Conflict Minerals


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1. Introduction

1.1 A Brief Background on the Concept of Conflict Minerals

Conflict minerals are minerals mined in conditions of human rights abuses or violations, and consist of columbite-tantaline (coltan), cassiterite (tin), wolframite (tungsten) and gold, often referred to as the 3TG minerals.\(^1\)

These minerals are incorporated into most of today’s technical products\(^2\), such as cell phones, batteries, connectors and laptops, why the demand for the minerals is extremely high.

These minerals often originate in less developed, unstable regions, such as the Democratic Republic of Congo (Congo) – a country rich on natural resources. Many times, access to natural resources constitutes the main export for conflict-affected countries and helps stimulate growth and development. Unfortunately, the trade in minerals and natural resources also has a downside. It is generally known that armed groups in Congo control a major part of the mining industry, particularly in the eastern parts of Congo – e.g. the Kivu Provinces.\(^3\) The trade in conflict minerals helps support human rights abuses, with the revenue financing the activities of armed groups.\(^4\) Indirectly, the Western consumption of electronics plays a role in financing the prolonging of conflicts and human rights abuses. Based on the identified relationship between Western consumption and illegal exploitation of natural resources, Western businesses have been given a key role in breaking the linkage between the two.

A number of initiatives have been taken in order to address the problems of conflict minerals. Initiatives and regulations on conflict minerals are meant to restrict the number of transactions through which human rights violations


\(^2\) Karel De Gucht, IPC, “Re: Public consultation on a Possible EU Initiative on Responsible Sourcing of Minerals Originating from Conflict-Affected and High-Risk Areas”, p. 1, and, the Economic Commission for Africa, p. 7.

\(^3\) See 2.1.2.

\(^4\) See 2.1.3.
are directly or indirectly financially supported through mineral trade. Due to the Western consumption of electronics and conflict minerals, Western businesses have been given a key role in breaking the link between illegal exploitation of natural resources and human rights abuses. By imposing obligations with regard to conflict minerals on businesses, one hope to stem the financing of armed groups and their capacity to conduct war and violate human rights and, as a result, help promote peace and stability.

On the 20th of May 2015 the European Parliament voted, by amending the European Commission’s proposal on a ‘voluntary self-certification scheme on the use of conflict minerals for European businesses’\(^5\), in favour of a regulation imposing mandatory supply chain due diligence on all businesses using conflict minerals in their products.\(^6\) A couple of weeks later, on 14th of July 2015, institutional negotiations were initiated. However, the final version is yet being decided upon.\(^7\) In the European Council’s programme for the period of the 1st of January to the 30th of June 2016, the regulation on conflict minerals is referred to as one out of three issues that will dominate the agenda related to trade. For the purpose of this thesis, unless the context otherwise requires, all references made to ‘the EU proposal’, the ‘proposed regulation’ etc. shall mean the European Parliament’s amendment of the Commissions’ proposal on a voluntary self-certification scheme on conflict minerals.

1.2 Purpose, Limitations and Method

1.2.1 Purpose and Limitations

The purpose with this thesis is to critically assess the European Parliament’s proposal on a mandatory regulation on conflict minerals. I will focus on the

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\(^5\) 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, tungsten, their ores, and gold originating in conflict-affected and high-risk areas, 5th of Mars 2014.


proposed regulation’s likely effect on European businesses and what practical challenges may be imbedded in its provisions. In addition, I will review how such effect and challenges may impact the realisation of the intended purpose of the proposed regulation; to break the nexus between conflict and illegal exploitation of minerals and to promote peace, development and stability.

In order to understand the scope and the likely effects of the EU Proposal, it needs to be compared to and interpreted in the light of current regulation on conflict minerals as well as expressed criticism towards the same. In my comparison, I focus on section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (The Dodd-Frank Act), currently being the only legislative framework targeting trade in conflict minerals. As such, the Dodd-Frank Act has been an important source of influence in preparing the EU proposal. Also other schemes and frameworks on conflict minerals are important for the purpose of this thesis. However, as these are of voluntary nature or otherwise limited in their scope, they will serve only as a background to the content of this paper.

Before going into the details of these schemes, and in order to fully understand the intention, characteristics and effects of these schemes, I will outline the multi-layered complexity in regulating trade in conflict minerals, by using Congo as an example. I will present the historic and current situation of Congo and briefly explain the complex nature of what seems like an almost everlasting conflict. I will continue with identifying the relationship between access to natural resources and conflicts, in general as well as Congo specific, and assess what role the mining industry actually plays in causing or fuelling the conflict of Congo. I have chosen to focus on Congo as it is one of few countries\(^8\), so far, ever being subject to legislation regulating due diligence with regard to conflict minerals. Due to the attention paid to Congo’s mining industry, prior to and after the enactment of the Dodd-Frank Act, the information is rich and represents a wide range of

\(^8\) Together with its adjoining countries.
authors taking on different perspectives. However, I want to stress that illegal exploitation of natural resources is evident elsewhere as well – but left outside the scope of this thesis.

When discussing the Dodd-Frank Act and its received criticism, I will not take into account whether or not the US Security and Exchange Committee has overstepped its authority introducing rules with such strong connection to humanitarian law⁹, as this does not affect the content of the Dodd-Frank Act or its relevance for the purpose of this thesis.

1.2.2 Method

When conducting my research I have used a dogmatic method, which means that I have read and analysed both legislation and relevant doctrine within the area.¹⁰ In addition to traditional articles – i.e. research conducted by independent authors – and public investigations, the doctrine includes research conducted in the name of institutions. Public or private, institutions rely on financial support to exist, support often given by other private or public institutions or organisations. Research institutions may have hidden or even public agendas that may affect the outcome of their research – i.a. depending on their financiers and mission statements. Thus, attention must be paid to the independence of used sources.

As I have evaluated the European proposal in the light of existing legislation in the US and received criticism of the same, the study also contains some comparative elements. The comparative character of this thesis comes with challenges and calls for caution when drawing conclusions, as such conclusions rely on understanding another jurisdiction, an understanding I may not master to its full extent. Therefor, I have limited myself to mainly focus on the background of the US legislation, which rather relies on understanding of facts, and the purpose with the legislation, which is highly

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⁹ For information on this matter, see i.a. Marcia Narine, "From Kansas to the Congo: When Naming and Shaming Corporations through the Dodd–Frank Act’s Corporate Governance Disclosure Won’t Solve a Human Rights Crisis”.

connected to the background on the same, as well as the expressed criticism towards it. Relying on comparative elements, I believe myself and the reader of this paper will gain a deeper and more accurate understanding of the issues and challenges imbedded in the trade with conflict minerals and regulations on the same.

My research further relies on interviews held with representatives of affected businesses. I have chosen to interview businesses located at different levels of the supply chain, indirectly respectively directly affected by the Dodd-Frank Act, in order to gain inputs from varying perspectives. The businesses I have interviewed are: Husqvarna AB\textsuperscript{11} (Husqvarna), Telefonaktiebolaget LM Ericsson\textsuperscript{12} (Ericsson) and Boliden Group AB\textsuperscript{13} (Boliden). As per interview subjects’ requests, the full content of the interviews is not enclosed to this paper.

The interviews will not lay ground for any sort of statistic research, but ought to contribute to a wider understanding of the topic by offering practical perspectives on mandatory conflict minerals due diligence, practices used as well as challenges identified with regard to extensive due diligence schemes. Opinions held by interviewed business representatives will be referred to continuously along the presentation of this paper, and will be at special focus when evaluating the proposal in the light of its effect on European businesses.

1.3 Disposition
In order to understand the intentions of and the background to the proposed EU Regulation on conflict minerals due diligence, I will begin with giving a short background on the topic (2). By using Congo as an example, I will describe the mining industry of conflict-affected and high-risk areas and how the extraction of natural resources may be linked to conflict (2.1).

\textsuperscript{11} Jonas Willaredt, President of Sustainability Affairs at Husqvarna Groups, and Krister-Hansson Dahl, Chemical Regulatory Specialist at Husqvarna Groups.

\textsuperscript{12} Jenny Sandahl, Environmental Product Manager at Ericsson.

\textsuperscript{13} Anna Gejke, Environment, Safety and Quality Manager at Boliden.
In order to gain contextual knowledge also with regard to existing schemes and measures taken on the matter of conflict minerals, I will shortly present the main initiatives and schemes currently available within the field (2.2).

Having the background on the concept of conflict minerals, the conditions in which they are sourced, the relation between resource extraction and conflict and the linkage to the western consumption of electronics, I will analyse the role of todays’ businesses with regard to responsible business making in general, and the central role they have been given with regard to conflict minerals in particular (2.3).

Given the Dodd-Frank Act is the only legislative framework currently available on the matter of conflict minerals it is an important influence to the EU proposal. Thus, in order to lay ground for a comprehensive understanding of the intentions, provisions and the likely effects of the proposed EU Regulation, I will present the Dodd-Frank Act’s provisions on conflict minerals and the unintentional consequences thereof (3).

After submitting the Dodd-Frank Act and the grounds for the received criticism towards it, I will continue with presenting the background to and the provisions of the European proposal in detail (4).

Having the facts on both the background to and the relevant provisions of the proposed EU Regulation, I will analyse the likely effects of the proposal (5). In the light of the purpose of this thesis, my analytical focal point will be on the proposal’s likely impact on European businesses. I will evaluate what obligations and expectations are put on businesses through the proposed Regulation together with what practical challenges have been identified by businesses and industry organisations (5.2). I will continue with assessing how these challenges may hinder a full realisation of the intended purpose of the proposed regulation (5.3).

I will conclude with summarising my findings all together and, in the light of the purpose of this thesis, answer to whether or not I believe the proposed
regulation will meet its intended purpose (6).

2. Background

2.1 Conflicts and Access to Natural Resources

2.1.1 The Congolese Conflict

The conflict in Congo has been divided into two major wars, referred to as the First and the Second Congo War. However, even if divided into to major wars, the conflict in Congo has been going on for a long time. Some authors mean it goes as long back as to the colonial time, with the restructuring of population and land, even though the main root of conflict may have varied through time.

The First Congo War lasted from 1996-1997 and was mainly driven by the desire for political change and the end of a 32-year-long dictatorship.\textsuperscript{14} Even though the First Congo War was of internal character, the leading rebel group ‘Alliance des forces démocratiques pour la liberation du Congo-Zaire’ (AFDL) was backed by Rwanda and Uganda to take down the dictator regime, something that paid way for further and deeper regional tensions. Also the Rwandan genocide in 1994, forcing an estimated number of 1 million refugees to flee into the Eastern parts of Congo, caused regional instability.\textsuperscript{15} Thus, even if officially internal, the First Congo War was influenced and trigged by both internal and external factors.

