Commission Delegated Regulation (EU) 2019/429 of 11 January 2019 supplementing Regulation (EU) 2017/821 of the European Parliament and of the Council as regards the methodology and criteria for the assessment and recognition of supply chain due diligence schemes concerning tin, tantalum, tungsten and gold

COMMISSION DELEGATED REGULATION (EU) 2019/429

of 11 January 2019

supplementing Regulation (EU) 2017/821 of the European Parliament and of the Council as regards the methodology and criteria for the assessment and recognition of supply chain due diligence schemes concerning tin, tantalum, tungsten and gold

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas[(1)], and in particular Article 8(2) thereof,

Whereas:

(1) Natural mineral resources hold great potential for development but can, in conflict-affected or high-risk areas, fuel the outbreak or continuation of violent conflict, undermining endeavours towards development, good governance and the rule of law. In those areas, breaking the nexus between conflict and illegal exploitation of minerals is a critical element in guaranteeing peace, development and stability.

(2) Regulation (EU) 2017/821 sets out due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold which will apply from 1 January 2021. The Regulation is designed to provide transparency and certainty as regards the supply practices of Union importers and of smelters and refiners sourcing from conflict-affected and high-risk areas.

(3) A number of voluntary supply chain due diligence schemes with the same or similar objectives as Regulation (EU) 2017/821 already exist. Regulation (EU) 2017/821 provides for the possibility for the Commission to recognise schemes which, when effectively implemented by a Union importer of minerals or metals, enables that importer to comply with that Regulation.

(4) It is therefore necessary to establish the methodology and the criteria to be used by the Commission to determine whether a scheme should be granted recognition by the Commission.

(5) Recital (14) of Regulation (EU) 2017/821 sets out, inter alia, that the requirements for supply chain due diligence schemes should be aligned to the OECD Due Diligence Guidance and meet the procedural requirements such as stakeholders' engagement, grievance mechanisms and responsiveness. That recital also sets out that Union

importers retains individual responsibility for compliance with the due diligence obligations, irrespective of whether they are covered by a supply chain due diligence scheme recognised by the Commission.

(6) The requirements of Regulation (EU) 2017/821 are consistent with the OECD Guidance. To ensure consistency between also this Regulation and the OECD's work, the OECD's Methodology for the Alignment Assessment of Industry Programmes with the OECD Minerals Guidance (the 'OECD Methodology'), should serve as the basis for the Commission's methodology and criteria for assessment and recognition of supply chain due diligence schemes.

(7) The OECD Secretariat should, as appropriate, be consulted prior to the finalisation of the Commission's assessments of applications for recognition and should be given the opportunity to issue an opinion on the draft report and the preliminary conclusions.

(8) The competent authorities of the Member States are responsible for the application and effective and uniform implementation of Regulation (EU) 2017/821 throughout the Union. The Commission should therefore share information on applications for recognition and its assessment of them with Member State competent authorities so as to afford the competent authorities the opportunity to contribute effectively to the Commission's assessment.

(9) Article 8(3) of Regulation (EU) 2017/821 sets out that the Commission is to take into account the diverse industry practices covered by a scheme and that it is also to have regard to the risk-based approach and method used by a scheme to identify conflict-affected and high-risk areas, and the listed results thereof.

(10) This Regulation does not cover verification of schemes that have already been recognised, nor the requirements relating to changes to schemes over time, while those matters are dealt with by Article 8(4) and (5) of Regulation (EU) 2017/821.

(11) The Union should endeavour to cooperate as appropriate with other jurisdictions to support the development and implementation of due diligence schemes consistent with the OECD Due Diligence Guidance,

HAS ADOPTED THIS REGULATION:

Article 1

Subject matter and scope

1 This Regulation sets out rules on the methodology and criteria allowing the Commission to assess whether supply chain due diligence schemes concerning tin, tantalum, tungsten and gold facilitate the fulfilment of the requirements of Regulation (EU) 2017/821 by economic operators and to recognise such schemes, pursuant to Article 8 of that Regulation.

2 This Regulation only applies to schemes or part of schemes which relate to the metals and minerals falling within the scope of Regulation (EU) 2017/821, as set out in Annex 1 of that Regulation.

Article 2

Definitions

1 For the purposes of this Regulation, the definitions in Regulation (EU) 2017/821 apply.

The following definitions shall also apply:

a ‘scheme’ means ‘supply chain due diligence scheme’ or ‘due diligence scheme’ as defined in point (m) of Article 2 of Regulation (EU) 2017/821;

b ‘applicant’ means the entity that has submitted or intends to submit an application for recognition of a scheme;

c ‘scheme owners’ means those entities referred to in Article 8(1) of Regulation (EU) 2017/821;

d ‘economic operators participating in the scheme’ means natural or legal persons that are subject to an audit under the requirements of the scheme or that are otherwise associated with or participate in the scheme in such a way that they are expected by the scheme to meet its standards and policies;

e ‘OECD Methodology’ means the OECD's Methodology for the Alignment Assessment of Industry Programmes with the OECD Minerals Guidance, including its Annex, published with the OECD note COM/DAF/INV/DCD/DAC(2018)1;

f ‘overarching due diligence principles’ means the principles set out in section A of Annex 1 to the OECD Methodology;

g ‘repeat application’ means:

(i) an application concerning a scheme which has already been subject to at least one earlier application that was either declared inadmissible or was unsuccessful or withdrawn;

(ii) an application concerning a scheme which has had its recognition withdrawn by the Commission;

h ‘general conditions for recognition’ means the conditions set out in Article 4;

i ‘specific criteria for assessment’ means the criteria set out in Article 5.

