SQUIRE PATTON BOGGS

The EU Conflict Minerals Regulation and the Labyrinth of Brexit

March 2021

The initial provisions of Regulation (EU) 2017/821 of the European Parliament and of the Council laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas (the "EU Conflict Minerals Regulation") took effect in 2017.

It was aimed at reducing the financing of armed conflicts through the trade of valuable minerals. As required, the EU Conflict Minerals Regulation was amended by Delegated Regulation (EU) 2020/1588 of 25 June 2020, which set the threshold amounts of several of the listed minerals and metals. The amendment came into effect in November 2020. Then, on January 1, 2021, the rest of the provisions of the EU Conflict Minerals Regulation came into full effect requiring supply chain due diligence and, in certain cases, third-party audits and consultations. The supply chain due diligence required by the EU Conflict Minerals Regulation is based on the due diligence framework set out in the OECD's Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas.

1. The UK Is Not an EU Member State

Of course, the UK is no longer an EU member state. It officially left the EU on January 31, 2020. However, EU law remained applicable during the period of "transition" – from January 31, 2020 to December 31, 2020 – pending the conclusion of an agreement between the EU and UK on their "future relationship." That agreement was concluded on December 24, 2020. The period of transition ended at 11 p.m. on December 31, 2020.

2. Principles of Retained EU Law

EU Regulations, including the EU Conflict Minerals Regulation, are directly applicable as law in an EU member state, without any further action being required to implement them by that EU member state. EU legislation that applied directly to the UK immediately before 11 p.m. on December 31, 2020 – known as "direct EU legislation" – became what is known as "retained EU law," and forms part of UK domestic law. However, where elements of a regulation were not due to enter into force until after December 31, 2020, as is the case with the operative provisions of the EU Conflict Minerals Regulation, those elements do not form part of retained EU law. As a further complication, the position in Northern Ireland is different from the rest of the UK (that is, Great Britain). The Northern Ireland Protocol to the Withdrawal Agreement between the UK and the EU (the Northern Ireland Protocol) provides that EU law will continue to apply in Northern Ireland. Therefore, as discussed in more detail below, importers into Northern Ireland are covered by all aspects of the EU Conflict Minerals Regulation.

3. The EU Conflict Minerals Regulation – Application in Great Britain

The core compliance and due diligence requirements imposed on "EU importers" under the EU Conflict Minerals Regulation only came into force starting on January 1, 2021 – i.e., after the end of the transition. That means that while parts of the EU Conflict Minerals Regulation (mainly dealing with obligations on the EU Commission to determine the scope of the EU Regulation and develop guidance) have applied since July 9, 2017, and so applied directly to the UK immediately before 11 p.m. on December 31, 2020, the key operative provisions of the EU Conflict Minerals Regulation (covering the imposition of due diligence, third-party audits, consultations and reporting obligations on importers and obligations upon member state competent authorities in relation to the effective implementation regulation) did not.

As a result, the key operative provisions of the EU Conflict Minerals Regulation were not retained EU law, have not automatically taken effect in Great Britain (that is, England, Scotland and Wales), and, therefore, do not currently apply in Great Britain.

4. The EU Conflict Minerals Regulation – Application in Northern Ireland

However, the status of the EU Conflict Minerals Regulation in Northern Ireland is different. The Northern Ireland Protocol makes the EU Conflict Minerals Regulation apply to importers into Northern Ireland. This is true because the EU Conflict Minerals Regulation was specifically listed in the Northern Ireland Protocol as a provision of EU law that was to apply to and in Northern Ireland. The operative provisions of the Northern Ireland Protocol took effect starting at the end of the transition period (i.e., 11 p.m. on December 31, 2020).

The UK legislation that gives effect to the Northern Ireland Protocol enables the rights and obligations that arise under it, and EU law applied by it, to flow into UK law automatically. Therefore, the EU Conflict Minerals Regulation does apply, in full, to importers into Northern Ireland.

While EU Regulations are directly applicable without implementing legislation, they leave the setting of enforcement powers and penalties to national governments. The EU Conflict Minerals Regulation is no exception providing that, "Member states shall lay down the rules applicable to infringements of this Regulation." In response to that requirement, the UK government enacted the Conflict Minerals (Compliance) (Northern Ireland) (EU Exit) Regulations 2020 to set out the enforcement and penalty regime for conflict minerals in Northern Ireland to be effective starting on January 1, 2021.