The Second Congo War started in 1998, just more than a year after the end of the First Congo War, and officially ended in 2003. Even if the main actors, Rwanda and Congo, were equally responsible for the build-up of and contribution to the Second Congo War, the start shot for the Second Congo War is referred to as the Rwandan backed march to take down previously supported president Laurent Kabila.\textsuperscript{16} At its peak, the Second Congo War involved as many as seven nations. The Second Congo War is often referred

\textsuperscript{15} The Öko-Institut, p. 16.
\textsuperscript{16} Stearns, Rift Valley Institute – Usalama Project, “North Kivu: The Background to Conflict in North Kivu Province of Eastern Congo”, p. 32.
to as the “Great War of Africa” or the “African World War”, which somewhat states the seriousness and wide spread of its consequences. A report conducted by the International Rescue Committee suggests that approximately 3.9 million people lost their lives between 1998-2004, making the Second Congo War the deadliest conflict since the World War Two.\footnote{The International Rescue Committee, “Mortality in the Democratic Republic of Congo: An Ongoing Crisis”, p. 1.}

To conclude, both wars arose from a mix of reasons, with the most evident driving factors being ethnicity, revenge and power related issues in combination with the lack of an effective and stable government. Even though the Second Congo War lasted longer, was much more serious in its range, had more widespread consequences and a much deadlier outcome than the First Congo War, I conclude the underlying tensions were of similar nature. As a general summary of the characteristics of the First and Second Congo War, the following can be said. The tensions between different groups, generally indigenous and foreign populations, worsened with a government repeatedly favouring some groups over others.\footnote{One example being the sometimes extreme restrictiveness in allowing for Congolese Citizenship – with the most aggressive legislation being the one of 1972, which claimed only those settled in Congo before 1885 were to gain Congolese citizenship. See Stearns, Rift Valley Institute – Usalama Project, “North Kivu: The Background to Conflict in North Kivu Province of Eastern Congo”, p. 23.} Together with declining or sometimes even lacking governmental control over eastern Congo, these tensions have had the opportunity to escalate into intense conflicts and wars. With an unstable Rwanda as neighbouring country, generating floods of refugees migrating to an already labile Eastern Congo, tensions among different groups and communities intensified even more. These sociological changes, together with the colonial restructures of land and population taking place throughout the 19\textsuperscript{th} and 20\textsuperscript{th} centuries, have laid ground for the political, ethnical and social instability we are experiencing still today.
2.1.2 Congo and the Mining Industry Today

Since the end of the Second Congo War, Congo has experienced many changes, including the national elections of 2006 and 2011, attempts to reform and control the mining sector, as will be discussed further below, as well as a decline in violence in many parts of the country. Nevertheless, fighting has continued and is still evident in North- and South-Kivu, where many mines are yet controlled by armed groups.\(^{19}\) Illegal and highly corrupt systems have made it possible for government officials and army commanders to control the mineral trade and take sizeable cuts from the revenues, while artisanal miners work by hand with pick-axes and shovels.\(^{20}\)

2.1.3 The Relation between Natural Resources and Conflict

There have been several attempts to calm the situation in Congo over the last decades. International Criminal Court procedures have been carried out and a peace agreement has been signed by all parties, but still, the violence is prominent.\(^{21}\) In attempts to improve the situation for the Congolese civilians, many private and non-governmental measures have been initiated with the goal to stabilise the situation. Such initiatives are often, but not exclusively, related to the trade in conflict minerals, as the trade is said to help financing the activities of armed groups.\(^{22}\) Even though the roots of the Congolese conflict are manifold, the illegal extraction of and trade in minerals is regularly documented and referred to as a key economic driver in its prolonging. By cutting the links of funding, one hope to improve the situation for civilians and the conditions in which minors operate. However, in order to estimate the effects and possible success of such initiatives, the relation between access to natural resources and conflict must be further defined.

The German Öko-Institut, a leading European research and consultancy institute working for a sustainable future globally, nationally and locally, has

\(^{19}\) Fidel Bafilemba and Sasha Lezhnev, The Enough Project, "Congo’s Conflict Gold Rush – Bringing Gold into the legal trade in the Democratic Republic of Congo”, p. 2.
\(^{21}\) The Öko-Institut, p. 17-18.
\(^{22}\) Chatham House, p. 6, and, The Öko-Institut, p. 35.
done an impressing job aggregating the debate on the relation between access to natural resources and conflicts.\textsuperscript{23} In its study, the institute concludes access to natural resources do not, generally, cause conflicts.\textsuperscript{24} As the global trade association, connecting electronics industries, IPC puts it, there are many areas equally rich in resources as Congo that are not plagued by conflict.\textsuperscript{25} The vast majority of authors believe the main effect of access to natural resources is the ability to prolong conflicts by financing the activity of armed troupes, which in itself is a result of a weak and unable state, and that access to natural resources do no, generally cause conflict. However, if it would, then it is more likely to constitute one, out of many, underlying factors causing a conflict.\textsuperscript{26}

By using the Congolese Conflict as an example, and explaining the link between extraction of natural resources and conflict in general, I hope to have shown the relation between the two is often more complex than it first seems. Depending on the history and characteristics of a conflict, the mining industry may constitute only one, if any, out of many ingredients in either causing or fuelling a conflict.

2.2 Existing Schemes and Frameworks

The European Proposal on mandatory due diligence for companies using conflict minerals in their products stems from earlier initiatives taken and schemes established within the area. Therefor, before going into detail of the European Proposal, I will begin by giving an introduction to and background on the concept of conflict minerals and existing schemes.

The concept of conflict minerals is a relatively new phenomenon. Even though the UN Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo published a report stating the links between the on-going conflict and

\textsuperscript{23} For more information on their operations, see their webpage at http://www.oeko.de/en/.
\textsuperscript{24} The Öko-Institut, p. 13.
\textsuperscript{25} IPC, p. 4.
\textsuperscript{26} The Öko-Institut, p. 12.
illegal minerals extraction already in 2002\textsuperscript{27}, the issue has not been subject to public discussion until recently. In April 2009, the Enough Project\textsuperscript{28} released its “Can You Hear Congo Now? Cell Phones, conflict minerals, and the Worst Sexual Violence in the World” in which the founder of Enough Project, John Prendergast, linked the western consumption of electronics to sexual and other forms of violence in the eastern Congo.\textsuperscript{29} Today, and in the last 6 or 7 years, the issue of conflict minerals has generated a number of initiatives around the world, of binding as well as guiding nature.

In 2012, UN adopted ‘Due diligence guidelines for the responsible supply chain of minerals from red flag locations to mitigate the risk of providing direct or indirect support for conflict in the eastern part of the Democratic Republic of the Congo’\textsuperscript{30} (the UN Guidelines). The UN Guidelines focuses on a five-step process, consisting of the following steps: i) strengthening company management systems, ii) identifying and assessing risks in supply chains, iii) designing and implementing a strategy to respond to identified risks, iv) ensuring independent third-party audits and lastly v) publicly disclosing supply-chain due diligence and findings. In its legally binding resolution 1952 (2010), the UN Security Council called for all States to endorse these principles and to urge importers within the relevant field to apply and comply with the UN Guidelines.\textsuperscript{31} Even though the UN Guidelines are of guiding character, they have some sort of legal effect for those falling under its discretion, as the UN Sanction Committee posses the power to impose targeted sanctions against companies not exercising due

\textsuperscript{27} Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, addressed to the UN Security Council in October 2002. See para 175 for the linkage between conflict and illegal exploitation of natural resources.

\textsuperscript{28} The Enough Project was founded in 2006 and aims to build leverage for peace and justice in Africa, focusing i.a. on the illegal extraction and trafficking on minerals. The project conducts field research in conflict zones, develops and advocates for policy recommendations, supports social movements in affected countries and mobilise public campaigns. For more information on their activities, see their website: \url{http://www.enoughproject.org}.


\textsuperscript{31} Resolution 1952 (2010) on the Democratic Republic of the Congo, adopted by the Security Council at its 6432\textsuperscript{nd} meeting, on 29 of November 2012, para 8.
diligence in accordance with the UN Guidelines.

Also the OECD has issued Guidelines\textsuperscript{32} on due diligence (the OECD Guidelines), adopted in 2010, with regard to conflict minerals. The OECD Guidelines are based on the same five-steps process as presented by the UN. However, in contrast to the UN Guidelines, the OECD Guidelines are of purely voluntary nature and are not limited to minerals originating from the Congo but apply to all global conflict and high-risk areas. Although voluntary, the OECD Guidelines constitute substantial guidance for businesses on the matter of responsible sourcing and due diligence practices and are widely referred to among legislators all over the world, including the European Parliament.\textsuperscript{33} As such, the OECD Guidelines may provide useful information on specific matters. Thus, I will refer to them whenever contextually required.

Furthermore, the International Conference on the Great Lake Region (ICGLR), comprising twelve African states\textsuperscript{34}, has taken measures against the illegal exploitation of natural resources as part of their work towards peace, security, stability and development.\textsuperscript{35} In 2006 ICGLR adopted the Protocol on Fight Against the Illegal Exploitation of Natural Resources\textsuperscript{36}, which requires all member states to cooperate in the fight and to protect human rights, criminalize both the illegal exploitation of natural resources as well as the laundering of the proceeds of illegal resource exploitation. Furthermore, the protocol established the need for a certification mechanism in combination with a tracking scheme for natural resources from the Region.


\textsuperscript{33} Chatham House, p. 18.

\textsuperscript{34} Angola, Burundi, Central African Republic, Republic of Congo, Congo, Kenya, Uganda, Rwanda, Sudan, South Sudan, Tanzania and Zambia.

\textsuperscript{35} Chatham House, p. 25.

\textsuperscript{36} As the protocol is signed by regional parties, its character and provisions differs from other international initiatives and schemes on Conflict Minerals as it impose obligations on both states and third-parties (businesses) and addresses issues such as “permanent sovereignty over natural resources” and other regionally important features with focus on regional stability.
which was adopted in 2011.\textsuperscript{37}

Apart from voluntary schemes and the ICGLR protocol, there has been progress also within the legislative area. The first legislative initiative on conflict minerals ever to be taken was carried out by the US Government in 2010. The rules are incorporated in the Dodd-Frank Act, section 1502, and lay ground for mandatory due diligence and disclosure obligations for American listed companies. A couple of years later, EU initiated an investigation on a possible regulation on conflict minerals in the path of the Dodd-Frank Act, and today, years later, the European Parliament has voted in favour of an extensive and mandatory due diligence scheme on conflict minerals for all affected European businesses.

2.3 The Role of Today’s Businesses

Through the documented linkage between Western consumption of electronics and the financing and prolonging of conflict and human rights abuses in countries such as Congo, Western Businesses have been identified as key actors – given their central role and purchase power. By regulating the trade in conflict minerals and imposing obligations on the companies involved, one hope to stimulate businesses to conduct responsible sourcing and make public their “Conflict Mineral Footprint”\textsuperscript{38}.

Historically, and commonly, a business’ main purpose is referred to as shareholder value maximization, incorporated into corporate law worldwide.\textsuperscript{39} Over the last decades, however, what role businesses ought to play in society has been widely debated and somewhat questioned.\textsuperscript{40}

\textsuperscript{37} The ICGLR Mineral Tracking and Certification Scheme as well as the practical guide the ICGLR Certification Manual, see \url{http://www.oecd.org/investment/mne/49111368.pdf}.

\textsuperscript{38} My expression.

\textsuperscript{39} I.a. (Swe) Aktiebolagslagen 3:3 (profit maximisation as business purpose may be changed in accordance with the provisions in 3:3).

seems the focus has shifted from an isolated, one-dimensional point of view towards a wider perspective in which social and environmental aspects are included as well, often referred to as Corporate Social Responsibility (CSR).\(^{41}\) Even if companies are still profit-driven legal entities, the concept of shareholder value is changing.

The group to which a corporation owns duties has extended into one of more divergent interests and of more complex nature. Today, companies’ stakeholders do not only consist of shareowners, but includes employees, creditors, consumers, suppliers and society at large.\(^{42}\) In its Annual Report from 2014, Boliden states its commitment to have in mind interests of a larger group than just the shareowners when doing business, such as the interest of local communities in which Boliden operates as well as the environment and society at large.\(^{43}\)

In my opinion, the development of businesses’ responsibilities reflects a number of parameters. First of all, after the economic crisis of 2008/09, boards and directors are required to run businesses transparently and with greater accountability.\(^{44}\) States, investors and costumers call for long-term investments and responsible business making in order to stabilize the economy, nationally, regionally and internationally, and to better balance

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\(^{43}\) Boliden, Annual Report 2014, p. 3 and 24.

