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

REGULATION (EU) 2017/821 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

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THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 207 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national Parliaments,

Acting in accordance with the ordinary legislative procedure[(1)],

Whereas:

(1) Although they hold great potential for development, natural mineral resources can, in conflict-affected or high-risk areas, be a cause of dispute where their revenues 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) The challenge posed by the desire to prevent the financing of armed groups and security forces in resource-rich areas has been taken up by governments and international organisations together with economic operators and civil society organisations, including women's organisations that are to the forefront of drawing attention to the exploitative conditions imposed by these groups and forces, as well as to rape and violence used to control local populations.

(3) Human rights abuses are common in resource-rich conflict-affected and high-risk areas and may include child labour, sexual violence, the disappearance of people, forced resettlement and the destruction of ritually or culturally significant sites.

(4) The Union has been actively engaged in an initiative of the Organisation for Economic Co-operation and Development (OECD) to advance the responsible sourcing of minerals from conflict areas, which has resulted in a government-backed multi-stakeholder process leading to the adoption of the *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*

Changes to legislation: *There are currently no known outstanding effects for the Regulation (EU) 2017/821 of the European Parliament and of the Council. (See end of Document for details)*

('OECD Due Diligence Guidance') including the Annexes and Supplements thereto. In May 2011, the OECD Ministerial Council recommended the active promotion of the observance of that Guidance.

(5) The concept of responsible sourcing is referred to in the updated OECD Guidelines for Multinational Enterprises[(2)] and is in line with the UN Guiding Principles on Business and Human Rights[(3)]. Those documents aim to advance supply chain due diligence practices when businesses source from areas affected by conflict and instability. At the highest international level, UN Security Council Resolution 1952 (2010) specifically targeted the Democratic Republic of Congo (the DRC) and its neighbours in Central Africa calling for supply chain due diligence to be observed. Following up on that Resolution, the UN Group of Experts on the DRC also advocated compliance with the OECD Due Diligence Guidance.

(6) In addition to multilateral initiatives, on 15 December 2010, the Heads of State and Government of the African Great Lakes Region took a political commitment in Lusaka to fight the illegal exploitation of natural resources in the region and approved, inter alia, a regional certification mechanism based on the OECD Due Diligence Guidance.

(7) This Regulation, by controlling trade in minerals from conflict areas, is one of the ways of eliminating the financing of armed groups. The Union's foreign and development policy action also contributes to fighting local corruption, to the strengthening of borders and to providing training for local populations and their representatives in order to help them highlight abuses.

(8) In its communication of 4 November 2008 entitled 'The raw materials initiative — meeting our critical needs for growth and jobs in Europe', the Commission recognised that securing reliable and undistorted access to raw materials is an important factor for the Union's competitiveness. The raw materials initiative contained in that Commission communication is an integrated strategy aimed at responding to different challenges related to access to non-energy and non-agriculture raw materials. That initiative recognises and promotes financial as well as supply chain transparency, and the application of corporate social responsibility standards.

(9) In its resolutions of 7 October 2010, of 8 March 2011, of 5 July 2011 and of 26 February 2014, the European Parliament called for the Union to legislate along the lines of the US law on conflict minerals, Section 1502 of the *Dodd-Frank Wall Street Reform and Consumer Protection Act*. In its communications of 2 February 2011 entitled 'Tackling the challenges in commodity markets and on raw materials' and of 27 January 2012 entitled 'Trade, growth and development — Tailoring trade and investment policy for those countries most in need', the Commission announced its intention to explore ways of improving transparency throughout the supply chain, including aspects of due diligence. In the latter communication and in line with the commitment made by it at the May 2011 OECD Ministerial Council, the Commission also advocated greater support for and use of the OECD Guidelines for Multinational Enterprises, and of the OECD Due Diligence Guidance, even outside the OECD membership.

(10) Union citizens and civil society actors have raised awareness with respect to Union economic operators not being held accountable for their potential connection to the illicit extraction of and trade in minerals from conflict areas. Such minerals, potentially present in consumer products, link consumers to conflicts outside the Union. As such, consumers are indirectly linked to conflicts that have severe impacts on human rights, in particular the rights of women, as armed groups often use mass rape as a deliberate strategy to intimidate and control local populations in order to preserve their interests. For this reason, Union citizens have requested, in particular through petitions, that the Commission make a legislative proposal to the European Parliament and to the Council to hold economic operators accountable under the relevant Guidelines as established by the UN and OECD.

(11) In the context of this Regulation, and as set out in the OECD Due Diligence Guidance, supply chain due diligence is an ongoing, proactive and reactive process through which economic operators monitor and administer their purchases and sales with a view to ensuring that they do not contribute to conflict or the adverse impacts thereof.

(12) Third-party auditing of an economic operator's supply chain due diligence practices ensures credibility for the benefit of downstream economic operators and contributes to the improvement of upstream due diligence practices.

(13) Public reporting by an economic operator on its supply chain due diligence policies and practices provides the necessary transparency to generate public confidence in the measures economic operators are taking.

(14) Union importers retain individual responsibility to comply with the due diligence obligations set out in this Regulation. However, many existing and future supply chain due diligence schemes (‘due diligence schemes’) could contribute to achieving the aims of this Regulation. Due diligence schemes that are aimed at breaking the link between conflict and the sourcing of tin, tantalum, tungsten and gold already exist. Such schemes use independent third-party audits to certify smelters and refiners that have systems in place to ensure the responsible sourcing of minerals. It should be possible to recognise those schemes in the Union system for supply chain due diligence (‘Union system’). The methodology and criteria for such schemes to be recognised as equivalent to the requirements of this Regulation should be established in a delegated act to allow for compliance with this Regulation by individual economic operators that are members of those schemes and to avoid double auditing. Such schemes should incorporate the overarching due diligence principles, ensure that requirements are aligned to the specific recommendations of the OECD Due Diligence Guidance and meet the procedural requirements such as stakeholders' engagement, grievance mechanisms and responsiveness.

