

THE EU BATTERY REGULATION DUE DILIGENCE RULES

ENSURING THAT HUMAN RIGHTS AND THE ENVIRONMENT
ARE NOT CASUALTIES OF THE ENERGY TRANSITION

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In December 2020, the European Commission presented its long-awaited proposal for a Battery Regulation.¹ The Regulation is in the framework of the European Green Deal,² and is the first initiative under the new Circular Economy Action Plan.³

The proposed legislation introduces mandatory requirements for all batteries (i.e. portable, automotive, electric vehicle (EV) and industrial batteries) placed on the EU market, and sets targets on collection, treatment and recycling of batteries at the end of their life.⁴

One crucial element of the proposed regulation is the introduction of a due diligence regime, that aims to ensure the production of batteries, and in particular the extraction of necessary materials for that production, does not lead to human rights abuses or environmental damage.

While the proposed introduction of an obligation for economic operators to carry out human rights and environmental due diligence is welcome, the legislative proposal presents several shortcomings that risk seriously undermining the effectiveness of the proposed due diligence regime. In particular, it appears that certain key features of the proposed legislation have been aligned with the due diligence rules of the Conflict Minerals Regulation,⁵ without having been adapted to the specific challenges within the battery sector.

Due to increasing reliance on batteries for road transport specifically, a Bloomberg New Energy Finance study has forecasted a five-fold increase in global demand of Lithium by 2030 as compared to 2021 levels.⁶ The International Energy Association (IEA) forecasts that mineral demand for clean energy technologies will rise fourfold by 2040, as states make efforts to meet the Paris Agreement goals, with particularly high growth for EV-related minerals.⁷ If unchecked, these activities could place an enormous strain on the environment, peoples' livelihoods, and the human rights of workers and other stakeholders impacted throughout the value chain of batteries. It is therefore key that in their due diligence processes, economic operators effectively identify and adequately address risks and harms.

This paper sets out the most critical shortcomings of the due diligence regime presented in the proposed Regulation. It is essential that the European Parliament and Council correct these shortcomings by amending the proposed Regulation and approve legislation that effectively protects human rights and the environment, rather than sacrificing these core principles in the race to implement the energy transition.

¹ European Commission, *Green Deal: Sustainable batteries for a circular and climate neutral economy*, 10 December 2020, https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2312

² European Commission, *Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions*, 11 December 2020, <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1576150542719&uri=COM%3A2019%3A640%3AFIN>

³ European Commission, *Changing how we produce and consume: New Circular Economy Action Plan shows the way to a climate-neutral, competitive economy of empowered consumers*, 11 March 2020, https://ec.europa.eu/commission/presscorner/detail/en/ip_20_420

⁴ For a critical commentary on the proposed Regulation, see: Environmental Coalition on Standards, Transport & Environment, Deutsche Umwelthilfe, and the European Environmental Bureau, *Enhancing the Sustainability of Batteries: A Joint NGOs' Position Paper on the EU Battery Regulation Proposal (first round position paper)*, 17 March 2021, <https://circulareconomy.europa.eu/platform/en/knowledge/enhancing-sustainability-batteries-joint-ngo-position-paper-eu-battery-regulation-proposal>

⁵ European Union, *Regulation (EU) 2017/821 of the European Parliament and 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*, 17 May 2017, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017R0821&from=EN>

⁶ Bloomberg, *Top Lithium Miner Sees Inflation as Speed Bump in Supply Growth*, 5 August 2021, www.bloomberg.com/news/articles/2021-08-05/higher-cost-is-a-speed-bump-in-lithium-supply-growth-albemarle?cmpid=BBDO81921_hyperdrive&utm_medium=email&utm_source=newsletter&utm_term=210819&utm_campaign=hyperdrive

⁷ International Energy Agency, *The Role of Critical World Energy Outlook Special Report Minerals in Clean Energy Transitions: World Energy Outlook Special Report*, May 2021, <https://iea.blob.core.windows.net/assets/24d5dfbb-a77a-4647-abcc-667867207f74/TheRoleofCriticalMineralsinCleanEnergyTransitions.pdf>

1.1 THE NEED TO EXTEND THE SCOPE OF DUE DILIGENCE OBLIGATIONS (ART.39)⁸

Recommendation 1: The scope of due diligence obligations (Art.39) should be expanded to cover all four categories of batteries identified in the proposed Regulation, independent of the battery's size or capacity.