2 For the purposes of this Regulation, the term ‘industry programme’ used in the OECD Methodology shall be understood to have the same meaning as the term ‘scheme’.

Article 3

Requirements for and admissibility of applications

1 Scheme owners may apply to have the schemes that are developed and overseen by them recognised by the Commission in accordance with this Article.

2 In order to be admissible, applications shall contain the following information:

a the identity of the applicant;

b the name and contact details of the person who will be responsible for the assessment and hence be the Commission's contact person;

c a description of the scheme's objectives, the metals and minerals covered by the scheme, the types of economic operators participating in the scheme, and in which part of the value chain those economic operators are active;

d information with regard to the scope of the application, clarifying whether the application relates to a specific part of a scheme or to a specific part of the value or supply chain;

e evidence that the design of the scheme's policies and standards is coherent with the supply chain due diligence principles as set out in point (d) of Article 2 of Regulation (EU) 2017/821, in a manner consistent with the five-step framework as set out in Annex 1 to the OECD Guidance;

f a list of economic operators participating in the scheme, and other entities that are members of or otherwise associated with the scheme;

g if available, any other assessment of the scheme, including self-assessments, assessments by competent authorities in another jurisdiction, and assessments by a third party;

h if applicable, the relationship between the application and any earlier application.

3 Applicants may include any other information that they consider relevant.

4 Within 45 calendar days after having received an application, the Commission shall determine whether the application is admissible and shall inform the applicant thereof.

5 If the Commission considers that the evidence referred to in point (e) of paragraph 2 has been provided but that other information referred to in paragraph 2 is missing, it shall inform the applicant in due time and in any event before the expiry of the time-limit laid down in paragraph 4, and invite the applicant to complete the application within 30 calendar days.

6 If the Commission considers that the evidence referred to in point (e) of paragraph 2 has not been provided, or if an applicant does not complete the application before the expiry of the time-limit laid-down pursuant to paragraph 5, it shall declare the application inadmissible and shall notify the applicant thereof and shall not proceed with further assessment of the application.

7 By submitting an application, scheme owners accept that the scheme will be subject to the assessment provided for in this Regulation. However, applicants may withdraw their application at any time.

Article 4

General conditions for recognition of equivalence

1 A scheme shall be granted recognition of equivalence if the scheme's overarching due diligence principles, its requirements for economic operators participating in the scheme, and the specific responsibilities of the scheme itself are aligned with the applicable requirements of Regulation (EU) 2017/821.

2 The requirements of paragraph 1 shall be considered met where the Commission considers that the conditions for the scheme to be rated as ‘fully aligned’ in accordance with Section 4 of the OECD Methodology are satisfied based on its assessment of all applicable specific criteria having regard both to the scheme's policies and standards and the scheme's implementation of them.

Article 5

Specific criteria for assessment

1 The Commission shall assess the scheme against the applicable specific criteria set out in Annex 1 to the OECD Methodology, in accordance with Articles 6, 7 and 8.

2 The Commission shall determine, for each individual assessment, the relevance of each of the specific criteria in Annex 1 to the OECD Methodology, taking into account the nature, scope and specificities of the scheme subject to the assessment. It shall for this purpose consider the applicability of the specific criteria indicated in Annex 1 of the OECD Methodology. It may also, consider deviation from the specific criteria indicated in Annex 1 to the OECD Methodology if needed to ensure that the assessment corresponds to the scope and requirements of Regulation (EU) 2017/821 with regard to, inter alia, the type of entities that are subject to the obligations of that Regulation.

Article 6

Completion of the information provided in the application so as to enable the assessment of specific criteria

1 The Commission shall as appropriate complete the information contained in admissible applications to enable it to carry out its assessment of the applicable specific criteria under Article 5(2). In particular, this may include:

a reviews of documents the Commission considers relevant, such as the scheme's bylaws or equivalent and other policy documents; terms of reference of relevant committees of the scheme; audit reports of economic operators participating in the scheme; reports from experts and relevant stakeholders; any other assessment of the scheme, including self-assessments, assessments by competent authorities in other jurisdictions, and assessments by a third party; and any other relevant information relating to the management of the scheme;

b interviews with representatives of the scheme, the management of economic operators participating in the scheme, auditors, and other relevant stakeholders;

c attendance at and observation of third party audits of economic operators participating in the scheme against the requirements of the scheme, and assess the corresponding audit reports.

2 When implementing paragraph 1, the Commission may request the applicant to submit any additional information or documentation and to facilitate interviews and attendance of third party audits.

3 The Commission shall determine what additional information is necessary in order to enable it to carry out the assessment of all applicable specific criteria. It may for this purpose consider the guidance set out in Section 2 of the OECD Methodology.