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EUROPEAN ASSOCIATION OF METALS

Eurometaux response to the

EU draft regulation

setting up a Union system for supply chain due diligence self-certification of responsible importers of tin, tantalum and tungsten, their ores, and gold originating in conflict-affected and high-risk areas

April 2014

Eurometaux, the European Non-Ferrous Metals Association, welcomes the Draft Legislative Proposal on Responsible Sourcing published on 5 March 2014[1]. We appreciate the joint efforts of the European Commission and the European External Action Service to provide a comprehensive approach to address the issue of responsible sourcing.

The European non-ferrous metals industry is concerned about the human rights situation in conflict-affected and high-risk areas, and recognises the need to ensure the responsible sourcing of natural resources. As stated in our latest position paper sent to the Commission's Services[2], as well as in our letter to the Commission's President, Mr. Barroso[3], the European Non-Ferrous Metals industry supports the objective of moving towards increased transparency in the trade of certain minerals originating from conflict areas, and would hence support a comprehensive, pragmatic, and effective proposal without putting the competitiveness of the European industry at risk. Herewith, we would like to share the following preliminary comments, suggestions and concerns that may need to be clarified to ensure the efficient implementation of the proposed legislation once it has been approved.

[1] Proposal for a Regulation of the European Parliament and of the Council setting up a Union system for supply chain due diligence self-certification of responsible importers of tin, tantalum and tungsten, their ores, and gold originating in conflict affected and high-risk areas

[2] Eurometaux's Position and Proposals on a possible EU initiative on minerals originating from conflict-affected countries, sent to the European Commission's Services, February 2013

[3] Eurometaux's Call for a pragmatic and effective proposal on the forthcoming EU initiative on responsible sourcing of minerals from conflict-affected regions, sent to President of the European Commission Mr. José Manuel Barroso, November 2013

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An effective foreign policy and a development co-operation initiative are vital in order to break the link between minerals extraction and conflict

The Joint Communication to the European Parliament and the Council accompanying the Draft Proposal[4] states that *"any trade-related EU action in this area needs to be placed in this broader context and complement the EU's foreign policy and development co-operation initiatives".*
Eurometaux very much welcomes this approach, and urges the European authorities to come up with a set of concrete actions that should help to improve the situation on the ground. As stated earlier in Eurometaux's position paper, our industry is keen to contribute to an effective and workable solution that will increase the level of transparency in the trade of minerals originating from conflict zones. However, the role of the EU authorities is indispensable in order to break the link between minerals extraction and conflict. Thus, to fully achieve this goal, this Draft Regulation must be treated as a part of a broader context which has to be supported by concrete and effective foreign policy and development co-operation activities.

EU system should be explicit in scope and consistent with existing regulatory frameworks

We support the EU authorities' efforts to ensure consistency with the already existing US Dodd-Frank Act Regulation[5]. Indeed, the potential incoherence between European and US regulations could well force companies to undergo two separate compliance processes for EU and US companies and create unnecessary administrative burdens. We therefore urge the European authorities to be consistent with the already existing Dodd-Frank Act in scope and to guarantee that European regulation is recognized on both sides of the Atlantic.

Existing voluntary initiatives should not be undermined

Eurometaux's members are in line with the OECD guidelines and are already actively involved in a number of responsible supply chain initiatives and auditing programmes geared to the implementation of more transparency along their supply chains. We believe that the European authorities should make sure that these efforts are not undermined, and should recognise participation in already existing self-certification systems. In particular, it would be

[4] The European Commission's and European External Action Service's Joint Communication to the European Parliament and the Council on Responsible sourcing of minerals originating in conflict-affected and high-risk areas; towards an integrated EU approach
[5] Securities and Exchange Commission's conflict mineral rules created pursuant to the U.S. Dodd-Frank Wall Street Reform and Consumer Protection Act

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important to confirm that third party audit reports produced for the purpose of voluntary industry initiatives are accepted under the EU proposed legislation.

In order to have an effective mechanism, the EU legislation should contain a set of concrete incentives

Although the Joint Communication to the European Parliament and the Council provides a list of possible incentives for companies to comply with the proposed regulation, there seems to be a lack of precision regarding concrete schemes and their implementation. We believe that an effective set of concrete incentives for both the upstream and downstream sectors of the supply chain, is the crucial factor in order to make the proposed EU system work. Following the example of the U.S. Dodd-Frank Act, where downstream companies are incentivized to purchase conflict-free minerals through the SEC reporting requirements, we suggest, among other measures, to create an analogous listing for "responsible" customers to ensure transparency and "buy-in" of downstream customers.

