

Public consultation on a possible EU initiative on responsible sourcing of minerals originating from conflict-affected and high-risk areas

| 1. Information on respondents | |
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| 1.1 Do you agree that your contribution may be made public? -single choice reply-(compulsory) | Yes |
| 1.2 Please state the name of your business / association/ organisation. -open reply-(compulsory) | Institute for Human Rights and Business |
| 1.3 What is your profile? -single choice reply-(compulsory) | Other non-governmental organisation |
| 1.4 What is your main area/sector of activities/interest? -multiple choices reply-(compulsory) | Other |
| 1.4.1 If other, please specify. -open reply-(compulsory) | Think tank specialising in business & human rights policy advocacy upholding international standards |
| 1.5 In which country are your headquarters located? -multiple choices reply-(compulsory) | United Kingdom |
| 1.6 In which regions do you operate? -multiple choices reply-(compulsory) | Africa - Asia - Europe |
| 1.7 Are you listed on a regulated market? -single choice reply-(compulsory) | No |
| 1.8 Do you prepare due diligence reports on a mandatory basis? -single choice reply-(compulsory) | No |
| 1.9 Do you prepare due diligence reports on a voluntary basis? -single choice reply-(compulsory) | No |
| 1.10 Can the European Commission contact you if further details on the information you submitted is required? -single choice reply-(compulsory) | Yes |
| 1.10.1 Contact details, including email address. -open reply-(optional) | Margaret Wachenfeld - margaret.wachenfeld@ihrb.org |
| 2. Rationale and existing frameworks | |
| 2.1 Is the private sector interested in sourcing minerals in a socially responsible manner? -single choice reply-(optional) | Yes |
| 2.2 What would you consider the single most compelling motivation for the private sector to source minerals in a socially responsible way? -multiple choices reply-(optional) | Consumer satisfaction - Corporate Social Responsibility agenda - Regulatory obligation |

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| <p>2.3 Are you already undertaking efforts to ensure responsible sourcing of minerals? -single choice reply-(optional)</p> | <p>Yes</p> |
| <p>2.3.1 Please shortly describe your efforts and possible difficulties you encounter. -open reply-(optional)</p> <p>IHRB advocates responsible business behaviour everywhere, but particularly in high risk areas. In “Red to Green Flags” we highlight the need for enhanced due diligence measures in operational contexts such as where conflict minerals are found. We convened multi-stakeholder dialogues with OECD National Contact Points in the extractive sector. For the EU, we prepared guidance on human rights due diligence in the oil and gas sector together with Shift. We are engaged with the International Council on Mining and Metals in human rights training.</p> | |
| <p>2.4 Do you consider it unachievable for the private sector to source minerals in a socially responsible way? -single choice reply-(optional)</p> | <p>No</p> |
| <p>2.5 Would you consider existing international instruments under the corporate social responsibility and supply chain due diligence agenda such as the <i>UN Guiding Principles on Business and Human Rights</i>, <i>OECD Guidelines for Multinational Enterprises</i> and <i>OECD Due Diligence Guidance for responsible supply chains of minerals from conflict-affected and high-risk areas</i> sufficient as they stand? -single choice reply-(optional)</p> | <p>Somewhat disagree</p> |
| <p>2.5.1 Companies have already fully integrated those international instruments into corporate risk management systems. -single choice reply-(optional)</p> | <p>Stronly disagree</p> |
| <p>2.5.2 Those instruments appropriately address the issue of responsible sourcing in resource-rich, high-risk developing countries affected by conflicts. -single choice reply-(optional)</p> | <p>Somewhat agree</p> |
| <p>2.5.3 If in questions 2.5 / 2.5.1 / 2.5.2 you disagree and think there is scope for improving or complementing the existing instruments, how could this be achieved? -open reply-(optional)</p> <p>The UN Guiding Principles (UNGPs) are internationally agreed standards, normative in nature, providing an important framework but more specific guidance is needed to drive change in particular sectors or contexts. In addition to effective business implementation, state action on enforcement is necessary to fully implement the UNGPs. The OECD MNE Guidelines are equally general but the OECD Due Diligence Guidance begins to provide the detail needed although still lack the specificity required by some. These would be strengthened by: aligning an EU reporting requirement with US Dodd-Frank reporting requirements to avoid conflicting requirements, requiring due diligence and transparency throughout the supply chain based on the OECD Due Diligence Guidance, combined with a liability regime modelled on the EU Timber Regulation. Diverging from Dodd Frank risks confusing companies, dissipating important momentum; instead this suggested combined approach would reinforce international efforts.</p> | |
| <p>2.6 What practical lessons can we draw from existing supply chain due diligence schemes such as the OECD Due Diligence? What are the advantages and downsides for industry and producing countries? -open reply-(optional)</p> <p>Experience shows that integration in industry schemes and advice on what to do rather than on how to do it has made compliance easier for companies. The costs of implementation are not onerous, and monitoring and enforcement matter. Pushing for progressive improvement rather than absolute results has encouraged risk mitigation over disengagement. Industries gain from better risk management, supply chain knowledge, performance improvement, consumer confidence and opportunities for better relationships with</p> | |