5. The Trade and Cooperation Agreement and References to OECD Guidance

The Trade and Cooperation Agreement (TCA) reached between the UK and the EU on December 24, 2020, makes specific reference to conflict minerals at Article 8.10 (Trade and responsible supply chain management):

"The Parties recognise the utility of international sector-specific guidelines in the area of corporate social responsibility and responsible business conduct and shall encourage joint work in this regard. **In respect of the OECD Due Diligence Guidance for responsible supply chains of minerals from conflict-affected and high-risk areas and its supplements, the Parties shall also implement measures to promote the uptake of that Guidance**." (Emphasis added.)

Clearly, the EU Conflict Minerals Regulation already applies in the EU and, as outlined above, it is fully applicable in Northern Ireland, with an enforcement regime set out by the Conflict Minerals (Compliance) (Northern Ireland) (EU Exit) Regulations 2020. In addition, the mutual commitment to promote the uptake of the OECD's Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas (OECD Guidance) appears to signal that the UK government will work to make the OECD Guidance mandatory for importers into the rest of the UK. This is not a surprise because of the significant involvement of the UK in the development of the standards in the OECD Guidance.

Developments relating to the OECD Guidance in Great Britain are likely to emerge from the Foreign, Commonwealth & Development Office (FCDO) and/or the Department for Business, Energy & Industrial Strategy. Article 8.10 of the TCA also commits the EU and UK to strengthen their cooperation on this issue. At this point, it appears that the UK government's approach to the EU Conflict Minerals Regulation has been to ensure alignment across the whole of the UK. Guidance issued by the FCDO clearly states, "Businesses have a statutory requirement to comply with the OECD guidance only in Northern Ireland. However, the Government expects all companies importing [tin, tungsten, tantalum and gold] into Great Britain to also comply with the OECD guidance." On the basis of this guidance, we expect that, in due course, the UK will introduce domestic legislation that, at a minimum, will ensure that all UK importers will be bound to the standards and obligations as set out in the OECD's Guidance.

6. Further Impact of Brexit on the Regulation

It is worth noting that importers of covered minerals and metals into the EU from Great Britain will also now be covered by the EU Conflict Minerals Regulation. Although the EU Conflict Minerals Regulation does not apply to importers into the EU whose annual import volumes are below certain annual threshold amounts, the volume thresholds are set to ensure that at least 95% of the total imported volumes into the EU of each metal and mineral will be captured and covered by the Regulation. Each of the total imported volumes is to be re-calculated every three years, with the first re-calculation due on January 1, 2024. As discussed above, because of the Northern Ireland Protocol, amounts imported into Northern Ireland will be covered by the EU Conflict Minerals Regulation (and included in the calculations of the total imported volume thresholds). But as a result of Brexit, the re-calculated total imported volume threshold amounts will likely decrease from the current threshold amounts because imports into Great Britain will no longer be included in the calculations, while the 95% target percentage will not change. Therefore, it is likely that considerably more EU importers will be covered by the EU Conflict Minerals Regulation after the re-calculation in January 2024. Finally, if, as expected, the UK does adopt similar rules that put the OECD Guidance into law in the rest of the UK, importers into Great Britain will (subject to any thresholds the UK government chooses to apply) be covered as well (including, presumably, on their imports into Great Britain from the EU).

Assuming the UK government adopts a specific provision that provides for it, importers into Great Britain are likely, in future, to be covered by a separate Great Britain conflict minerals regime. Importers into Northern Ireland will, however, continue to be covered by the EU Conflict Minerals Regulation for as long as the Northern Ireland Protocol remains in force.

Contacts

Dynda A. Thomas
Partner, Cleveland
T +1 216 479 8583
E dynda.thomas@squirepb.com

Robert O'Hare
Senior Tax Policy Advisor, London
T +44 20 7655 1157
E robert.ohare@squirepb.com

Anita Lloyd
Director, Birmingham
T +44 121 222 3504
E anita.lloyd@squirepb.com