The proposed Regulation covers all types of batteries, grouped in four categories: portable, automotive, electric vehicle and industrial. However, under Art.39, due diligence obligations are imposed only on economic operators placing on the market two types of batteries: rechargeable industrial batteries and electric-vehicle batteries with internal storage and a capacity above 2 kWh. This creates a significant gap. It should be noted that the risks related to mineral extraction are the same for each of the final products. In addition, the UN Guiding Principles on Business and Human Rights (UN Guiding Principles) – which outline business enterprises' human rights responsibilities under international law – emphasize that *all* businesses must respect human rights throughout *all* their operations, independent of their size or the product that they are placing on the market and carry out due diligence.⁹

Recommendation 2: The Regulation should acknowledge that battery producers must respect human rights and the environment in all their operations and business relationships throughout their value chain.

The regulation needs to acknowledge the need and obligation for economic operators to carry out due diligence throughout the entire value chain. Currently, the proposed Regulation only introduces due diligence obligations in relation to the *supply* chain of minerals identified in Annex X which are used in the production and marketisation of batteries. Yet, harm might occur along the entire *value chain*, including at the point of recycling and recovery of minerals.¹⁰ Other examples include carrying out due diligence on the electronics of the battery management system or the connectors, parts belonging to the electronic sector which has also been linked to human rights abuses.¹¹ It is therefore essential that economic operators carry out human rights and environmental due diligence for all of their operations and in relation to any part of their value chain.

Given that industrial and artisanal small-scale mining around the world is all too often linked to serious human rights abuse and environmental damage,¹² it seems warranted to establish specific requirements addressing the risks particularly linked to mineral extraction. These requirements provide business with adequate tools adapted to the specific risks arising from mineral extraction.

⁸ All references to articles are references to: European Commission, *Regulation of the European Parliament and of the Council concerning batteries and waste batteries, repealing Directive 2006/66/EC and amending Regulation (EU) No 019/1020*, 10 December 2020, https://ec.europa.eu/environment/pdf/waste/batteries/Proposal_for_a_Regulation_on_batteries_and_waste_batteries.pdf

⁹ OHCHR, *UN Guiding Principles on Business and Human Rights*, Commentary to Principle 11, 2011, www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

¹⁰ European Union, Regulation (EU) 2017/821 defines a 'mineral supply chain' as "the system of activities, organisations, actors, technology, information, resources and services involved in moving and processing the minerals from the extraction site to their incorporation in the final product". In contrast, a business' *value chain* encompasses the activities that convert input into output by adding value. It includes entities with which it has a direct or indirect business relationship and which either (a) supply products or services that contribute to the enterprise's own products or services, or (b) receive products or services from the enterprise.

See: European Union, *Regulation (EU) 2017/821 of the European Parliament and 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*, 17 May 2017, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017R0821&from=EN>;

¹¹ Reuters Events, *Electronics sector charts new path after bloody decade of labour abuse*, 23 May 2018, www.reuters.com/sustainability/electronics-sector-charts-new-path-after-bloody-decade-labour-abuse; Good Electronics, *Time for a reboot: Monitoring in China's electronics industry*, 1 September 2018, <https://goodelectronics.org/time-for-a-reboot/>; Good Electronics, *Paper: Exploitation by deception in the electronics industry*, 3 December 2018, <https://goodelectronics.org/paper-exploitation-by-deception-in-the-electronics-industry/>; Business and Human Rights Resource Centre, *Business and human rights snapshot: ICT Sector*, October 2018, https://media.business-humanrights.org/media/documents/files/BHRRC_Briefing_ICTSector_OCT2018.pdf