local communities and stakeholders; disadvantages are primarily financial in the short term but offset by the longer term advantages. Producing countries can expect reduced access to and flow of resources to armed groups, potential improvement in conditions for miners, workers and local communities, increase in legal trade which brings in tax revenues and reduction in smuggling and corruption. Countries may experience a reduction in employment and income if investments move elsewhere.

2.7 What practical lessons can we draw from existing supply chain due diligence schemes adopted by third countries to promote mineral supply chain transparency (e.g. US Dodd - Frank Act section 1502)? What are the advantages and downsides for industry and producing countries? -open reply-(optional)

Assessing the impact of S.1502 is premature, but in 2011 the UN Group of Experts said that since the Act, “a higher proportion than before [of the 3Ts]...is not funding conflict.” Initial industry reluctance notwithstanding, companies are able to implement it and are doing so. The costs are not onerous over the long term and according to KPMG “savings could be immeasurable in the next 5-10 years.” Instead of defining the scope of the legislation by specific geography or actors (as in the Kimberley Process) it is better to use the OECD definition of “minerals production in association with conflict financing and gross human rights violations” (OECD Guidance, Annex II). The geographic location is an indicator of risk and triggers due diligence, but does not limit application; instead application is linked to the core issue: conflict finance. See 2.6 transparency in the supply chain resulting in more accurate data to make better decisions to manage risks and strengthen governance.

2.8 In some cases, mineral producing developing countries have introduced regulatory schemes to allow trade of minerals to be conducted in a socially responsible way. What is your assessment of such national or regional initiatives and regulatory schemes? -open reply-(optional)

The initiatives and regulatory schemes introduced in mineral producing countries are all positive steps towards addressing the conflict mineral trade. However, they are still relatively new and untested and some still require implementation. The 'note circulaire' of 6 Sept 2011, requiring all DRC mining and mineral trading companies to carry out due diligence in line with the OECD standards has resulted in two companies being suspended and the Presidential ban on military involvement in mining, along with the reorganisation of military units in the Kivus, did result in the demilitarisation of at least one mine. Implementation of the International Conference on the Great Lakes Region's Regional Certification Mechanism (ICGLR RCM) has not been as quick or effective as hoped. These initiatives need support to ensure continual monitoring and enforcement and to be supported by the surrounding countries as, according to the UN Group of Experts, border smuggling has already increased.

3. Need and scope of a possible EU initiative

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| 3.1 Is there a need for the EU to promote responsible sourcing of minerals through actions focused on transparency of the supply chain, in addition to what already exists in the policy landscape? -single choice reply-(compulsory) | Yes |
| 3.1.1 If so, what should be the geographical scope of such action? -multiple choices reply-(optional) | Global |
| 3.1.2 Which minerals should it cover? -multiple choices reply-(optional) | All minerals |
| 3.2 Should the scope of an EU initiative refer to specific end-products or downstream industry sectors? -single choice reply-(optional) | No |
| 3.3 Should an EU initiative target specific segments in the minerals' supply chain? -single choice reply-(optional) | Yes |
| 3.3.1 If yes, which segment(s) should be targeted? -multiple choices reply-(optional) | All segments |
| 3.4 Should an EU initiative include exemptions for Small and Medium-sized Enterprises | No |

(SMEs)? -single choice reply-(optional)