\(^{44}\) The American due diligence obligations with regard to the origin of conflict minerals were released and finalised under SEC, whose primary mission is to "protect investors, maintain fair, orderly and efficient markets, and facilitate capital formation", as expressed on its official webpage, available at: [http://www.sec.gov/about/whatwedo.shtml](http://www.sec.gov/about/whatwedo.shtml). Also the UK Bribery Act, enacted in 2010, and the incorporation of section 172 in the UK Company Act 2006 can be referred to as an increased focus on transparent business practices. For more information on this, see e.g. Richard Williams, “Enlightened Shareholder Value in UK Company Law” (2012) 35 University of New South Wales Law Journal 360-377, and, Richard Murphy, “Companies do not have a duty to maximise their profit or to avoid tax”, (2011), Tax Research UK, available at: [http://www.taxresearch.org.uk/Blog/2011/10/24/companies-do-not-have-a-duty-to-maximise-their-profits-or-to-avoid-tax/](http://www.taxresearch.org.uk/Blog/2011/10/24/companies-do-not-have-a-duty-to-maximise-their-profits-or-to-avoid-tax/).
and integrate social and environmental values in the every-day business. Claude Fussler, Special Advisor at the UN Global Compact, means society’s recognition of businesses’ vital role in economic development has put management qualities such as transparency and accountability on the forefront.\textsuperscript{45} As consumers become more and more aware of corporation’s footprints, responsible business-making forms part of companies’ competitiveness – the better reputation, the higher market share.\textsuperscript{46} Tim Mohin, Director of Corporate Responsibility at Advanced Micro Devices, refers to a company’s brand – i.e. a company’s reputation – as the generally highest ranked intangible asset in companies’ balance sheets.\textsuperscript{47} Fussler links CSR-practices to ‘management excellence and responsibility’ and means ‘responsible excellence’ reflects credibility and indicates future return, which in turn will attract business investors.\textsuperscript{48} Fussler further states a business should be ranked in the light of expected excess returns compared to other investment options, and holds excess returns depend on the “competitive advantage of the company and, particularly, the sustainability of its competitive advantage over time”.\textsuperscript{49}

To my understanding, there is an increased “market” for business responsibility, a demand that naturally expands the scope of stakeholder value to include parameters of wider range. Even if maximization of shareholder value still remains the main purpose of businesses, it boils down to when a business decision, direction or event should be profitable and generate shareholder value.\textsuperscript{50} Business decisions taking e.g. environmental responsibility into account may be as profitable – or even more profitable given the increasing awareness among consumers and the risk-prevention nature of such decisions – as business decisions made regardless of their environmental impact. However, the profit may come years later, as such decisions are based on long-term parameters, than would have been the case

\textsuperscript{45} Claude Fussler, “Responsible Excellence Pays!”, p. 43.
\textsuperscript{47} Ibid.
\textsuperscript{48} Claude Fussler, p. 38.
\textsuperscript{49} Claude Fussler, p. 42.
with decisions made on short-term basis. H&M’s chairman, Stefan Person, has embraced this wider perception of shareholder value, and holds the business should be profitable in 30 years. Also Boliden uses a long-term approach in their way of doing business. In my opinion, these practices go hand in hand with Tim Mohin’s profit model of “regulation, reputation and reward”.

However, one can wonder exact how much burden can – effectively – be put on companies and where the line is to be drawn. Some may argue European businesses face a huge – disproportionate – burden through the proposed EU Regulation, and that it is not, primarily, the private sector’s responsibility to improve the living conditions in countries such as Congo. At the same time, one can argue businesses always carry the ultimate responsibility for what products they place on the market and, therefor, should be obliged to account for what is contained in those products and from what conditions they originate.

Having the background on conflict minerals, the relationship between conflict and illegal exploitation of natural resources, what role businesses ought to play in today’s society and what initiatives have been taken within the area, I will now present the Dodd-Frank Act’s rules on conflict minerals and the unintended side-effects thereof.

3. The Dodd-Frank Act

3.1 Introduction

The Dodd-Frank Act was signed in 2010 by US President Barack Obama, as a response to the economic crises of 2008/2009. As stated in the preamble, the act aims at promoting “the financial stability of the United States by

51 Dagens Industri Weekend, ”Modegigant utan slipstvang”, under section ”Besjälad av hållbarhetsfrågan”, available at http://weekend.di.se/reportage/modegigant-utan-slipstvang.
52 Boliden, Annual Report 2014, p. 3.
54 Marcia Narine, ”From Kansas to the Congo: When Naming and Shaming Corporations through the Dodd–Frank Act’s Corporate Governance Disclosure Won’t Solve a Human Rights Crisis”, p. 387.
improving accountability and transparency in the financial system, to end “too big to fail”, to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes”.\textsuperscript{55} The rules on conflict minerals are further given meaning through the explanatory rules released by the US Security and Exchange Commission (SEC). The provisions became effective on the 1st of January 2013, with businesses’ first due diligence report being due on the 31th of May 2014.\textsuperscript{56}

The rules on resources and mining related issues are found in Title XV, which includes section 1502 on conflict minerals due diligence.\textsuperscript{57} In the light of the purpose of and the historic events leading up to the establishment of the Dodd-Frank Act, most sections of it deal with issues around financial stability. The rules addressing resources and mining related issues are somewhat linked to financial stability as well, as they encourage and demand transparency and traceability, but can also be said to have a wider purpose as they touch upon human rights related issues and the end of conflict.\textsuperscript{58}

As addressed earlier, the purpose with conflict minerals legislation and other such initiatives is to stop direct or indirect financing of armed activities and human rights abuses. This purpose is built upon the documented relationship between trade in conflict minerals, the activities of armed groups and human rights abuses. In the introduction of section 1502, the Congress states it is its sense that “the exploitation and trade of conflict minerals originating in the Democratic Republic of the Congo is helping to finance conflict characterized by extreme levels of violence in the eastern Democratic Republic of the Congo, particularly sexual- and gender-based violence, and contributing to an emergency humanitarian situation therein”.\textsuperscript{59} Note that the Congress does not explicitly say that the trade with conflict minerals

\textsuperscript{55} Preamble of the Dodd-Frank Act, p. 1.
\textsuperscript{56} SEC’s final rule (17 CFR PARTS 240 and 249b), p. 2.
\textsuperscript{57} The other mining related provisions are included in section 1503 on Reporting requirements regarding coal or other mine safety and section 1504 on Disclosure of payments by resource extraction issuers.
\textsuperscript{58} Marcia Narine, p. 391.
\textsuperscript{59} The Dodd-Frank Act, section 1502 (a).
originating from Congo is a cause of conflict, but that it helps financing it and contributes to an emergence humanitarian situation therein. Even so, it has been debated whether or not the US Government got it wrong, referring to the trade with conflict minerals as a cause of conflict (as will be further discussed in 3.3).

3.2 Section 1502; Disclosure Requirements

Section 1502 requires businesses listed under SEC to annually disclose whether any conflict mineral necessary to the functionality or the production of the products of the company originated from Congo or an adjoining country (1.A). This means that the company must disclose also in the case that such mineral does not originate from Congo. In its Explanatory rules, SEC refers to the reasonable country of origin.60 When determining the reasonable country of origin, the company must conduct a “reasonable country of origin inquiry” in good faith.61 However, the Explanatory rules do not give away what constitute such inquiry, as SEC believes a “performance standard” rather than a “design standard” will allow for flexibility and lower compliance costs which should benefit the companies.62 If a conflict mineral does, reasonably, originate from Congo, the company is required to provide a report identifying what measures have been taken to carry out due diligence on the source and chain of custody of the relevant mineral. Such measures must include an independent private sector audit (1.A.i). According to the Congress, such independent audit constitutes a critical component of due diligence (B). Furthermore, the report must include a description of the products manufactured or contracted to be manufactured containing conflict minerals originating from DRC or adjoining country, specifying the country of origin and the efforts taken to determine the mine or location of origin with the greatest possible specificity (1.A.ii). Such information must also be available for the public on the companies’ webpages.

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60 SEC’s final rule, p. 269.
61 Ibid.
62 SEC’s final rule, p. 269-272.
It is not totally clear to what extent a retailor is required to report under section 1502, as a retailor who is only buying and reselling products do not have a say with regard to what minerals are incorporated into the products and do not have insight in the process and measures taken with regard to responsible sourcing. A retailor is not required to report simply because it is buying and reselling products, however, if the retailor can be considered as “contractor of manufacturing”, it is obligated under the section in accordance with (1.A.ii). In its final rule, SEC holds that “contractor of manufacturing” must be determined in the light of individual circumstances and facts and that there will be no common definition of the meaning.\(^{63}\) Due to the wide variety of affected industries, defining “contractor of manufacturing” would be very complicated, in fact, so complicated it would be unworkable.\(^{64}\) However, as general guidance, SEC states whether a retailor is to be considered as contractor depends on what impact it has on the manufacturer, especially with regard to materials, parts, ingredients, or components included in the product or examples thereof.\(^{65}\) Furthermore, in order for an issuer to be considered contractor of manufacturing it must exercise some degree of control or influence over the manufacturing process.\(^{66}\) However, such influence or control must not be “substantial”, as such standard would significantly limit the coverage of the conflict minerals provision.\(^{67}\)

According to PwC\(^{68}\), there is no specific point to which the retailer goes from being “only retailor” to manufacturer. Instead, there is a sliding scale of impact, going from having “none” to having “significant” impact.\(^{69}\) However, it is yet not clear where the line is to be drawn between retailor – i.e. contractor – with reporting obligations and a retailor with such limited impact that no obligations apply. In my opinion, the most likely situation in

\(^{63}\) SEC’s final rule, p. 62 and 65.
\(^{64}\) SEC’s final rule, p. 62.
\(^{65}\) SEC’s final rule, p 281.
\(^{66}\) SEC’s final rule, p. 64.
\(^{66}\) SEC’s final rule, p. 65-66.
\(^{67}\) PwC is a major global consultancy and revision agency, focusing on audits and assurance, tax and consulting services for businesses worldwide. For more information on their business, see their webpage at: [http://www.pwc.com/us/en.html](http://www.pwc.com/us/en.html).
which a retailer is obliged to report would be when the manufacturer can be seen only as a third party finalizing the wishes of a private label brand.

Also the meaning of “necessary to the functionality” of a product is rather unclear. As the National Retail Federation (NRF) states, the phrase limits the scope of the law and indicates “Congress did not intend that all subject minerals should fall within the scope of the statute”.70 NRF further states that a mineral should only be considered necessary to the functionality of a product if it is a) intentionally added to the product, and b) is essential to the basic function, use or purpose of the product. Another suggestion, made by at least one panelist, is to require the mineral or metal produced from such mineral to be specifically mentioned in a contract or purchase order. NRF means such definition would exclude products that unintentionally or naturally include covered minerals.71 In its final rule, SEC stresses there will not be a legal definition of what constitutes “necessary to the functionality”, however, SEC will provide guidance for issuer’s to use when determining whether or not their products are covered by the provisions.72 SEC continues with stressing whether or not an issuer is obliged under the conflict minerals provisions depend on individual facts and circumstances and must be determined on a case-by-case basis.73 In line with the NRF’s suggestion, SEC holds an issuer should consider a) whether or not a conflict minerals is added intentionally to a product or is considered a naturally-occurring by-product, b) is necessary to a product’s generally expected function, use or purpose, and c) is incorporated for the purpose of ornamentation, decoration or embellishment and whether the primary purpose of the product is ornamentation or decoration.74

With regard to a conflict minerals necessity to the production of a product, SEC stresses the mineral must be both contained in the product and be necessary to the production. Thus, a conflict mineral used only as a catalyst,

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70 NRF, "Re: File Number S7-40-10 – Issues Related to Implementation of the Dodd-Frank Act – Special Disclosures Section 1502 (Conflict Minerals)", p. 3.
71 NRF, p. 3.
72 SEC’s final rule, p. 21.
73 SEC’s final rule, p. 22.
74 Ibid.
or in a similar manner, in a process that is necessary to the production of a product, but is not contained in the actual product, does not require disclosure or other measures under the provisions of conflict minerals to be taken.\footnote{SEC’s final rule, p. 22-23.}

With regard to scrap or recycled minerals, the requirements on due diligence differ. An issuer who reasonably believes that minerals are from recycle or scrap sources does not have to carry out extensive due diligence, but have to conduct a reasonable inquiry regarding the mineral’s origin. If the inquiry gives ground for assuming the minerals originate from recycle or scrap sources, and the inquiry is conducted in good faith, the issuer will not have to obtain an independent private sector audit or further due diligence measures.\footnote{SEC’s final rule, p. 229 and 287.} However, issuers that have reason to believe the minerals may not come from recycled or scrap sources will be required to exercise due diligence in determining whether the minerals are, in fact, from recycle or scrap sources.\footnote{Ibid.} When presenting the alternative rules with regard to recycled minerals or scrap materials, SEC refers to the coast advantages for companies choosing to trade with minerals from these sources rather than from Congolese or adjoining countries’ mines.\footnote{SEC’s final rule, p. 288.} To me, it seems like SEC wants to stimulate companies to trade in recycled minerals or scrap materials rather than newly extracted ones.