¹² Amnesty International, *Democratic Republic of the Congo: Time to recharge: Corporate action and inaction to tackle abuses in the cobalt supply chain* (Index: AFR 62/7395/2017), www.amnesty.org/en/documents/afr62/7395/2017/en/; and ScienceDirect, *Assessing the future environmental impacts of copper production in China: Implications of the energy transition*, 20 November 2020, www.sciencedirect.com/science/article/pii/S0959652620328705

1.2 COVERING ALL RELEVANT RISKS THROUGH THE ESTABLISHED DUE DILIGENCE RULES

Recommendation 3: The Regulation's due diligence rules must be based on, and make explicit reference to, the UN Guiding Principles and OECD Guidelines for Multinational Enterprises (Art. 39 (2) (b)).

The responsibility to respect human rights and the environment has been outlined in detail in the *UN Guiding Principles* and in the *OECD Guidelines for Multinational Enterprises* (OECD MNE Guidelines).¹³ These represent the most widely recognised international standards on the corporate responsibility to respect human rights and the environment, along with the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (ILO MNE Principles) already mentioned in Annex X of the proposed Regulation. The due diligence obligations established under the draft Regulation should therefore be in line with these. However, currently the proposed Regulation, in Art. 39 (2) (b), refers only to the *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas* (OECD Minerals Supply Chain Guidance), aligning with the methodology applied in the EU Conflict Minerals Regulation.

The reference to the OECD Minerals Supply Chain Guidance is problematic because this a) only covers activities and operations in conflict-affected and high-risk areas and b) only addresses risks of gross human rights abuses, torture, cruel, inhuman and degrading treatment; widespread sexual violence, and the worst forms of child labour. As a consequence, battery producers' obligation to carry out due diligence would be limited geographically to minerals originating or transported through conflict and high-risk areas, it would therefore not include, for instance, raw materials originating from the South American Lithium triangle (Argentina, Bolivia, Chile). Also, as due diligence would be limited to detecting risks of gross human rights abuses, leaving other risks aside, the provision would exclude other salient risks, including to land, labour and water rights. The scope of the due diligence must be expanded to be consistent with the UN Guiding Principles and the OECD MNE Guidelines and aim to prevent *any* human rights harm.

1.3 ENSURING THAT THE DUE DILIGENCE ANALYSIS IS BASED ON ALL POSSIBLE AND RELEVANT INFORMATION THAT ECONOMIC OPERATORS CAN GATHER

Recommendation 4: Economic operators must gather and base their due diligence on all relevant information on geographic, sectoral, product and enterprise risk factors, including through consultation with actually and potentially affected rightsholders and with local communities, Indigenous peoples, civil society organisations, and reviewing credible media sources.

- i) Information for the identification of risks

Art. 39 (3) (a) of the proposed Regulation requires battery producers to assess risks based on information retrieved through two means: the tracing system and the grievance mechanism outlined in paragraph 2 of the same article.

The suggested tracing system offers some transparency along the supply chain via the identification of the chain of custody (i.e. name and address of suppliers, transport route, smelter and refiner) and the quantity of minerals. In the context of conflict-related risks, geographic information is a main indicator for red flags which indicate a potential risk.

However, this is not sufficient to identify all risks that should be addressed in the due diligence process.

Relying solely on geographic information, and a chain of custody provided by the immediate supplier, fails to provide the full picture. Information on, for instance, environmental risks arising from a specific extraction technique used in a mine, labour rights risks, discrimination, or failures to consult with an indigenous community would be excluded. It further fails to take into account other sources, such as potentially affected rightsholders themselves, media or civil society organisations. Operators must ensure that consultation and stakeholder engagement takes place throughout the value chain and at every relevant stage of due diligence: extraction, storage, transport, export, processing, battery manufacturing, end usage, and recycling. The second tool identified in the Regulation to retrieve information, the grievance mechanism, will equally not fill this information gap. This is because a grievance mechanism requires proactive steps taken by the actual or potentially aggrieved party. Whether or not such a mechanism will be used will depend on whether those affected are informed about the human rights and environmental risks, know about the grievance mechanism, have confidence in it and feel empowered to use it. Further, a grievance mechanism at the level of the battery producers