4. Continuation of activity, security of supply and other international actors

4.1 Should an EU initiative explore ways to support security of supply of the identified minerals for EU industry? -single choice reply-(optional)

Yes

4.2 Would an EU initiative reach the necessary critical mass to motivate other major economies (e.g. China, Brazil, Indonesia, and Malaysia) to engage in similar initiatives? -open reply-(optional)

Together with the Dodd-Frank provisions in the US, a large number of multi-national companies (and their suppliers) will be covered by either or both EU and US legislation, which will help level the playing field. With two large economies addressing the issue, there will be pressure on other major economies to show they are also contributing to solving the conflict. If the entire supply chain bears responsibility to ensure compliance, EU based end users and manufacturers will be required to impose the conditions on their non-EU based suppliers, spreading the effect and burden. The Malaysian Ministry of Foreign Affairs and the Ministry of Natural Resources and Environment have already expressed their support for the OECD Due Diligence Guidance and expect Malaysian companies to work toward compliance¹ and other countries, such as Canada are already discussing similar legislation.

4.3 To the extent that the response strategies of some businesses to the U.S. Dodd-Frank Act section 1502 provisions is to stop sourcing minerals in Central Africa, what could an EU initiative do to support both market access and due diligence concerns? -open reply-(optional)

It is not clear if businesses have actually stopped sourcing minerals from Central Africa because of the Dodd-Frank Act. Some have been successfully sourcing conflict free minerals and using that fact to present themselves to the market as ethical businesses. Ultimately companies will have little choice but to source from the region because of the lack of alternatives where minerals are as conveniently accessible, available and exploitable. At a regional level, the EU should continue to support capacity building and provide technical support to producing countries to enable them to create the necessary conditions for legal trade. This would re-engage the region, alongside extending positive incentives for companies that continue to source responsibly from Central Africa. In addition, recognising and or incorporating some of the due diligence schemes that companies and trade bodies are already using will help allay concerns of unnecessary burden.

5. Nature of the initiative

5.1 To ensure sufficient private sector participation, the implementation of an EU initiative on supply chain, due diligence should not only be voluntary but should include a degree of obligation on business operators. -single choice reply-(optional)

Strongly agree

5.2 How should a scheme be designed to make sure companies keep engaging and sourcing responsibly in conflict-affected and high-risk regions rather than simply move on to different regions to source their products? -open reply-(optional)

Legislation covering all conflict-affected and high-risk regions is important, to prevent companies from contributing to conflict finance elsewhere, out of the spotlight. The region will need support to ensure that monitoring and enforcement of existing regulations are effective and assistance to devise and implement new regulations. National or regional law enforcement and customs protocols need strengthening. It is also vital to help build capacity and provide training to foster confidence among sourcing companies that the mines or minerals being certified are in fact genuine. In addition, there could be a phase-in period before full compliance is required (as has happened in Dodd-Frank) along with the acceptance of risk mitigation allowing companies to continue purchasing, providing they put strategies in place that demonstrate improvement. Incentives for companies that continue to source responsibly should be considered alongside disincentives for those that do not comply.