(15) Union economic operators have, through public consultations, expressed their interest in the responsible sourcing of minerals and reported on current due diligence schemes designed to pursue their corporate social responsibility objectives, customer requests, or the security of their supplies. However, Union economic operators have also reported countless difficulties and practical challenges in the exercise of supply chain due diligence because of lengthy and complex global supply chains involving a high number

of economic operators that are often insufficiently aware or ethically unconcerned. The Commission should review the cost of responsible sourcing and of third-party auditing, the administrative consequences of such sourcing and auditing and their potential impact on competitiveness, in particular that of small and medium-sized enterprises (SMEs), and should report its findings to the European Parliament and to the Council. The Commission should ensure that micro, small and medium-sized enterprises benefit from adequate technical assistance and should facilitate the exchange of information in order to implement this Regulation. Micro, small and medium-sized enterprises established in the Union which import minerals and metals should therefore benefit from the COSME programme established by Regulation (EU) No 1287/2013 of the European Parliament and of the Council[(4)].

(16) Smelters and refiners are an important stage in global mineral supply chains as they are typically the last stage in which due diligence can effectively be assured by collecting, disclosing and verifying information on the mineral's origin and chain of custody. After this stage of transformation, it is often considered to be unfeasible to trace back the origins of minerals. The same applies to recycled metals, which have undergone even further steps in the transformation process. A Union list of global responsible smelters and refiners could therefore provide transparency and certainty to downstream economic operators as regards supply chain due diligence practices. In accordance with the OECD Due Diligence Guidance, upstream economic operators such as smelters and refiners should undergo an independent third-party audit of their supply chain due diligence practices, with a view to also being included in the list of global responsible smelters and refiners.

(17) It is essential that Union importers of minerals and metals who fall within the scope of this Regulation comply with its provisions, including Union smelters and refiners which import and process minerals and concentrates thereof.

(18) To ensure the proper functioning of the Union system while guaranteeing that the vast majority of minerals and metals falling within the scope of this Regulation and imported into the Union are subject to its requirements, this Regulation should not apply in situations where the Union importers' annual import volumes of each mineral or metal concerned are below the volume thresholds listed in Annex I to this Regulation.

(19) In order to ensure the proper functioning of the Union system and to facilitate the assessment of due diligence schemes that might be recognised under this Regulation, the power to adopt acts in accordance with Article 290 of the Treaty on the Functioning of the European Union should be delegated to the Commission in respect of amending Annex I to this Regulation by establishing and amending the volume thresholds of minerals and metals and in respect of setting out the methodology and criteria to be followed for that assessment acknowledging, in this regard, the work of the OECD. It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level, and that those consultations be conducted in accordance with the principles laid down in the Interinstitutional Agreement of 13 April 2016 on Better Law-Making[(5)]. In particular, to ensure equal participation in the preparation of delegated acts, the European Parliament and the

Council receive all documents at the same time as Member States' experts, and their experts systematically have access to meetings of Commission expert groups dealing with the preparation of delegated acts.

(20) Member State competent authorities should be responsible for ensuring the uniform compliance of Union importers of minerals or metals who fall within the scope of this Regulation by carrying out appropriate *ex-post* checks. Records of such checks should be kept for at least five years. Member States should be required to establish the rules applicable to infringements of this Regulation.

(21) In order to ensure uniform conditions for the implementation of this Regulation, implementing powers should be conferred on the Commission. The implementing powers relating to the recognition of due diligence schemes as equivalent, the withdrawal of equivalence in the case of deficiencies, as well as the establishment of the list of global responsible smelters and refiners should be exercised in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council[(6)]. In view of the nature of those implementing acts, given the limited discretionary powers of the Commission, whereby those acts should be based on the methodology and criteria to be adopted by means of a delegated act for the recognition of due diligence schemes by the Commission, the advisory procedure is considered to be the appropriate procedure for the adoption of those implementing acts.

(22) In order to guarantee the efficient implementation of this Regulation, provision should be made for a transitional period to allow for, inter alia, the establishment of Member States' competent authorities, for the Commission to recognise due diligence schemes and for economic operators to become familiar with their obligations under this Regulation.

(23) The Commission and the High Representative of the Union for Foreign Affairs and Security Policy should regularly review their financial assistance to and political commitments with regard to conflict-affected and high-risk areas where tin, tantalum, tungsten and gold are mined, in particular in the African Great Lakes Region, in order to ensure policy coherence, and in order to incentivise and strengthen the respect for good governance, the rule of law and ethical mining.

(24) The Commission should report regularly to the European Parliament and to the Council on the effects of the Union system laid down by this Regulation. By 1 January 2023 and every three years thereafter, the Commission should review the functioning and the effectiveness of the Union system, and its impact on the ground as regards the promotion of responsible sourcing of the minerals falling within the scope of this Regulation from conflict-affected and high-risk areas and on Union economic operators including SMEs, and should report to the European Parliament and to the Council. Those reports may be accompanied, if necessary, by appropriate legislative proposals, which may include further mandatory measures.

(25) In their Joint Communication of 5 March 2014 entitled ‘Responsible sourcing of minerals originating in conflict-affected and high-risk areas: Towards an integrated EU approach’ (the ‘Joint Communication of 5 March 2014’), the Commission and the High Representative of the Union for Foreign Affairs and Security Policy committed to the