3.3 The Criticism and Unintended Effects of Section 1502

The Dodd-Frank Act is built upon the intention to do good, namely to help the Congolese society by reducing violence and creating stability with more money ending up in the pockets of those carrying out the actual work in mines instead of fuelling the activities of the armed groups occupying them. It has been a long complex process to finalize the rules on conflict minerals. It took SEC 2 years to come up with their Explanatory rules, and by the time they were published, it had received over 400 comment letters\footnote{Some comment letters were signed on behalf of thousands of “concerned consumers”, e.g.} and held
130 meetings with interested investors, business groups, NGOs, and members of the public.\(^{80}\)

Despite the timely and transparent process, the Dodd-Frank Act has been criticised for its many negative, unintended, consequences, affecting both the civilians of Congo, the people the regulation is meant to help, as well as put an, in many cases, unrealistic burden on companies. The rules were even challenged in Court by the US Chamber of Commerce, the National Association of Manufacturers and the Business Roundtable. However, the Court decided to reject the main part of the challenge and upheld the rules.\(^{81}\)

Seen from a practical perspective, section 1502 and its Explanatory rules have its faults. Given the increased public awareness on the matter on conflict minerals, businesses in the relevant sector face an evident reputational risk if trading with conflict minerals originating from Congo. However, there are ways of reducing the risk of negative reputation and avoiding suppliers unwilling to collaborate. As of the administrative burden put on and the reputational risked faced by American businesses trading with conflict minerals originating from Congo, many fear companies will seek partnerships outside the region to which the scope of section 1502 do not extend.\(^{82}\) Instead of conducting extensive due diligence throughout the supply chain and risking negative publicity, the easiest way to comply with section 1502 and to achieve a situation in which all products are “conflict-free”, is to avoid any sourcing from the affected region. This will result in a de-facto ban of Congolese conflict minerals. It is further believable this “withdrawal effect” holds true also for many European companies, which are indirectly affected by the legislation being suppliers to US-American

\(^{80}\) Marcia Narine, p. 388.


\(^{82}\) IPC, p. 3, The Öko-Institut p. 27, Marcia Narine, p. 392 and 394, and, Chatham House, p. 34.
However, I believe it likely the reluctance to do business with Congolese mines was especially evident the years just after the introduction of the Dodd-Frank Act as the provisions were yet new and companies awaited further guidance from SEC’s Explanatory rules. If so, I assume the trade with minerals from Congolese mines should steadily increase as businesses become more familiar with the obligations put on them. However, if companies have already established new relationships with mines located outside of Congo or its adjoining countries, than companies may stay in these relationships, at least for a foreseeable future, as it takes time and money to establish and enter into new ones. In other words, it may take more time for the Congolese mining market to recover than it takes for businesses to familiarise with the obligation imposed on them.

To complicate the situation even more, in September 2010, the Congolese President Joseph Kabila imposed Congo’s own provisions on due diligence obligations, resulting in an embargo that lasted until lifted in March 2012. The de facto embargo of the Dodd-Frank Act in combination with the presidential suspension has lead to the collapse of many artisanal mining and mineral trade structures. In its report from 2012, the UN Group of experts held that the Congolese exports of tin, tantalum and tungsten nearly halted as a result of Dodd-Frank Act and the Congolese due diligence rules on the trade with conflict minerals. The same is further supported by the European Parliaments Research Service and the International Peace Information Service, whose data shows a drastic decline in export during 2010-2011. The Öko-Institut holds the declining demand in Eastern Congo

86 The European Parliamentary Research Service, p. 4, and, the International Peace
resulted in price drops as big as US$ 5.5–8.0 per kg in 2010 to US$ 2.0–2.5 per kg in May 2012.\textsuperscript{87}

Many argue the decreased demand in the mining sector has led to an even worse socio-economic situation for the general miner and their families due to reduced income opportunities.\textsuperscript{88} The loss of livelihood for Congolese families set forth a number of actions. Not only does the loss of revenue directly affect the miners and their families, it also stems the society at large.\textsuperscript{89} As the UN Group of Experts on Congo states, reduced family income has a direct impact on family expenditure.\textsuperscript{90} When the mines were still up and running, I suppose they generated growth in other businesses as well as minors had money to buy groceries and support local services. As a result, also the local community at large should have halted when the trade in minerals suddenly decreased. However, I believe it is important to have in mind the decrease in mineral trade resulted from an unfortunate combination of factors. In my opinion, some factors, such as the likeliness of US businesses abandoning Congolese mines due to extensive burden associated with minerals originating from Congo and adjoining countries, could have been foreseen by the US Congress. However, factors trigged by external actors, such as the Congolese precedential suspension, were simply out of Congress’ control and should not burden the framing and establishment of the Dodd-Frank Act. It should also be noted that a field study conducted by the Enough Project shows the establishment of Dodd-Frank Act, together with other initiatives on conflict minerals, has reduced the involvement of armed groups in Eastern Congo and made it much less economically viable for such groups to engage in the mining of conflict minerals (apart from gold).\textsuperscript{91} However, it may be that armed groups have been less involved in the mineral trade after the enactment of the Dodd-Frank Act and the temporary Congolese suspension as a natural result of the decreased demand.

\textsuperscript{87}Information Service, “The formalisation of artisanal mining in the Democratic Republic of the Congo and Rwanda”, p. 49-50.
\textsuperscript{88}The Öko-Institut, p. 31.
\textsuperscript{89}The Öko-Institut, p. 10.
\textsuperscript{90}IPC, p. 4.
\textsuperscript{91}UN Report on Congo 2012, para 221(d).
and falling prices. If so, that remains to be seen.

Apart from the social and economic side effects, the collapse of many minesite has set forth actions prolonging the conflict, or at least that has not help cutting it off. By removing economic opportunities, unemployed miners have been forced to join the army in order to earn a living for them and their families, and it is documented the rise of rebel groups and various new militias coincided with the downturn in mining in the Kivus.92

Apart from the effect on prices and demand and the loss of livelihood for Congolese families, the mining ban has had less apparent consequences, affecting many certification and transparency initiatives within Eastern Congo.93 Interestingly, similar initiatives established in Katanga, a province also part of Eastern Congo but not covered by the Congolese presidential de facto ban, was not affected.94 In other words, conflict minerals regulations can be linked to the haltering of transparency initiatives. However, the provisions of the Dodd-Frank Act apply also to the Katanga province. This suggests regulating trade in conflict minerals should not always affect transparency initiatives and certification programmes. It may be that the Katanga province where less affected due to a lower number of US businesses sourcing from that particular province already before the adoption of the Dodd-Frank Act. However, I have found no data supporting such an assumption. Therefore, if handled correctly, I believe successful certification schemes may co-exist with regulations on the trade with conflict minerals.

Furthermore, the decline in demand for untagged conflict minerals, or even tagged minerals as a result of businesses’ seeking trade partners outside of Congo and adjoining countries, in combination with the – presumably temporarily – closing down of transparency initiatives, has opened up for increased smuggling opportunities.95 However, according to the Enough

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92 Dominic Johnson, the Pole Institute, "No Kivu, No Conflict? The misguided struggle against “conflict minerals” in DRC”, p. 6-7.
93 The Öko-Institut, p. 37.
94 The Öko-Institut, p. 5.
95 Letter dated 29 November 2011 from the Chair of the Security Council Committee
Project, the incentives for smuggling are manifold, and should not solely be blamed the de facto ban and legal incentives such as the Dodd-Frank Act. For example, when it comes to the smuggling of gold, an important factor to have in mind is the gold taxation imposed by the Congolese government. The taxation rate on gold is much higher compared to the taxation rate on other minerals such as tungsten, ten and tantalum. A study conducted by the Enough Project states the taxation rate for gold is 13 percent, an enormous rate compared to average rates of between 1 and 5 percent in other countries, which is a major disincentive against bringing the trade into legal channels.\textsuperscript{96} The same study suggests that Congo’s government would increase its revenue by 870 percent\textsuperscript{97} by lowering taxes and better control the artisanal mining.\textsuperscript{98} Even so, the UN Group of Experts on Congo holds the smuggling has increased since the introduction of the Dodd-Frank Act, in combination with the Congolese ban, as a result of the decreased legal market for untagged minerals.\textsuperscript{99}

Laura E. Seay equals the results of section 1502 in the Congolese society with a “real tragedy”\textsuperscript{100} and Narine holds if governments choose to engage in further law imposing human rights related obligations on businesses, the Dodd-Frank Act should not “serve as a model”\textsuperscript{101}. Seay means the rules on conflict minerals has put entire communities out of work but have done little to secure their situation or to help overcome the threat of violence. In fact, she holds there has been no reduction in violence in the Kivu provinces despite the de facto bans imposed by the Congolese government and the Dodd-Frank Act, but that armed groups continue to terrorize local populations and to ‘prey upon communities for food, money, and other

\textsuperscript{96} The Enough Project, "Congo’s Conflict Gold Rush – Bringing Gold into the legal trade in the Democratic Republic of Congo", p. 2.
\textsuperscript{97} 870 percent would equal a yearly profit in incoming taxation of $1,770,000.
\textsuperscript{98} The Enough Project, "Congo’s Conflict Gold Rush – Bringing Gold into the legal trade in the Democratic Republic of Congo", p. 2 with appurtenant footnote 12 (at p. 24).
\textsuperscript{100} Laura E. Seay, p. 16.
\textsuperscript{101} Marcia Narine, p. 362.
resources’. She refers to the 2011 Final Report of the UN Group of Experts on Congo which all together suggests the de facto ban has led to an increase in conflict mineral smuggling via Rwanda and pushed Congolese armed groups to seek alternate sources of revenue, such as timber trade, trading in cannabis and palm oil. Regardless of alternative sources of revenue, she continues with questioning the likeliness of any armed group in Eastern Congo to stop fighting simply because it loses a key source of revenue. In fact, she means loss of revenue is rather likely to stimulate even extremer and more burdensome dependence on civilians than before, at least for a transitional period. All together, Laura E. Seay holds the rules on conflict minerals have – even if unintended – caused more problems than it have solved.

To conclude, many believe the daily situation for the Congolese people actually worsened with the introduction of the Dodd-Frank Act in combination with other factors, such as the Congolese ban. At the same time, decreased trade in conflict minerals originating from Congo endowed armed groups with more men – i.e. minors seeking new income opportunities – without cutting off the ability to finance their activities.

4. The EU Proposal

4.1 Introduction

Having the background of the Dodd-Frank Act, the reasons for its creation and the ground for the received criticism, I am now going to analyse the European Proposal for a Regulation on conflict minerals. I will begin with presenting the background on the Proposal and go through its provisions. I will then interpret the proposal in the light of the debate around the Dodd-Frank Act and its unintended consequences, to see whether or not the Parliament has listen to and learnt from the criticism of the Dodd-Frank Act.

102 Laura E. Seay, p. 16.
103 See footnote 92.
105 Laura E. Seay, p. 19.
106 Laura E. Seay, p. 16.
I will pay special attention to the proposed regulation’s likely effect on European businesses and assess how well the proposal should meet its intended purpose.

4.2 Background

The European initiative to initiate a legislative process on conflict minerals is a relatively recent development. In the 2008 raw material initiative, the European Commission stated its support for international initiatives on the promotion of transparency and responsible sourcing. When reporting on the implementation of the initiative, the Commission stressed the importance of supply chain transparency and manifested its strong support for schemes such as the OECD Guidelines. In the report, the Commission further held it is exploring ways to provide political and financial support for activities addressed in ICGLR, such as certification schemes for conflict free minerals. The increased interest in, and focus on, conflict minerals has lead to today’s proposed Regulation on conflict minerals. In February 2014, the Committee on Development called for legislative means to be taken and in March 2014, the Commission made public its proposal on a Conflict Mineral Regulation for the Parliament to vote upon.