6. Lessons learned from the EU Timber Regulation

6.1 The EU has some experience in promoting

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| <p>due diligence along the supply chain of the timber sector. Should the EU consider an initiative for minerals modelled on the 2010 Timber Regulation? -single choice reply-(optional)</p> | Somewhat disagree |
| <p>6.2 As is the case in the EU Timber Regulation, should an EU initiative promote responsible sourcing of minerals by requiring that the entity first placing a selected mineral (processed or not) on the EU market must provide evidence of due diligence thereby giving reasonable assurance that its supply chain is conflict-free? -single choice reply-(optional)</p> | No |
| <p>6.3 Should the EU initiative consider preventing the placing on the market of specific minerals/end products extracted and exported against the laws of producing countries? -single choice reply-(optional)</p> | Yes |
| <p>6.3.1 If yes, which laws of the mineral producing countries should be taken into account? Please be country-specific in your examples. -open reply-(optional)</p> | |
| <p>All minerals and end products that cannot be shown to be compliant with exporting and producing country laws should be prevented from entering the EU. Specific laws and regulations that should be adhered to include all mining laws of producing countries (eg The Congolese Code Minier (2002) and Reglement Minier (2003) etc) and the regulations from Rwanda, the DRC and surrounding countries that implement the ICGLR RCM to certify and manage the extraction, processing and trade in the 3Ts and gold.</p> | |
| <p>6.4 Are the laws of the mineral producing countries sufficiently developed and implemented? -single choice reply-(optional)</p> | Don't know |
| <p>6.4.1 If you have examples to back either opinion, please share. -open reply-(optional)</p> | |
| <p>Some countries have recently amended their laws to bring them in line with international standards but enforcement remains an issue, whereas others have to implement the necessary laws. While the Rwandan scheme states that all minerals entering Rwanda must be tagged and certified, corruption and smuggling means the trade of conflict minerals continues. In addition the scheme does not legally require conformance with the OECD due diligence guidelines in spite of the ICGLR RCM scheme. The DRC 'note circulaire' has resulted in two companies being suspended from trading but for this to be effective its continued monitoring and enforcement is vital. The Presidential ban was initially successful and the Bisie mine was demilitarised having been under the Congolese National Army (FARDC) control for over 5 years. However recent evidence suggests the mine has reverted to military control and a number of other mines are under the control of the DRC military or their proxies.</p> | |
| <p>7. Positive incentives to international corporations and businesses</p> | |
| <p>7.1 Should an EU initiative provide positive incentives to businesses to foster clean trade from conflict-affected and high-risk areas (i.e. not contributing to adverse impacts and conflicts)? -single choice reply-(optional)</p> | Yes |
| <p>7.1.1 What kind of incentives could be considered? -open reply-(optional)</p> | |
| <p>There are several ways the EU can provide positive incentives to businesses. These include: - Trade finance incentives, such as reinsurance and risk insurance and export credit; - Link company violations of the scheme to ineligibility for competing under public procurement; - Encourage stock markets to include such companies in sustainability indices, if appropriate; - Labelling of products that</p> | |

comply with standards to help consumers arrive at informed choices.

7.2 Business would benefit in terms of brand image and consumer recognition by complying with an EU initiative on responsible sourcing. -single choice reply-(optional) **Yes**

7.3 Can existing frameworks such as OECD Due Diligence Guidance or certification initiative by the International Conference on the Great Lakes Region be used to facilitate incentives considered by the EU? -single choice reply-(optional) **Yes**

7.4 Numerous private sector initiatives currently carried out allow to promote responsible sourcing from conflict-affected and high-risk areas. -single choice reply-(optional) **Somewhat agree**

7.5 How can governments complement private sector led initiatives? Are there examples of positive incentives provided by governments in non-EU jurisdictions? -open reply-(optional)

Governments can build on and integrate effective, functioning and tested private sector initiatives. A number of industries have harmonised standards and it would be helpful if the EU legislation ensured where possible that these initiatives were incorporated or at least referenced so that compliance with these would result in compliance with the legislation. Positive incentives have included the ability to bid for state backed projects, tax incentives, labelling products that comply with standards to help consumers arrive at informed choices, etc.

8. Economic and Competitiveness impacts

8.1 Would you expect any competitiveness impact (positive or negative) should the EU undertake a supply chain due diligence initiative on minerals originating from conflict-affected and high-risk areas? -single choice reply-(optional) **Yes**

8.1.1 If yes, what impact do you expect for the upstream industries? -open reply-(optional)

In the medium-longer term, after the scheme has been implemented properly, conditions at the mines are likely to improve, thereby making them more attractive to investors and international buyers. Increased monitoring will prevent illegal exploitation and help curtail corruption and improve local governance. Infrastructure will improve which will result in cheaper production costs.

8.1.2 If yes, what impact do you expect for the downstream industries? -open reply-(optional)

A study by Green Research found many companies expect compliance with the Dodd-Frank Act to have a “negligible to positive impact” on competition. Companies should move towards greater supply chain transparency, which will improve processes and systems over the long term and enhance competitiveness in the international market. The initiative will help harmonise EU and US regulatory standards enabling companies to consolidate and spread costs of implementing due diligence systems.

