

Ensuring transparency in the implementation of the European Union's Regulation on the supply of 3TG minerals

The EU regulation on the responsible supply of tin, tungsten, tantalum and gold (3TG) from conflict-affected and high-risk areas (CAHRA) is an important first step towards enabling supply chains for these important minerals that are equitable and free from human rights abuse. The Regulation was approved in 2017 and will enter into force in 2021. Before that date, there are a number of steps that member states must take to ensure the implementation of the law at the national level.

Some member states might need or decide to adopt national legislation to ensure the implementation of the Regulation, as it has been the case in Germany and in the Netherlands, while other member states might be able to implement through government regulation. In both cases, it is important that measures are adopted so that the spirit of the Regulation is not diluted within national implementation.

This policy note, directed and member states and their Competent Authorities (MCAs), highlights three key concerns that the above-mentioned parties must take into account to ensure that the Regulation has a real impact on the practices of European importers of 3TG.

1. Transparency of the list of national importers subject to the Regulation

If the list of national importers to which the regulation applies is not publicly available, important control mechanisms provided by in the text of the Regulation will be rendered impossible. Article 11(2) states that MCAs, when carrying out ex-post checks on companies' compliance, may include in their assessments 'concerns provided by third parties, substantiated concerning the compliance by a Union importer with this Regulation'. This last provision, logically requires that the list of importers is publicly accessible for third parties, such as Civil Society Organizations (CSOs) to raise 'substantiated concerns'.

Oculting the list of national importers would also create a more even playing field amongst companies of different size – as third party checks would focus on larger companies which are known to import 3TG, while smaller companies might remain unknown. The non-publication of the list of national importers will make it near impossible for third parties to raise substantiated concerns. Moreover, existing international transparency requirements within the extractive sector, such as those set out by the Extractives Industries

Transparency Initiative (EITI), have created a precedent that Competent Authorities must not undermine.

Some member states customs authorities have raised the argument that publishing the list of national importers would breach corporate confidentiality, and that the Regulation does not impose an obligation on competent authorities to publish the list. However, this argument does not stand in the face of a) the fact that the Union custom (see Union Custom's Code, Art 12(1)) legislation allows for exception to confidentiality rules and b) the fact that these data is already available through for-pay market-data companies. Moreover, it is questionable whether the simple publication of the nominative list of national importers, without including any further fiscal information, would be in violation of customs or tax law. Eventually, the responsibility for the disclosure of this information falls is a political choice that falls on member states. Member states must chose transparency of opacity in handling the list of national importers.

Member States and their Competent Authorities should:

- › Ensure that a list of all national importers subject to the Regulation is not only made available to competent authorities, but it is also published annually.

1.1 Transparency is a fundamental requirement for effective due diligence

Transparency over the companies that are subject to specific pieces of legislation is already in place in a number of cases:

- The German Federal Environment Agency must publish on the internet the list of companies covered by the so-called PRTR Regulation (Regulation 166/2016) as well as data on the pollutants they release.
- Companies subject to the European Emissions Trading Scheme (ETS) are published on the Commission's website.
- The Commission's own list of global responsible smelters and refiners will publicly identify and make available the list of concerned companies.

2. Consequences for non-compliance that represent an effective incentive to change corporate behaviour

Article 16(1) of the Regulation states that member states shall lay down the 'rules governing infringement of the Regulation'. Previous experience with the EU Regulation on timber trade shows that weak or ineffective penalties for infringement might seriously compromise the effectiveness of the regulation.

The draft German implementation law, currently being discussed at the Federal Parliament, sets a maximum of 50 000 euro as a monetary penalty for non-compliance. By adopting such low threshold, Germany and other member states might send the message that compliance with the regulation is not a priority, and that the cost

of complying might be higher than the cost of non-compliance, especially since this is an indication of the maximum fine to be charged. In the German example, other national legislation provides for much higher levels of penalties. For instance, the Administration Enforcement Act of Northern Westphalia in Germany Section 60 VwVG NRW and such as the Lower Saxony Police and Regulatory Authorities Act (Section 67(1) of the POPG Nds) set a ceiling of 100 000 euro. The ceiling for the German Energy Industry Act is ten million euro. are actually implementing the due diligence standards outlined by the relevant scheme. As such, companies cannot and should not be considered in compliance with the Regulation by virtue of their membership of a recognized scheme alone. Moreover, member states should be able to issue penalties for infringement iteratively. That is to say, penalties should be re-issued if remedial action is not taken by the importer concerned.

Member States and their Competent Authorities should:

- › Set high ceilings for infringement fines, so that there is enough room for manoeuvre to issue effective consequences for infringement based on the size and turnover of individual importers.

3. Ex-post checks must go beyond membership schemes

It is of pivotal importance that MCAs consider the individual responsibility of

national importers when assessing the compliance of national importers with the Regulation, even in the case when said importer is member of an industry schemes. By bringing together different industrial actors, industry schemes can allow companies to exchange information and good due diligence practices, and can facilitate the dissemination of standards. However, membership in an industry scheme cannot be a sufficient element to assess compliance. As was evident in the OECD Alignment Assessment of Industry Programmes with the OECD Minerals Guidance , voluntary industry schemes generally failed to comply with OECD Guidance. Of the five schemes analyzed in the assessment, none was found to be in compliance. Similar results were found in Germanwatch's study on raw material supply chains.

MCAs should carry out random checks for national importers to ensure that they are complying with their due diligence obligation, whether or not they are member of an industry initiatives. Moreover, as recognized by the OECD, checks should not be limited to third party audits but they should ensure that companies are continuously monitoring their supply chains, that they are taking into account information provided by third parties such as CSOs and NGOs, analyzing risks and taking action to manage the risks identified.

National implementation laws and/or measures should include an assessment of companies' adherence to the OECD five step approach. This includes step three, which concerns the success or failure of risk mitigation efforts adopted by the company. MCAs should gather information on the

effects of risk mitigation efforts along supply chains and their effects on the supply chain and in producing countries.

Member States and their Competent Authorities should:

- > Go beyond membership in industry schemes and third-party audits and perform random checks to monitor corporate due diligence practices
- > Adopt national implementation measures that explicitly refer to the OECD five step approach and should hold national importers to OECD standards when performing ex-post checks.



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