The upcoming EU Regulation on conflict minerals has been widely debated. In 2013, a coalition consisting of 58 civil society organisations from all around the world called for EU to pass a strong law on conflict minerals, supporting the standpoint of the European Parliament’s development.

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committee. Meanwhile, others put on a less supporting approach arguing EU should be careful stimulating the same unintended cause of actions that were brought about through the initiation of the Dodd-Frank Act. The Öko-Institut highlights the importance of having in mind the lessons learnt from the first years after the Dodd-Frank Act as well as to draw from experiences made by other initiatives aiming at cutting the links between resource extraction and conflict financing. They mean EU now has the chance of developing an approach that effectively contributes to stabilising Congo, or other conflict-affected or high-risk areas for that matter, without running the risks of creating unintended and adverse side effects on legitimate economic activities and people’s livelihood in the region. Furthermore, IPC stresses the limited role of the private sector, and holds the private sector cannot alone master the challenges inbuilt in the mineral trade in areas characterised by lack of security and political and humanitarian instability. Having in mind the side effects of the Dodd-Frank Act and the limited role of the private sector, IPC strongly urges EU to take ‘great caution in its development of any future laws or regulations related to the sourcing of minerals from conflict areas’. Also the Information Technology Industry Council (ITIC) has expressed its concerns with repeating the mistakes inbuilt in the Dodd-Frank Act. In an email correspondence with author Laura E. Seay, the representative of ITIC, Rick Goss, stated that even if the private sector has a clear role to play helping the situation in Congo, is committed to responsible sourcing and supports the underlying intention of conflict minerals regulations, the solution to Congo’s problems will not come from the private sector. He refers to the roots of conflict and holds the absence of effective governance, security and accountability in Congo allows age-old ethnic tensions and conflicts over land rights to rage unabated. Goss holds only steadfast and coordinated global engagement by governments can

112 The Öko-Institut, page 6.
113 The Öko-Institut, page 7.
114 IPC, p. 3.
115 IPC, p. 5.
116 Laura E. Seay, p. 12.
address such roots of conflict. The many negative, unintended, consequences of the Dodd-Frank Act are acknowledged also in the European Parliamentary Research Service’s report from 2014. However, no possible solutions or alternative methods were presented in this report.

To summarise, regulating trade in conflict minerals is challenging. There are a number of complex issues to be considered before choosing the most efficient and appropriate approach. Having the background to and understanding of the underlying discussion on the coming EU Regulation, I will now present the direction of the European Parliament’s proposal together with a description of the provisions relevant for the purpose of this thesis.

4.3 The EU Proposal on Conflict Minerals Due Diligence

4.3.1 Introduction and Purpose

In March 2014, the Commission presented its proposal on conflict minerals due diligence. The Commission suggested a voluntary scheme for up-stream supply chain due diligence, which was ought to be accompanied with third party audits.

However, in May 2015 the European Parliament voted against the Commission’s proposal, in favour of a mandatory Regulation requiring all upstream and downstream businesses that use and trade in minerals to be legally obliged to undertake supply chain due diligence. In its amendment of the Commissions’ proposal, the Parliament holds due diligence obligations should apply to “all Union importers who source minerals… in conflict-affected or high-risk areas, in order to minimize or prevent violent conflicts and human rights abuses by curtailing the opportunities for armed groups and security forces… to trade in those minerals and metals”. In other words, the purpose of the regulation is to help reduce violence and human rights abuses in conflict-affected or high-risk areas, by stabilising the situation and cut the

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117 Laura E. Seay, p. 12.
118 The European Parliamentary Research Service, p. 3-4.
120 The Parliament’s Proposal, amendment 154, art. 1.2.
links of funding. The Parliament stresses the same in the recital to the proposed regulation, where it holds “breaking the nexus between conflict and illegal exploitation of minerals is a critical element in guaranteeing peace, development and stability”.

4.3.2 Subjected Businesses
The Regulation will require all businesses who first place covered resources, including products that contain those resources, on the Union market to conduct and publicly report on their supply chain due diligence. The European Parliament identifies smelters and refiners as key operators 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” and highlights the need for due diligence throughout the entire supply chain, from the sourcing site to the final product.

4.3.3 The Geographical Scope – “Conflict-affected and High-risk Areas”
More than just amending to whom the regulation applies and what obligations come with it, the Parliament also extends the geographical scope and to what situations the Regulation ought to apply. As mentioned earlier, the due diligence obligations applies to trade with conflict minerals from high-risk or conflict-affected areas. The proposed Regulation is not limited to minerals originating from DRC or adjoining countries. The Parliament refers to “conflict-affected and high-risk areas” as areas in a state of armed conflict with presence of widespread violence or the collapse of civil infrastructure or fragile post-conflict areas with weak or non-existing governance and security, such as failed states characterised by widespread and systematic violations of human rights.

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121 The Parliament’s Proposal, amendment 1, recital 1.
122 The Parliament’s proposal, amendment 71, 91 and 112, recital 9a (new).
123 The Parliament’s proposal, amendment 14, recital 13.
124 Ibid.
125 The Parliament’s proposal, amendment 24, art. 2.e.
4.3.4 Flexible and Appropriately Tailored Due Diligence

The due diligence measures ought to be progressive, flexible and appropriately tailored to enterprises’ individual circumstances, such as a company’s size, leverage and position in the supply chain. This approach is further incorporated in article 1, paragraph 2b, where the Parliament holds it is important to distinguish between “the roles of undertakings situated upstream of and those situated downstream from the supply chain”, in order to prevent unintended distortions of the market. In the same article, it is stated the due diligence must be “tailored to the activities of the undertaking in question, its size and its position in the supply chain”.

4.3.5 About the Effect on Small and Medium Sized Enterprises

The Parliament continues with stating the complexity in supply chain due diligence will be especially hard on small and medium sized enterprises (SME’s). In order to ease the burden on SME’s, they ought to be assisted both technically and financially in the carrying out of responsible due diligence, through the Commission’s COSME programme. The Parliament does not address the challenges in any detail or what the COSME program will actually include. However, the Parliament lays down the possibility of the Commission, working together with industry schemes and in accordance with the OECD Guidelines, to provide guidelines on “the obligations put on undertakings, depending on their position in the supply chain, to ensure the system involves a flexible procedure that takes into account the position of SMEs”.

4.3.6 Union Lists of Responsible Smelters, Refiners and Importers

Due to the central role of smelters and refiners, the Parliament considers a “Union list” of responsible smelters and refiners should be established in order to bring “transparency and certainty to downstream companies” into

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126 The Parliament’s proposal, amendment 71, 91 and 112, recital 9a (new).
127 The Parliament’s Proposal, amendment 76, article 1.2b (new).
128 Ibid.
129 The Parliament’s proposal, amendment 10, recital 12.
130 The Parliament’s proposal, amendment 77, 98, 118 and 136, article 1.2c (new).
The list should rely on information provided by Member States in reports and reviews evaluating the implementation of the Regulation, including names and addresses of responsible smelters and refiners. With regard to the establishment of such list, the Parliament holds accounts must be taken to existing equivalent industry, governmental or other due diligence schemes. However, it is not clear what equivalent scheme the Parliament has in mind.

With regard to European importers, the Parliament holds a similar list ought to be established – based on the information provided by the Member States in the same reports and reviews as referred to above.

4.3.7 Certification of Responsible Businesses

The Parliament further states that enterprises operating down the supply chain that voluntarily establish responsible sourcing systems should be certified as responsible by competent authority in the relevant Member State, a certification referred to as the “European Certification of Responsibility”.

The Parliament holds the Commission should rely on the OECD Guidelines when setting the criteria for granting the certification and may consult the OECD Secretariat for guidance. The Parliament further stresses the conditions for granting the 'European certification of responsibility' should be as stringent as those required by the OECD certification system. I believe it valuable to refer to the OECD Guidelines in the direct wording of the Regulation, as these guidelines are already well established around the world. Furthermore, it is of instinct value to limit and gather what schemes are available among due diligence participants. In my opinion, the many schemes available at the moment may confuse both participants and authorisers and may result in a weaker system than if all financial and intellectual resources were gathered and invested in one, or a few, well understood and established schemes.

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131 The Parliament’s proposal, amendment 14, recital 13.
132 The Parliament’s proposal, amendment 45, art. 8.1
133 The Parliament’s proposal, amendment 45, art. 8.2.
134 The Parliament’s proposal, amendment 40, art. 7a (new).
135 The Parliament’s proposal, amendment 12, recital 12a (new).
136 Ibid.
4.3.8 Exclusion of Metals Reasonable Assumed to be Recycled

Metals reasonable assumed to be recycled are excluded from due diligence obligations.\textsuperscript{137} The Parliament refers to recycled metals as “reclaimed end-user or post-consumer products, or scrap processed metals created during product manufacturing”, including “excess, obsolete, defective, and scrap metal materials which contain refined or processed metals that are appropriate to recycle in the production of tin, tantalum, tungsten and/or gold”, while “minerals partially processed, unprocessed or a bi-product from another ore are not recycled metals”.\textsuperscript{138} SEC relies on the same definition in its final rule, as do OECD in its guidelines.\textsuperscript{139}

It is not clear to what extent the Parliament ought to rely on the same inquire process as established by SEC in its Explanatory rules (see 3.2). The Parliament does not give any further guidance to what measures must have been carried out before \textit{reasonably assuming} the metals are recycled, but settles with stating \textit{when} such assumption can be made, the company must publicly announce its determination and describe “in reasonable detail” what due diligence measures were taken when making that determination.\textsuperscript{140} In my opinion, it is of great importance that the Parliament define “reasonable assumed” and what measures must be taken before making such an assumption, as it lays ground for whether or not the company is obliged to conduct full due diligence or not.\textsuperscript{141}

Furthermore, the Parliament should present the reasons for the exclusion of recycled minerals. I assume the Parliament’s decision is made upon the fact that recycled minerals are harder – or even impossible – to trace, a fact that the Parliament refers to in its amendment of Recital 13 where it is stated it is “often considered unfeasible to trace back the origin of minerals”, especially “recycled metals, which have undergone even further steps in the

\textsuperscript{137} The Parliament’s proposal, amendment 23, art. 1.2a.
\textsuperscript{138} The Parliament’s proposal, amendment 26, art. 2.ba (new).
\textsuperscript{139} SEC’s final rule, p. 230 (see footnote 702 in SEC’s final rule for exact description).
\textsuperscript{140} The Parliament’s proposal, amendment 85, 126 and 145, art. 4.1a (new).
\textsuperscript{141} The Parliament’s proposal, amendment 23, article 1.2a (new), in combination with amendment 16, recital 13b (new) and amendment 85, 126 and 145, art. 4.1a (new).
transformation process”. However, in my opinion, it should be mentioned specifically in the article excluding recycled minerals.

4.3.9 Implementation Period

The Parliament further suggests an implementation period of two-years. This is for the Commission to set up a third-party audit system and for importers to become familiar with the obligation put on them through the regulation. The Parliament’s proposal of 2 years is 1 year shorter compared to the implementation period of 3 years proposed by the Öko-Intitut. The implementation period proposed by the Parliament is furthermore relatively short with regard to the implementation time of section 1502 of the Dodd-Frank Act and documented market uncertainties connected to it. However, given the Commission would have had time enough to develop useful guiding and explanatory documents by the time of implementation, 2 years may be enough time for European companies to familiarise themselves with the obligations put on them and develop useful schemes. Furthermore, many European businesses will already be familiar with the requirement imposed by the Dodd-Frank Act, which should serve as useful guidance for companies when setting up internal due diligence practises.

5. Evaluation of the EU Proposal

5.1 Introduction

Based on the provisions and characteristics of the proposed EU Regulation, I am now going to analyse the proposed regulation’s likely impact on business behaviour and practices, and identify what practical challenges there may. I will accompany the assessment with practical examples of how interviewed businesses are currently working on the matter of conflict minerals and what they expect from the proposed regulation.