Definition of the scope of the regulation is essential

According to Article 2 (a) and (b):
'minerals' means ores and concentrates containing tin, tantalum and tungsten, and gold as set out in Annex I;
'metals' means metals containing or consisting of tin, tantalum, tungsten and gold as set out in Annex I;
According to our understanding, the metals and minerals falling under the scope of the Draft Legislative Proposal are those listed in Annex I, although it would be useful if a more precise description were to be provided.
We welcome the European authorities' approach to introduce definitions of metals and minerals corresponding to the combined nomenclature (CN) classification. The CN system is widely recognized in international trade and will help to identify products by their composition or by their purpose.
However, in this context, we ask the Commission to keep the scope of minerals and metals in line with the US Dodd-Frank Act. In addition, it is important to state clearly that secondary raw materials are excluded from the scope of the draft proposal. Although secondary materials have other CN numbers, the formats listed in Annex I (bars, rods, wire, profiles, sheets, strip, foil, powder, etc.) can be processed from secondary raw materials, which can create confusion in the market.
Furthermore, there is no evidence that downstream products beyond raw ores and concentrates would contribute to conflicts (e.g., oxides, carbides, powders, bars, rods, wires,

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plates, etc.). The processing of ores is a costly and labour-intensive process that requires conversion plants, chemicals and equipment that are not present in conflict regions. We would therefore welcome clarification from the Commission as to why these products are included.
The EU system as proposed will inadvertently distort markets and create an advantage for businesses outside of Europe, i.e. the manufacturing of value added products from conflict minerals will be pushed out of the EU. The EU importers, smelters and upstream manufacturers are put at a disadvantage vis-à-vis their counterparts outside of Europe because customers of products that contain or use 3Ts and gold in a manufacturing process can freely import "downstream products", i.e. products with CN codes not covered by the draft regulation. This is in clear contradiction to the Commission's goal of securing an industrial base in Europe.

Definition of "conflict-affected and high-risk areas"

According to Article 2(e): "conflict-affected and high-risk areas" are defined as *"areas in a state of armed conflict, 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."*
The definition leaves much room for subjective interpretation and legal uncertainty. Although we are aware that the Commission's aim is to avoid stigmatising any regions, such a vague and broad definition could well lead to a situation where subjective interpretation by companies or governmental authorities can result in competitive disadvantages, market distortions and unequal applications for EU companies.
We urge the Commission to provide a clear definition of which countries and which regions are covered, and to attach a detailed list of conflict-affected and high-risk areas to the regulation.

Disclosure requirements are extensive and impossible to implement in practice

Art. 4 (f) states:
As regards minerals, operate a chain of custody or supply chain traceability system that provides, supported by documentation, the following information:
(i) description of the mineral, including its trade name and type,
(ii) name and address of the supplier to the importer,
(iii) country of origin of the minerals,
(iv) quantities and dates of extraction, expressed in volume or weight,
(v) when minerals originate from conflict-affected and high-risk areas, additional information, such as the mine of mineral origin; locations where minerals are

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***consolidated, traded and processed; and taxes, fees, royalties paid, in accordance with the specific recommendations for upstream companies, as set out in the OECD Due Diligence Guidance*.**

However, seeing that external raw materials trade is often carried out by small, specialized counterparties, compliance with Points (iii), (iv) and (v) **might well be impossible**. The suppliers companies often do not have precise information about the country of origin of the ores and concentrates they sell, as these products are very often mixed in ports. Furthermore, their scale of activity is limited, so they have no capability to verify and store such data.

In addition, the practical reasoning of the requirement for stating the date of extraction is not understandable, and impossible to comply with in practice. Even major mining companies do not have such data, as it would be difficult to obtain them, and the practical reasoning of this requirement is questionable.

Furthermore, there is a potential risk that the requirement laid down in Point (v) of the above-mentioned article concerning taxes, fees, and royalties paid would not be aligned with requirements laid down in Chapter 10 of the Accounting Directive which was adopted last year. We therefore need clarification from the European authorities on this point.

Thus, the introduction of disclosure requirements that are expansive and impossible to implement in practice will significantly weaken the EU system by creating administrative burdens for European companies, which will reduce their incentive to produce and deal with products containing the minerals concerned. This will result in European companies withdrawing from the market and being replaced by companies from other regions (Asia, for example) that are not bound by similar regulations.

Without establishing a global supply chain control supported by legislative actions in all main global economies, the goal of gathering all necessary data as mentioned in Article 4 of the proposed Draft Regulation would be impossible to achieve without a major threat to the competitiveness of EU companies.

Third party audits need further clarification

The subsequent element which raises our concern is the "independent third-party audits regarding each of the responsible smelters or refiners in its supply chain carried out in accordance with the scope, objective and principles set out in Article 6 of the Regulation." As proposed in the regulation, every importer who takes part in the process of transportation and processing of minerals from extraction until the final product is manufactured is obliged to present an audit of his smelters or refineries that are along the supply chain.