¹³ The UN Guiding Principles were adopted by the Human Rights Council in 2011 and endorsed by the European Union the very same year. See: OHCHR, *UN Guiding Principles on Business and Human Rights*, p. iv, www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf; and European Commission, *A renewed EU strategy 2011-14 for Corporate Social Responsibility*, 25 October 2011, eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52011DC0681

will hardly be accessible for workers and communities harmed by extractive or other potentially damaging activities upstream. As an alerting system it is therefore unlikely to pick up on risks further up the supply chain.

To ensure their due diligence identifies and assesses all relevant risks, economic operators must therefore use information gathered in addition to information retrieved through the tracing system and grievance mechanisms, including information obtained through consultation with potentially affected right holders, such as local communities, Indigenous peoples, NGOs, media and other sources, on top of established tracking systems and grievance mechanisms. This should include relevant elements such as information about sectoral, geographic, product and enterprise risk factors, including known risks the enterprise has faced or is likely to face e.g. risks surrounding the rapid formalisation of artisanal miners by large industrial cobalt-copper mining concessions, or the mass expansion of industrial lithium, copper, and nickel mines in arid climates, placing enormous stress on water resources and communities' livelihoods.

ii) Information for the assessment of the probability of harm

Further, Art.39 (3) (b) line 22 requires the economic operator to assess the probability of adverse impacts based on available reports by third-party verification done by a notified body, concerning the suppliers in that chain against the due diligence requirements of the regulation. Again, the information on which the due diligence of suppliers will be assessed against seems to be limited to information listed in Art. 39 (2), while information provided by media, affected rightsholders, civil society, Independent experts or others is not to be taken into account. Basing due diligence on a limited set of information risks excluding the voice of those potentially affected, defeating its purpose. It is essential that due diligence is based on the UN Guiding Principles and the OECD MNE Guidelines, which both state that businesses must respect human rights throughout their operations, and carry out due diligence. To help companies meet their due diligence obligations, the OECD Guidance for Responsible Business Conduct, referenced in Annex X (3) of the regulation, provides detailed support on the practical implementation of these standards and the responsibilities of downstream companies.

iii) Reliance on audit reports

Finally, Art. 39 (3) (b) suggests over-reliance only on auditing reports. This risks economic operators effectively delegating their due diligence to auditors. Yet, it is important that the regulation ensures that the responsibility to respect human rights and the environment and the obligation to carry out due diligence remains with the individual economic operator.

Recommendation 5: Expand the list of raw materials covered under due diligence requirements in Annex X (1) to ensure, at a minimum, that copper, iron and bauxite are also sourced responsibly.

The list of raw materials falling within the scope of the due diligence regime, outlined in Annex X (1) to the proposed Regulation, covers only four raw minerals and metals: cobalt, natural graphite, lithium, and nickel. Whilst these raw materials are key in battery chemistries, concerning the list excludes some raw materials whose extraction is often associated with environmental damage or human rights abuses, such as copper.

One of the reasons copper was not included, is due to the relatively small share (6%) of total use that ends up in the automotive sector, and therefore in EV batteries.¹⁴ However, copper is a key battery material and is used at both the cell level in the anode and at the pack level in the electrical interconnects. With EV battery demand and production set to grow exponentially, demand for copper within the automotive sector will do so too – as pointed out by the industry itself.¹⁵ Furthermore, copper and cobalt, which falls within the scope of the Regulation, are often mined together, where cobalt is mined as a by-product of copper (and nickel) mining, e.g. in the Copper-Cobalt belt in the DRC. Since they are mined together or close to each other (44% of cobalt comes from copper mining), the environmental impact and human rights risks are often similar. It is therefore important to include copper also to ensure that cobalt, when mined as a by-product of copper mining, does not escape due diligence requirements, not just at extraction level but refining and beyond.