After assessing how the proposed Regulation is likely to affect European businesses, I will analyse the proposal in relation to its intended purpose. I

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142 The Parliament’s proposal, amendment 14, recital 13.
143 The Parliament’s proposal, amendment 18, recital (new) 15a.
will conclude with evaluating what likely consequences there will be with regard to challenges identified and how they may affect the efficiency of the proposed Regulation. When analysing the identified challenges – and consequences thereof – I will draw upon documented experiences from the enactment and effects of the Dodd-Frank Act.

5.2 Evaluating the EU Proposal with regard to the Likely Effect on European Businesses

5.2.1 Introduction

In the light of the role of today’s businesses, what expectations are put on them and the evolvement of “shareholder value”, I will assess the European Parliament’s proposal on extensive mandatory due diligence throughout the entire supply chain. As the EU proposal stems from already established initiatives, increased public awareness on conflict minerals and the introduction of the Dodd-Frank Act, these parameters will be taken into account when evaluating the EU proposal and its likely effect on European businesses.

Most likely, European businesses will already be subject to some sort of due diligence with regard to conflict minerals, as the Dodd-Frank Act should have affected also European businesses to some extent. A European business listed on the US market would have fallen in the direct scope of the Dodd-Frank Act. Furthermore, a business unlisted on the US market would also have fallen, indirectly, in the scope of the Dodd-Frank Act if having a US listed company as costumer and being part of the US company’s supply chain. The proposed legislation is further meant to build upon established principles such as the OECD Guidelines. As we know, the OECD Guidelines are well anchored and often referred to among businesses all over the world, however, they are of voluntary nature. However, even if businesses should be fairly familiar with the OECD Guidelines as well as the requirements imposed on US listed businesses through the Dodd-Frank Act, there should be significant change for businesses operating in the relevant
sector as the proposed EU Regulation will require all businesses to take on
due diligence measures with regard to conflict minerals.

5.2.2 Behaviour Changing Law
The core in both the EU proposal and the Dodd-Frank Act is to impose due
diligence obligations on businesses using conflict minerals in their products
in order to stop indirect or direct financing of human right abuses and
activities of armed groups. However, neither the European Proposal nor the
Dodd-Frank Act prohibit the use of conflict minerals from conflict-affected
or high-risk areas, but only require businesses using conflict minerals from
such areas to disclose their use in combination with a description of taken
due diligence measures.144

Section 1502 of the Dodd-Frank Act has many times been referred to as a
“name-and-shame” law145, and I believe that expression suits the EU
proposal as well. As Narine puts it, the realisation of the law depends on
consumers and investors to pressure businesses, “especially those that
depend on CSR programs to enhance their images”, to change their business
practices.146 The RAISE Hope for Congo Campaign – organised under the
Enough Project – calls for consumers to take action and use their collective
power to pressure companies and demand conflict free supply chains.147 In
other words, the idea of transparency relies on the perception that companies
prefer careful and responsible sourcing – carried out through extensive due
diligence – over damaged reputation.

Even though businesses using conflict minerals in their products are
required to disclose relevant information148, I believe the success of the
proposed Regulation depends on the concept of CSR and companies striving

144 European Parliamentary Research Service, p. 3.
920.html, and, Marcia Narine, p. 360.
146 Marcia Narine, p. 360.
147 RAISE Hope for Congo, Conflict Minerals – You Can Help End the War, available at
http://www.raisehopeforcongo.org/content/initiatives/conflict-minerals.
148 Whether or not such mineral originates from a conflict-affected or high-risk area as well
as what due diligence measures have been taken.
for high reputation. By changing business behaviour the EU proposal ought to contribute to a sustainable situation in Congo and other conflict-affected or high-risk areas, promoting peace, development and stability. Thus, I conclude the regulation is meant to be “behaviour changing” in that it ought to change business behaviour to a greater extent than what is required by law.

According to Jenny Sandahl, the behaviour changing effect of, so far, the Dodd-Frank Act is already evident. After 4 years of reporting obligations under the Dodd-Frank Act, Ericsson receives much better and more reliable data from its suppliers compared to the first years after the establishment of the Dodd-Frank Act. Sandahl’s observation supports the perception of disclosure requirements in combination with due diligence obligations being behaviour changing.

5.2.3 Subjected Businesses

The EU proposal requires all European businesses using conflict minerals in their products to conduct responsible sourcing and to provide information on the origin of those minerals, regardless of where their customers or suppliers are located or whether or not they are considered upstream or downstream actors. By including the entire supply chain, the scope of affected subjects is wider in the EU proposal compared to the Dodd-Frank Act. Jenny Sandahl stresses the advantage of the European Parliament’s approach. In line with the European Parliament, she refers to smelters and refiners as key ingredients in supply chain due diligence and embraces the Parliament’s choice to included them. She means integrating smelters and refiners in the process helps raise awareness on responsible sourcing along often international, complex and long supply chains.

Furthermore, compared to the provisions of section 1505 of the Dodd-Frank Act, the European Parliaments’ approach is clearer in that it does not distinguish between businesses or products. In contrary to SEC, the

\[149\] See Marcia Narine for further discussion on what is social responsibility in the case of sourcing Conflict Minerals in Congo, p. 400.
European Parliament makes no different between products depending on the incorporation of conflict minerals and those that do not as no reference is made to “necessary for the functionality or the production of a product”. Furthermore, the Parliament does not refer to ‘manufacturer’ or ‘contractor of manufacturing’ but simply states all businesses that first place conflict minerals or products containing conflict minerals on the Union market must comply with the Regulation. Thus, I conclude the proposed Regulation is clearer to whom it applies and should prevent unnecessary obscurity.

5.2.4 **Collaboration and Information Sharing**

Both section 1502 of the Dodd-Frank Act and the EU proposal rely on collaboration and information sharing in order to succeed. However, some suppliers may be less willing to share information which may cause problems with regard to the accuracy of data. However, by obliging all supply chain actors, situated both up- and downstream, to take on due diligence measures with regard to conflict minerals, I believe the EU proposal better mitigates the risks of unsanctioned uncooperative behaviour compared to the Dodd-Frank Act.

From a business point of view, all interviewed business representatives believe collaboration and information sharing along the supply chain may be enforced through the incorporation of contractual clauses on conflict minerals due diligence. Even if contractual obligations imposed through an agreement generally concerns contracting parties alone and not third parties, Jonas Willaredt believes incorporation of contractual clauses is important as it sends a clear message throughout the supply chain. Also Ericsson recognises the importance of contractual clauses in responsible sourcing. In its Sustainability and Corporate Responsibility Report from 2014, Ericsson refers to the use of contractual clauses as key in assuring its commitment not to finance illegal extraction of minerals is reflected throughout the entire supply chain.150

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For contractual clauses to be more than a paper tiger, suppliers are assessed. Apart from sending a message or reflecting a business’ commitment to responsible sourcing, contractual clauses lay ground for what expectations can be put on suppliers’ practices and what aspects can be taken into consideration when conducting supplier compliance assessments. Also global and common standards may be incorporated in supplier contracts and form part of supplier evaluations. Boliden, for example, evaluates its business partners with regard not only to commercial aspects, but also from a sustainability point of view. The 10 UN Global Compact principles and the standards of ILO and ISO lay ground for the supplier assessment which bring about special attention to human rights, working conditions, environmental responsibility, anti-corruption and the way in which business partners evaluate and follow-up their own sustainability work. Thus, despite contractual clauses’ sometimes limited effects, they do play a key role in supply chain due diligence.

5.2.5 Downstream Due Diligence – Practically Challenging

However, even if including the entire supply chain should have positive effects with regard to information sharing and efficiency, it may also be posed with challenges. In the proposal, the Parliament states downstream businesses must take “all reasonable steps” to identify and address any risks arising in the supply chain. The Parliament also recognises the practical challenges expressed by European businesses in the carrying out of due diligence down the supply chain, especially in relation to the complexity and length of global supply chains, often involving a high number of operators, some less aware or ethically unconcerned. Also the Öko-Institut distinguish between downstream and upstream due diligence measures and holds the higher up the supply chain, the more pressure is put on the practising business and the more extensive procedures need to be established in order for the due diligence to bear fruit.

153 The Parliament’s Proposal, amendment 155, art. 1.2d (new).
155 The Öko-Institut, p. 8.
5.2.6 Flexible and Appropriately Tailored Due Diligence

The Parliament is clearly going for a flexible and comprehensive approach. Even if the Parliament does not go any further in its distinction between undertakings situated upstream of and those situated downstream of the supply chain, I believe the distinction witnesses about awareness and understanding of the increasing challenges and complexity the further down the supply chain a business is situated. In combination with the Parliaments’ repeated calls for flexible and tailored due diligence practices, I believe the Parliament mitigates the burden put on especially downstream operators.

However, there are some questions left unanswered with regard to the flexibility of the supply chain due diligence. Whether or not the Parliament intends for the meaning of “reasonable steps” to be of gliding character – i.e. the closer the source of raw material a company is situated, the more will be expected from the company – is not yet clear. Neither is it clear to what extent the extra challenging situation for SME’s should be taken into account when determining whether a company has taken “all reasonable steps” in its supply chain due diligence. In my opinion, the meaning of “all reasonable steps” should be better tailored to the Parliaments commitment to achieve flexible and transparent due diligence practices.

5.2.7 Union Lists of Responsible Smelters, Refiners and Importers

As smelters and refiners are usually the first step in which conflict minerals enter international supply chains, it is important there are sufficient means available for them to trace the source efficiently. In order to do so, Jenny Sandahl highlights the need for collaboration with existing initiatives on responsible sourcing for smelters and refiners – as such initiatives equals a direct link between the western market and the actual mines and exporters of minerals. As an example of a well-established certification scheme, Sandahl refers to the initiative on responsible sourcing for smelters and refiners is the Conflict-Free Smelter Program (CFSP), established under Conflict Free Smelter Initiative (CFSI). As stated on the CFSI’s webpage, the CFSP takes a unique approach by “helping companies (to) make informed choices about
conflict minerals in their supply chains”. 156 The certification is further accompanied by an independent third-party audit, living up to the standards of the OECD Guidelines and the Dodd-Frank Act. 157 Thus, in order to harmonise the recognition of responsible smelters and refiners, I believe the Union list on responsible smelters and refiners should have regard to the certification scheme available under the CFSI.

Apart from smelters and refiners, importers do also play an important role in tracing the source of extraction given their supply chain position. I believe approaching European importers is important, as these would often be the first link between a foreign and European market. The closer the smelters and refiners, the more successful is supply chain due diligence likely to be. However, Jonas Willaredt and Krister Hansson-Dahl stress the majority of European businesses purchase ready-to-incorporate product components, not raw material or metals, which restricts the number of actors that actually possess this positional advantage. Thus, approaching importers by establishing a list of responsible importers may have limited effects.

The idea of establishing Union lists of responsible smelters and refiners respectively importers goes hand in hand with an idea posed by the Öko-Institut, that suggests benefits and recognition should be provided for businesses engaging in responsible sourcing of conflict minerals. 158 I personally believe offering rewards and recognition for responsibily engaged businesses will have positive effects on the compliance rate. As positive recognition should be desired from a reputational point of view, businesses should want to make it to the list. In turn, it should help minimize negative side effects such as decreasing demand on conflict minerals and the closing of mines in conflict-affected and high-risk areas, as businesses would be encourage to trade – responsibly – in minerals from conflict-affected or high-risk areas such as Congo. At the same time, mines located in such areas will have an incentive to conduct legal and ethic business.

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157 Ibid.
158 The Öko-Institut, p. 13.
5.2.8 Using a Global Scope on the Concept of Conflict Minerals

Another difference between section 1502 of the Dodd-Frank Act and the EU Proposal is to what situation and geographic area the rules apply. While section 1502 of the Dodd-Frank Act only applies to conflict minerals extracted in Congo or adjoining countries, the geographical scope of the EU Proposal is global. In my opinion, the approach taken by the European Parliament should have positive effects on the realisation of the purpose of the Regulation, but may come with practical challenges for affected businesses (as will be further discussed in 5.2.9).