The first concern that arises is the lack of a precise indication of the auditor, as well as who is going to bear the costs of the process. As commencing an audit is the duty of 'responsible

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importers', it could be assumed that the responsible importer himself appoints and remunerates an auditor.
The second concern is related to a lack of clear wording as to whether an audit, once initiated, could be recognized by other clients/responsible investors. Otherwise, if every importer is obliged to commence his own audit, this might lead to a situation whereby companies are audited several times in the same case by many different auditors, thereby increasing the operational costs and adding to the employees' workload.
The third concern relates to the lack of an indication of the frequency of such audits. It might be understood from the wording in the proposed Regulation that it is necessary for importers to perform annual audits separately at their own expense. The justification for annual audits is not clear. Audits performed every two years or more would support the objective of the regulation without imposing as heavy an administrative burden. As a consequence, this could lead to operational problems in EU companies arising from numerous audits as well as significant costs for responsible importers.
We therefore urge the European authorities to clarify these points of the regulation, especially in terms of the possibility of recognition of audits once commenced, a precise indication of frequency, and the issue of the cost bearer. The risks of not amending the regulation are likely to result in non-uniform application and interpretation in the auditing process and during reviews conducted by the competent Member State authorities. This will significantly increase administrative burdens, costs and the workload on EU companies applying this regulation, which will in turn affect the competitiveness of EU companies in comparison with global competitors. We suggest that the audit protocols be made clear and developed in close consultation with industry groups.

Very far-reaching disclosure obligations (beyond OECD guidance) conflict with business confidentiality concerns

The auditing process envisioned under the EU system involves the disclosure of commercially sensitive information. We can foresee that the scope of information that should be transferred to clients in the supply chain could conflict with the business confidentiality principle. On the other hand, not submitting the information requested by the client due to its sensitivity may be treated as non-compliance. Thus, the company-level grievance mechanism (as well as "collaborative arrangements" with other companies or external experts) could conflict with laws and policies relating to data protection, employee confidentiality and works councils.
The EU system should therefore clarify how "*due regard*" will be given to "*business confidentiality and other competitive concerns*" (Art. 7) and resolve this issue in a more precise manner.
Another aspect of this issue is the transfer of sensitive data to the public authorities. This regulation should therefore foresee a Member States Guidance that includes proper technical

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and procedural measures in order to protect confidential information sent by companies to relevant authorities.

Member State Competent Authorities - Infringement and ex post Checks

The proposed EU system provides for the Member States to lay down the rules applicable to infringements of the regulation and the competent authorities of each Member State to ensure uniform compliance with the system. We question whether a uniform implementation throughout all Member States can be realized. Our member companies operate throughout the EU and may be subject to review and oversight by several competent authorities. Without a level playing field among different Member States, efficient enforcement and implementation of the legislation, the proposed EU system cannot be efficient.
We urge the European authorities to provide a dedicated Guidance for Member States. One of the suggestions that will make a system more effective is to allow a company or group of affiliated companies to interface with one authority.

List of responsible smelters and refiners

According to Art. 8 (2) *the Commission shall identify (…) those responsible smelters and refineries that source – at least partially – from conflict-affected and high risk areas*.
Therefore, smelters and refineries that will source from "safe" areas only will not be on the "responsible smelters and refineries list". It will bring some downstream users to the false conclusion that not being on the list is equal to not being in compliance with the Regulation, where in fact those companies will not be in scope of the Regulation, which may significantly undermine the competitiveness of EU companies.
Art. 8 (4) also needs further clarification: *"The Commission shall remove from the list … names of smelters/refiners in the supply chain of the no longer recognized responsible importer"* –If an importer has several smelters in his supply chain and, for example, one non-responsible, will all smelters then be taken from the list?
Article 8(1) does not foresee maximum timing for the European Commission to issue and update the list of 'responsible smelters and refiners'. As rightly pointed out in the Joint Communication to the European Parliament and the Council, appearing on a list of 'responsible smelters and refiners' could enhance the commercial visibility and credibility of responsible entities towards customers. Such a list should therefore be produced and updated quickly after the Member States have submitted their reports to the European Commission.
We suggest that the European authorities add a specific timing in a future version of the proposal.

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Concluding remarks

The European Non-Ferrous Metals industry supports the objective of moving towards increased transparency in the trade of certain minerals originating from conflict areas, and agrees with both the idea and the goal of the proposed EU regulation. However, we very much believe that some of the proposed solutions require enhanced analysis and refinement in order to make the current draft EU regulation efficient, while keeping EU companies competitive on global markets.
To fully achieve this goal, we are convinced that the Regulation should be treated as part of a broader context, which has to be supported by undertaking political activity.
We urge the European authorities to intensify a dialogue with third-party states in order to develop a unified global approach. The establishment of a global supply chain control supported by legislative actions in all main global economies would support the goal of gathering all necessary data, without threatening the competitiveness of EU companies. We would be grateful to receive further information regarding the state of the regulation, and for our opinion to be included in the planned regulation within the existing regulatory framework.

Eurometaux represents the European Non-Ferrous Metals industry

- **Non-ferrous metals contribute to the European creation of wealth and jobs**: they represent 2% of EU GDP and create **450,000 direct jobs and over 1 million indirect** jobs in Europe. Their use in high-tech and high added-value activities makes them very valuable to the EU's economy and competitiveness.
- **The non-ferrous metals industry is indispensable for modern society**. Thanks to their intrinsic properties – including durability and recyclability - non-ferrous metals are vital in order to meet essential societal needs and to build a low-carbon economy.

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