8.2 What would be the possible impact of non-action? -open reply-(optional)

The UN Group of Experts on the DRC stated to the SEC in 2011 that the Dodd-Frank Act “has had a massive and welcome impact” and that “requiring companies to exercise due diligence is effective.” Non-action would undermine these positive developments, “confuse all players in the market, unfairly and unwisely diminishing the efforts of those who are implementing due diligence, and playing into the hands of the cynical and those with other agendas who have thus far refused to implement due diligence in the hope that it will simply go away.” In addition, companies could face the risk of contributing to the conflict and as KPMG stated in 2012 “[c]ompanies that do not develop a rigorous conflict minerals compliance strategy may end up with a competitive disadvantage.”

8.3 In case a due diligence system will be proposed, what would be the expected impacts both in terms of administrative burdens and compliance cost (e.g. cost of collecting relevant information and cost of auditing). If you already apply due

diligence please provide exact information on your costs. -open reply-(optional)

While industry bodies have projected significant cost increases in implementing the provisions of the Dodd-Frank Act, other studies have shown that the cost of compliance is not as onerous as stated, and tends to decrease over time. A study by Green Research found that the more familiar companies were with the detail and requirements of the law, the more manageable they perceived the costs of compliance to be. And a Tulane University study found that 65% of the costs would be borne by suppliers with almost half of that being met by in-house personnel, the rest spent on outsourcing to 3rd parties such as auditors etc. The cost of compliance will vary depending on company size and supply chain, but overall the study found that companies considered the cost to be manageable across all sizes. In addition, the EU would be able to build on or incorporate the existing schemes and regulations that companies are already applying which will prevent unnecessary additional costs.

9. Environmental impacts

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| 9.1 Would you expect any environmental impact (positive or negative) should the EU undertake a supply chain due diligence initiative on minerals originating from conflict-affected and high-risk areas? -single choice reply-(optional) | Yes |
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9.1.1 If yes, what impact do you expect? -open reply-(optional)

Some of the existing initiatives¹ do make reference to environmental considerations however, most do not. Improvements in the monitoring and control of mine sites can result in closer attention to environmental controls, reducing the risk of environmental harm. In addition a better knowledge of their supply chains will enable those companies that have made environmental commitments regarding their activities to positively influence and or demand that their suppliers also adhere to these environmental standards.

9.2 What would be the possible impact of non-action? -open reply-(optional)

The mining industry is a high risk industry in terms of its environmental impact and open pit mining is the most environmentally taxing. Without regulation and permits there are no site visits, no expectations in regards to conforming to environmental laws and it is likely that the environmental situation will only get worse.

10. Social impacts

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| 10.1 Would you expect any social impact (positive or negative) should the EU undertake a supply chain due diligence initiative on minerals originating from conflict-affected and high-risk areas? -single choice reply-(optional) | Yes |
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10.1.1 If yes, what impact do you expect? -open reply-(optional)

Communities in mining areas in the DRC typically survive on around \$1 a day; less than half that of comparable communities living outside these areas. This initiative has potential to reduce smuggling, improved working conditions for miners, and may reduce extortion and human rights abuses committed against them. Security in the region is already improving and if invested properly, the resources generated can improve infrastructure, reduce poverty, isolation and other social improvements.

10.2 What would be the possible impact of non-action? -open reply-(optional)

In the Kivus and Maniema, there has been no direct contribution by the mining sector to development over the last 5 years, whereas in Katanga, the implementation of due diligence is largely positive and has given a modest impetus to local development. The security situation in the region remains extremely unstable. If the trade is not better controlled and monitored, the situation on the ground will inevitably deteriorate. As Martin Kabwelulu, DRC's Minister of Mines said "The traditional mining industry neither benefits the Congolese state, nor the provinces, nor the merchants... [r]ather, this exploitation just benefits some mafia groups." And as Maxwell Mwale, Zambia's mines minister has noted, "[i]llegal mining is one of the root causes that drive conflict and weakens governments in the region."

11. Other issues

11.1 If there are any other issues that are not mentioned in this questionnaire that you would like to address, please use the space below to set them out. -open reply-(optional)

This initiative and supporting legislation will be an additional important step in demonstrating the EU's "vision for the future of business and human rights: where respecting human rights is understood as being an intrinsic part of business excellence".¹ It complements recent proposed EU legislation on country-by-country reporting and corporate disclosure that seek to ensure that business is done in a transparent manner – providing flexibility to business to meet objectives while securing important objectives of reducing conflicting, improving human rights and enhancing transparency.