The global scope should hinder an extreme withdrawal from the Congo-specific market as the same due diligence obligations apply in all trade with relevant minerals from high-risk or conflict-affected areas. As the study conducted by the Öko-Institut suggested, increased administrative burden due to mandatory due diligence applying to a specific area or country will result in increased trade with minerals from “second-hand markets” – i.e. recycled minerals – or with well-known extraction companies sourcing from mines located outside that specific area or country.\(^\text{159}\) However, and interestingly, it should be noted that two out of three businesses interviewed for the purpose of this paper, currently obliged under the Dodd-Frank Act indirectly respectively directly, have chosen not to ban minerals originating from Congo or adjoining countries as they believe banning conflict minerals originating form Congo would only damage local development within the Congolese society.

Either way, I believe the global approach of the EU proposal supports the often referred to argument that minerals should be conflict-free rather than Congo-free and reflects a more nuanced approach, recognising all conflict-affected and high-risk areas and encouraging businesses to be responsible in all their sourcing of relevant minerals.

\(^{159}\) The Öko-Institut, p. 28.
5.2.9 Identifying Conflict-affected and High-risk Areas

Moving forward, apart from businesses’ obligation to provide information, they are also obliged to assess information. I believe the wider geographical scope puts an extensive burden and responsibility on businesses, which may not possess the knowledge or time it takes to properly assess what areas classify as high-risk or conflict-affected. As the European proposal is unlimited in the geographic scope, it is up to each company to determine whether or not the minerals originate from a conflict-affected or high-risk area. This is a very difficult task. First of all, companies will have to understand and refer to the definition of what is a conflict-affected or high-risk area and distinguish between sources linked to conflict-affected or high-risk areas and those of legitimate mining sites. Second of all, businesses will have to investigate the source of minerals and. The proposal leaves no practical guidance on or explanation to how “conflict-affected or high-risk area” should be identified. However, the Commission is currently working on a Handbook that ought to assist affected businesses in the identification process. In its guidance, the Commission stresses that understanding the country or area of origin is an important component when identifying the general level of risk or adverse impacts associated with a company’s operations, as it provides contextual information.¹⁶⁰

According to Anna Gejke, the number and level of risks depend on a variety of factors, such as the market in which the supplier operates, the geographical location of the operations as well as the political situation of the relevant area. She means factors such as these are extremely complex in their nature and may vary from time to time. However, she stresses that many factors relevant for the identification of conflict-affected and high-risk areas, such as corruption and working conditions, already form part in businesses’ operational and supply chain risk assessments. Therefore, it should not be too heavy of a burden to include parameters also on the identification of conflict-affected and high-risk areas.

¹⁶⁰ The European Commission, “Draft Handbook – To assist operators carrying out supply chain due diligence with the identification of conflict-affected and high-risk areas”, p. 5.
Furthermore, Gejke refers to the possibility of consulting a third party auditor when identifying and assessing risks. Boliden uses a private auditor specialised in CSR and supplier compliance to help identify relevant risk factors in their supply chain. Even if Boliden makes the actual risk assessment, Anna Gejke considers the insight and expertise of a certified third party auditor valuable in identifying and understanding the risks correctly.

5.2.10 Receiving Accurate Data and Assessing the Level of Proof

Despite its commitment to responsible sourcing and the many measures taken to achieve this aim, Ericsson recognises the challenges in obtaining sufficiently high-quality supplier data, which is necessary in order to gain reasonable knowledge of the origin of the minerals used, especially as the supply chain of a multinational company is very complex.\(^{161}\) Also the Humanitarian Information Unit (HIU), organised under the US Department of State, highlights the difficulties in identifying what mines conduct legal or illegal businesses. In its “Democratic Republic of the Congo Mineral Exploitation by Armed Groups & Other Entities” the HIU holds the lack of verifiable data makes it difficult to i) locate precisely mine sites, ii) to establish which mines are active respectively inactive at a given moment, and, iii) to identify which armed groups or other entities are either present at mines or have access to revenue streams emanating from them.\(^{162}\)

If a public unit, with a given mission and resources specifically dedicated for that mission – which in itself implies high expertise within the field – finds it hard to properly verify data, then private businesses with much broader missions, varying budgets and – probably – much lower, if any, knowledge within the field should find it very troublesome to identify what areas classify as conflict affected or high-risk areas, identify what exact mines are controlled, indirectly or directly, by armed groups, and, as a result, help financing their activities. However, it may be that businesses be provided

with a list of responsible refiners and smelters, what areas currently classify as conflict affected or high-risk areas, including a list of reliable mines. If this is the case, than someone – in my opinion a publicly supported unit – should verify and aggregate that data, to make sure it is of high standard and that someone is reliable for miscalculations. Such an arrangement relates to the ideological question to what extent businesses – i.e. the private sector – should carry the burden of expensive due diligence processes, established as a result of insufficient governance in a foreign country. However, the current proposal says nothing about such arrangement, more than that a “Union list” of responsible smelters and refines should be established.  

The difficulties in tracing and verifying data with regard to conflict free sources are further supported in doctrine. Laura E. Seay argues tractability schemes targeting a market in week and inefficiently governed states are deemed to fail, and she especially refers to the problems of corruption in combination with generally low and irregular salaries. Under such conditions, she holds even the most carefully planned tractability scheme need to be implemented and monitored at every single step of the process “including transport, by disinterested outside observers who cannot be bought” in order to work, and highlights the importance of effective oversight and functioning government institutions. The challenges in receiving trustworthy data have further been acknowledged by the Öko-Institut. Based on observations made by business representatives, the Öko-Institut questions what level of proof can actually be achieved through due diligence. In its calculations, the institute especially refers to the low level of certainty provided by suppliers to businesses with a large supplier base.

Jonas Willaredt and Krister Hanson-Dahl recognises these challenges and holds Husqvarna generally receives answers to 8 out of 10 supplier

163 The Parliament’s proposal, amendment 14, recital 13.
164 Laura E. Seay, p. 19.
165 Laura E. Seay, p. 20.
166 The Öko-Institut, p. 3.
167 Ibid.
inquiries.\textsuperscript{168} According to Husqvarna, due diligence is often conducted under deadline with requesting costumer being incapable of waiting for all of Husqvarna’s suppliers to have answered. In my opinion, this indicates the timeliness of and practical challenges in supply chain due diligence. However, I believe the more familiar businesses become with the concept of conflict minerals and due diligence on the same, the process should become more and more efficient – hopefully relying on unitary schemes and certification programmes.

\textit{5.2.11 About the Effect on Small and Medium Sized Enterprises}

As for the challenges faced by SME’s, the EU proposal provides for both financial and technical help to be given through the COSME programme. It is not yet very clear what exactly will be included in this program or how it will be organised. Even so, I believe technical and financial support is important in order for all companies, regardless of size and leverage, to be able to carry out the due diligence practises efficiently.

Being a SME, you may face extra difficulties with regard to conflict minerals due diligence. PwC holds smaller businesses with less leverage should face greater difficulties in enforcing compliance and information cooperation among suppliers.\textsuperscript{169} This seems to me a valid point. According to Krister Hansson-Dahl, in order for businesses to be able to actually understand and handle the data received from suppliers, affected businesses will have to invest in new, highly advanced computer programmes – sophisticated enough to process and aggregate a high quantity of data. Hansson-Dahl means such investment should be especially hard on smaller companies due to their limited financial situation.

Even if businesses will still have to establish extensive due diligence programmes, processes that will be timely and costly, I believe the burden put on businesses through the proposed EU Regulation should be of slightly

\textsuperscript{168} Note that this estimation is based on the current situation in which Husqvarna, as a non-listed US business, only answers to US listed costumers conducting due diligence under section 1502 of the Dodd-Frank Act.

lighter nature compared to the Dodd-Frank Act and better reflects the complexity in imposing due diligence obligations on an entire supply chain, consisting of businesses of different sizes and with varying leverage. The attention paid to individual circumstances of businesses should help overcome practical challenges faced by SME’s and as a result ease the due diligence process throughout the entire supply chain and generate efficiency. This should benefit all due diligence participants as due diligence carried out efficiently should be less timely and costly.

5.2.12 Exclusion of Metals Reasonably Assumed to be Recycled
Apart from the administrative burden and costs related to the identification of conflict-affected and high-risk areas, the may result in increased trade with “mixed minerals”\(^{170}\) from Asian smelters and refiners. Asian importers do not have any obligation similar to those of section 1502 of the Dodd-Frank Act or the European proposal on conflict minerals put on them.\(^{171}\) Based on held interviews and doctrine on the Congolese mineral market, it seems as the majority of smuggled minerals end up within the Asian market, where minerals can easily be mixed with a slight percentage of recycled or legally sourced minerals and consequently be labelled recycled or legal.\(^{172}\) As mixed and recycled minerals are untraceable, the success of the due diligence process stops then and there. However, very recently, the Chinese ‘Chamber of Commerce of Metals, Minerals & Chemicals Importers and Exporters’ stated its incentive to developing guidelines similar to those of OECD and the UN – something that may increase the awareness of and knowledge on conflict minerals and responsible sourcing among Asian operators.\(^{173}\) Another factor I believe should contribute to the same is the increasing expectations and demands on Asian smelters and refiners in their sourcing of conflict minerals, imposed by European businesses as a result of the obligations put on them, indirectly through American businesses, or

\(^{170}\) My expression. Meaning a mix of legally sourced minerals and minerals sourced through illegitimate means, such as smuggling.
\(^{171}\) The European Parliamentary Research Service, p. 4 and 5, and Marcia Narine, p. 361.
\(^{172}\) See i.a. UN Report on Congo 2011.
directly, under coming EU Regulation. The increased awareness on conflict minerals among Asian suppliers, documented by business representatives already conducting due diligence, only strengthens this assumption.

5.2.13 About the Mandatory Nature of the EU Proposal

Finally, I want to address the mandatory nature of the proposed EU Regulation. In contrary to the Commissions’ proposal, the European Parliament has chosen to go with a mandatory approach, requiring all businesses placing covered minerals on the Union market to comply with the due diligence standards. As discussed in the background to the proposed Regulation, there are various opinions on what solution is best on the matter of conflict minerals due diligence and one can only assume the approach taken by the European Parliament has been both applauded and received with critique and calls for cautions.

Going from a voluntary business landscape towards one of mandatory nature, one could believe businesses should, in general, do more than before. However, that may not be entirely true. Jenny Sandahl holds extensive mandatory schemes may act repressive in terms of voluntary actions and initiatives. She means businesses are often less willing to take on additional commitments or commitments going further than what is required in situations where they can be held accountable for measures undertaken, and concludes mandatory regulation may negatively affect the number of voluntary initiatives. She describes it as a chain reaction, ‘obligation – sanctions – reluctance’, that together may suppress the number of initiatives and CSR related commitments. However, there are no data available on the matter and she stresses it is rather a general observation, and, that it is hard to assess what approach is better; mandatory or voluntary.
5.3 Evaluating the EU Proposal with regard to the Likely Realisation of the Intended Purpose

5.3.1 Introduction

The Dodd-Frank Act has been criticised for its many negative unintended side effects as well as practical challenges. As discussed above, there are differences as well as similarities between the EU proposal and the Dodd-Frank Act. I will now assess whether the likely effects of the proposal will be similar to those of Dodd-Frank Act or if EU will actually manage to evade at least the worse unintended effects of the Dodd-Frank Act and come closer to the intended purpose; breaking the nexus between conflict and illegal exploitation of minerals and promote peace, development and stability in conflict-affected and high-risk areas.

