has proposed a two-year transition period from enactment of the legislation to allow companies to introduce audit systems and has indicated that it would be open to recognising existing industry due diligence schemes subject to certain conditions, it would be prudent for companies falling within the scope of the regulation to be cognisant of the compliance framework required, given the lengthy process of gathering data to conduct due diligence.

With the recent Brexit decision, the legislation will apply to UK companies within scope for at least as long as the UK remains a member of the EU; it remains to be seen what (if any) impact an exit from the EU would have on the application of the legislation to such companies.

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