

## **Position paper from the FBDi on “conflict minerals” EU draft, Dodd-Frank Act and OECD guidance\***

### **Significance of the Dodd-Frank Act for German businesses**

American legislation is not able to directly impose binding requirements on German businesses. However, German businesses are confronted with the extensive traceability and documentation obligations that arise through their delivery relationships with American business partners and contractual obligations. Refusal to provide information can therefore have unfavourable consequences for the business relationship. However, there is room for manoeuvrability in the amount of work involved in providing such information and the extensiveness of such information.

In this connection, German businesses should seek to consult with American business partners to reach an agreement regarding feasible solutions in respect of the as yet unfinalised legal situation in the USA.

### **OECD guidance**

In parallel to the US regulation efforts, the OECD has also agreed measures at an international level to encourage responsible procurement of minerals from high-risk areas or areas in which armed conflict is ongoing. This is primarily guidance for ensuring sustainable supply chains and for complying with due diligence requirements regarding minerals from conflict or high-risk regions<sup>1</sup>. These go beyond the scope of the Dodd-Frank Act, which is limited to conflict resources from the Democratic Republic of Congo and bordering nations, and apply to the procurement of conflict resources worldwide. They specify a procedure for the development of a responsible system of procurement. The guidance can be applied from all parties to the supply chain as an aid in training and processing the 3TG metals (tin, tungsten, tantalum, gold). They also contain special appendices with information on tin, tantalum, tungsten and also one for gold. The OECD system of due diligence compliance comprises five key components:

- Development of a **management system** (introduction of relevant standards, system for oversight and traceability in the supply chain, intensification of collaboration with suppliers, introduction of a complaint system);
- **Risk assessment** in the supply chain in accordance with the OECD guidance;

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1. OECD due diligence guidance for responsible supply chains of minerals from conflict-affected and high-risk areas, <http://www.oecd.org/daf/inv/mne/GuidanceEdition2.pdf>, second edition from 2012.

- Introduction of a **risk management strategy**;
- **Independent audits** (third-party) for selected aspects of the supply chain;
- **Publication of a corporate report on conflict minerals.**

The SEC has recognised the OECD guidance as a (potential) set of rules for the due diligence processes of companies bound by them, and these rules would then form the basis for a “conflict minerals report” that would have to be submitted annually. The EU too has undertaken to encourage broad compliance with this guidance and refers to it in its draft regulation proposal.

### **The EU draft proposal**

The EU draft proposal applies to the resource importers, the metallurgical businesses and smelters, who are at the narrow point of the supply chain. This should be welcomed as a streamlined and fundamentally efficient method of regulation, and would be a massive simplification for the downstream businesses in the supply chain.

However, the burden of documentation and proof falls upon the affected businesses, even though these under the presently applied voluntary system are not protected against disadvantages in relation to competitors who have not been certified. The concept of voluntary compliance on the whole is less than ideal, including in respect of the goals of the regulation.

Moreover, neither the regulation nor the surrounding EU legislation adequately govern the key obligations. This applies in particular to determine which areas are conflict and high-risk areas. In the interest of legal security, an authoritative means of determining relevant areas is required. As the planned regulation is also expected to be expanded to downstream participants in the supply chain (an intention already stated in the initiative report of the European Parliament), their concerns ought to already be reflected in the revision at this stage.

A consistent approach to regulation – as opposed to various uncoordinated management instruments (e.g. those applied in public procurement with special requirements imposed regarding non-conflict minerals and metals in downstream supply chains) – creates greater legal security and prevents the development of multiple documentation systems that are incompatible with one another. A plausible solution in this context would be notification and information obligations that are graded in the supply chain according to risk indication.

For European industry, greater compatibility with the requirements of the US Dodd-Frank Act or at least mutual recognition would also be beneficial, based on the OECD requirements for responsible supply chains.

**At present, the FBDi members are able to provide their customers with the following information:**

**Documents prepared and published by manufacturers and/or links to their websites. These documents may be prepared in EICC or OECD Due Diligence formats, depending on the country of origin of the manufacturer.**

**The affected manufacturers are requested by the FBDi members to provide relevant documentation if affected.**