5.3.2 Breaking the Nexus between Conflict and Illegal Exploitation of Minerals

Even though most authors agree that the trade in minerals do not classify as a root of conflict, it is generally believed trade in natural resources prolongs conflict by help funding it.\(^\text{174}\) In order to estimate the possible success of initiatives on conflict minerals in relation to their purposes, based on the approach that access to natural resources constitute a key source of funding, I believe the reasonable question to ask one-self is “can we help supress the activities of armed groups by cutting of their key source of funding?”. If we can, the next question would be “what will be the side effects?”. For example, not all violence in the eastern DRC is related to the mineral trade, nor are all mines controlled by violent actors.\(^\text{175}\) Laura E. Seay means the concept of conflict minerals and its relation to the situation in Congo is hugely misunderstood. As been discussed above, we know the main root of conflict is ethnicity related. In my opinion however, in order to help calm situations such as in Congo, also secondary “roots” or key sources of finance may be effective ways to tackle and reduce violence. Even so, Laura E. Seay

\(^{174}\) See 2.1.3.
\(^{175}\) Laura E. Seay, p. 8, and, the European Parliamentary Research Service, p. 4 (where it is stated the mineral trade accounts for roughly 90% percent of the export value in Eastern Congo).
argues the guerrilla groups will always find new sources of revenue as soon as one is cut off. That might be true, but if working together with local and regional institutions and initiatives, taking on multi-layered approaches including factors of a wider range, I believe the chances of breaking the nexus between conflict and illegal exploitation of natural resources are good.

5.3.3 Promoting Peace, Development and Stability

Breaking the nexus between illegal exploitation of resources and conflict is the first step in fulfilling the purpose with the proposed regulation. The next step is to promote peace, development and stability by breaking that nexus. When assessing the likeliness in fulfilling also the second part of the intended purpose, the following should be taken into account.

Resource rich regions’ economies often depend on revenues stemming from resource exploitation and trade. For example, Eastern Congo’s economy is largely dependent on mineral trade, whether linked to violence or not. Therefor, one can argue, a de facto ban of all minerals originating from a specific area is probably the worse that can actually happen for areas such as Eastern Congo. Apart from the actual miners loosing their jobs, the closing of mines negatively affects the society at large. There will be a decrease in incoming taxes as a result of less recorded export and private incomes, which in turn, will hinder economic and welfare development. Due to insufficient public resources, there will be less public projects stimulating new job opportunities, which in turn reduces the amount of possible future tax income – and so the circle goes on.

The many recent initiatives taken in the area of conflict minerals may, at least for a transitional period, negatively affect the market as it restricts it. However, if handled properly, it may also affect communities in positively. With regard to the negative circle of de facto bans and closing of mines, the Öko-Institut lifts the central role of “on-the-ground projects” and what

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176 Laura E. Seay, p. 18-19.
177 Laura E. Seay, p. 8.
178 Increased smuggling generates no taxes due to its unrecorded status.
opportunities comes with them. The institute means on-the-ground projects can create an “island of stability”, offering socio-economic development, in an otherwise destructive environment. 179 I believe creating new opportunities linked to the stricter and more regulated mining market is a great way of turning a challenge into something fruitful. For example, to ease certification processes for and tracking possibilities of conflict minerals, programs such as the “bag-and-tag” system can be further developed and invested in. Investing in certification programmes will furthermore ease the due diligence process for European businesses. As Jenny Sandahl holds, reliable certification schemes such as the CFSP are crucial to successful due diligence as this is the main link between foreign mines and the western market of electronics. Moreover, expanding existing tracking programs will require recruitment of additional taggers and organizers working in the certification process. Furthermore, to assist the expansion of and ease the transportation of certified minerals, it is likely the infrastructure needs to be developed, which in turn will create new job opportunities. In other words, investing in and expanding certification schemes and programs on the ground will help prevent a number of negative impacts on local societies due to the stricter mining market. At the same time, it will ease the process for European businesses conducting due diligence throughout long and complex supply chains by help overcoming practical challenges with regard to collecting and assessing high amounts of supplier data.

The Öko-Institut distinguishes between “hot-conflicts” and post-war ones and holds the need for certain actions may differ according to what stage a conflict is in. Even if violence is still evident in Congo, especially the eastern parts, the Congolese conflict has entered into a post-war phase, consisting of peace consolidation and economic reconstruction. 180 The Öko-Institut means that a de-facto embargo, resulting from extensive due diligence obligations, may work stemming hot conflicts by promptly

179 The Öko-Institut, p. 53.
Reducing its way of finance. However, in a post-war situation such strategy may turn counter-productive, as important ingredients in moving forward, away from conflict, are economic development, the creation of legal norms and the introduction of regular income opportunities. In my opinion, the observation made by the Öko-Institut is well put and I believe the many evidences of negative effects on the Congolese community underpin the conclusion and should be taken into consideration when establishing schemes and regulations within the field.

Due to the many documented negative effects on the Congolese society as well as limitations inbuilt in mandatory conflict minerals regulations with regard to achieving their purpose on their own, it is important to listen carefully to and engage with other projects and alternative solutions on conflict minerals and, by doing so, better balance purpose with risks. Fern Abrams, Director for Government Relations and Environmental Policy at IPC, holds that even if responsible sourcing can contribute to improvements of situations such as Congo or elsewhere, supply chains solutions cannot tackle the problems of conflict minerals on their own, but are dependent of on-the-ground projects in order to succeed. Also the Öko-Institut argues regulations on conflict minerals should be combined with industry driven “on-ground projects”. The very complex nature of situations in places such as Congo calls for multi-layered solutions, therefore, governments and NGO’s must collaborate with local leadership and work on wider polices, integrating security, human rights and corruption related issues as well as supporting infrastructure development and institution building along with the matter of conflict minerals.

In order to mitigate negative side effects on local communities due to mandatory due diligence on conflict minerals, the Öko-Institut suggests affected mining communities should be offered food aid and health and school funding to support the reestablishment of their communities. The

181 The Öko-Institut, p. 51.
182 IPC, p. 2.
183 The Öko-Institut, p. 12.
184 The Öko-Institut, p. 50-51.
institute means it would stimulate growth and independence in the long run as local businesses would get a chance to re-establish and the local economy to recover. However, in my opinion such an approach relies on the assumption that there will be negative consequences for mining communities as a result of the EU proposal. Though, due to the wider geographical scope of the proposed EU Regulation, I believe the negative effects on the mining market should not be nearly as evident as those of the Dodd-Frank Act. Furthermore, given that EU work together with other Initiative Groups on broader solutions, this should help counteract the most negative side effects.

6. Conclusion

Despite all the criticism towards the effect of the Dodd-Frank Act and calls for caution in repeating the same mistakes, the EU Parliament has chosen to go with an even stricter and more extensive approach in its proposed Regulation on conflict minerals than the US Government did back in 2010. Even so, the proposal does have some advantages over the Dodd-Frank Act.

However, going further does not necessarily mean going harder on businesses in a negative way. To begin with, the European proposal is much clearer in its requirements and to whom it applies. Some of the criticism towards the Dodd-Frank Act focused on its vagueness and unrealistic dependence on collaboration down the supply chain. With the EU proposal imposing mandatory due diligence responsibilities on the entire supply chain, the Regulation may tackle some of the practical obstacles imbedded in the Dodd-Frank Act. Even if companies still face extensive administrative work, at least every company down the supply chain is obliged to have the relevant information ready which hopefully eases the process.

Moving forward, not only is the European approach more extensive to whom it applies, it is also more extensive in its geographic approach and to what situation it applies. While the Dodd-Frank Act being limited to conflict minerals originating from Congo or adjoining countries, the EU Regulation
ought to apply to conflict minerals originating from any high-risk or conflict-affected area – anywhere. This may prevent a complete withdrawal from the Congolese mineral market, or at least soften it, as businesses will have to carry out due diligence with regard to all high-risk or conflict-affected areas. Furthermore, businesses seem well aware of the negative impacts withdrawal from a certain market may have on local communities in conflict-affected and high-risk regions. Ericsson’s and Husqvarna’s decision not to withdraw from the Congolese market may be exceptional, however, given that the effects of section 1502 should have had the time to be carefully documented and communicated to relevant businesses at the time of the implementation of the European Regulation on conflict minerals, as well as the wider geographical scope of the same, I believe the withdrawal effect should not be nearly as evident as the de-facto ban after the Dodd-Frank Act and the Congolese banning of illegal extraction of minerals.

At the same time, the global scope of the proposed EU Regulation put a huge responsibility on businesses, who may not have the resources or the knowledge to assess whether the minerals originate from a conflict-affected or high-risk area or not. This uncertainty may have negative effects on the market – as companies may choose to trade from “safe zones” or in recycled minerals rather than areas whose status as high-risk or conflict-affected is hard to define. Such scenario will in turn negatively affect the chances to fulfil the purpose of the proposed legislation – namely to promote stability, peace and development in conflict-affected and high-risk areas. However, as indicated by interviewed business representatives, today’s businesses are already working from a risk assessment point of view when evaluating business partners and locations. Many factors already being covered in these assessments, such as corruption and working conditions, should have direct effect on the identification and assessment of conflict-affected or high-risk areas. Given the Commission’s Handbook offers practical and useful guidance on how to identify conflict-affected and high-
risk areas, the burden put on businesses with regard to the identification of areas should not result in any major withdrawal effect.

Furthermore, the proposed Regulation offers both financial help and technical guidance for SME’s. This should help stem practical obstacles, both with regard to the – probably – limited financial resources of smaller businesses as well as their limited power to pressure suppliers less aware of or unwilling to provide rightful information. As been addressed by interviewed business representatives, compliance with the proposed regulation with require companies to invest in new, highly sophisticated data programs in order to handle and master all relevant data. Such programs are expensive, a cost that should be especially hard on smaller businesses. As the Dodd-Frank Act was criticized for its incapacity to balance the needs and limitations of SME’s, I believe the European Parliament’s approach is mature and better reflects the complexity in mandatory due diligence – considering size, financial resources and position of individual businesses.

The approach to include the entire supply chain – both upstream and downstream operators – is preferable also in a wider perspective, as it mitigates the risk of “incomplete” due diligence chains and should stimulate efficiency. Less timely and costly procedures should benefit all companies practising due diligence and in turn, result in higher compliance in the long run. However, concerns have been raised with regard to mandatory supply chain due diligence in relation to its impact on voluntary actions and businesses’ CSR commitments. Nevertheless, there are no data available on what approach should generate the highest result in achieving the purpose of conflict minerals due diligence.

With regard to downstream due diligence, practical challenges have been identified and in doctrine the efficiency of downstream due diligence has been questioned from a proportionality perspective. It seems extensive downstream obligations, in this case imposed on European traders, may not always generate effects “positive enough” with regard to the efforts taken by businesses, especially not in very long and complex supply chains. However,
interviewed business representatives have already documented increased awareness on conflict minerals and compliance with western standards among foreign businesses, businesses currently not obliged by local law. In my opinion, the increased awareness among foreign supply chain participants lay ground for suggesting due diligence down the supply chain does pay off – even if posed with practical challenges.

Even if the European Parliament should tackle many of the obstacles imbedded in the Dodd-Frank Act, full success relies on a combination of responsible sourcing, such as mandatory supply chain due diligence, and local “on-the-ground” projects. Such projects should, in my opinion, preferably be anchored in the work of ICGLR in order to gain local and regional support, understanding and inputs. If companies choose to join any additional on-the-ground projects, that should be awarded with some sort of recognition. Positive recognition should trig businesses to engage, as recognised engagement is known to generate positive reputation among consumers and the public. Through careful guidance, encouragement and recognition, I believe businesses’ willingness to commit to additional CSR related programs should not suffer too much of the mandatory nature of the Parliament’s proposal.

In order to optimize the efficiency of proposed Regulation, emphasis must be put on governmental efforts in combination with responsibilities of the private sector. In order not to repeat the lessons learnt form the Dodd-Frank Act, it is important to have in mind the often multi-layered complexity of situations in conflict-affected and high-risk areas and that the mineral trade may constitute only one, out of many, parameters. Full realisation relies on a wide range of factors, such as the local and regional social, economic and constitutional situation of an area.

Having in mind the above and today’s businesses’ commitment to act responsible together with the documented increased awareness on conflict minerals among both European and foreign operators, I would say progress is already on its way and that the nexus between the western consumption of
electronics and illegal exploitation of natural resources will eventually break. Provided governments, NGO’s and the private sector work together on multi-layered solutions, including the support for and the expansion of on-the-ground projects such as certification schemes and tracking systems, I believe also the second part of the purpose – promoting peace, development and stability – of the proposal will be fulfilled.
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