Beyond copper, other important raw materials have been excluded from due diligence requirements, such as iron and bauxite (aluminium).¹⁶ In fact, the demand for iron and bauxite for vehicles with electric engines is projected to increase by 13 to 14 times

¹⁴ European Commission, *Follow-up feasibility study on sustainable batteries under FWC ENER/C3/2015-619-Lot 1*, November 2019, <https://ecodesignbatteries.eu/sites/ecodesignbatteries.eu/files/attachments/EDbatteryFollowupWP4finalpreprint.pdf>

¹⁵ International Copper Association – Copper Alliance, *2.3 Million Tonne Energy Storage Boost for Copper*, April 2019, <https://copperalliance.org/wp-content/uploads/2019/04/fact-sheet-2.3-million-tonne-energy-storage-boost-for-copper.pdf>

¹⁶ Bauxite is a sedimentary rock with a relatively high content in aluminum, representing the primary source of aluminum.

between 2019 and 2030¹⁷ and future battery technologies could massively increase the demand for aluminium. The extraction of these metals has been accompanied by well-documented human rights abuses and environmental destruction.¹⁸

A due diligence regime establishing tools addressing the specific environmental and human rights risks linked to the minerals sourcing in the battery value chain should cover all minerals in a battery of which the extraction, trading and processing are linked to human rights and environmental risks. At a minimum, the Regulation should additionally cover copper, iron and bauxite which are regularly contained in batteries.

Recommendation 6: Strengthen environmental due diligence requirements by referencing key principles of EU environmental law, international environmental agreements and a non-exhaustive list of adverse environmental impacts.

Art. 39 (2) in combination with Annex X establishes environmental due diligence obligations to address risks in relation to air, water, soil, and biodiversity. Unlike international human rights law, there is no comprehensive body of internationally recognised environmental standards. To ensure legal certainty for economic operators, the Regulation should define the key legal principles economic operators should follow, such as the prevention, precautionary, rectification-at-source and polluter-pays principles (Article 192(2) TFEU). Furthermore, the Regulation should define adverse environmental impact, including by referencing international agreements to which the EU and its member states are party, and complement them with a non-exhaustive catalogue of adverse environmental impacts. Although often addressed to states, the objectives of international environmental agreements can and should be translated into concrete obligations for companies via the guidelines to be developed by the European Commission under Art.39 (7).

The list of environmental impacts should include, but not be limited to, direct and indirect impacts related to climate change (including greenhouse gas emissions), air, soil, water and noise pollution (including through disposal of chemicals), hazardous substances and production of waste, loss of and damage to forests and natural ecosystems, loss of biodiversity, and loss of habitats and species.¹⁹

Recommendation 7: Enable access to justice for victims by requiring economic operators to remediate harm and by removing procedural obstacles to judicial review.

In line with the UN Guiding Principles, economic operators should proactively engage in remediation if they cause or contribute to harm by way of actions or omissions.

In this context, Art. 39 should also ensure that economic operators are liable for human rights and environmental harm they, or a company they control or have the ability to control, has caused or contributed to.

Where two or more business enterprises are liable for the same harm, they should be liable jointly and severally. The Regulation must provide access to justice in the EU, whether harm occurred inside or outside the EU. This includes a fairer distribution of the burden of proof for all evidentiary elements, for instance through a reversal of the burden of proof in relation to causation of the harm, and adequate time limitations for victims' transnational claims. The latter should take into account the fact that environmental impacts may only be discovered long after they occur, such as the impact of mining on fresh water supplies, which is exacerbated in arid climates.

Recommendation 8: No role for industry schemes in the legal framework.

The proposed Regulation tasks the European Commission with the recognition of due diligence industry schemes, to enable economic operators to comply with the due diligence requirements set out in the Regulation itself (Art.72). Art. 39 (2) (d) also provides that the custody and traceability system for risks in the value chain "may be implemented through participation in industry-led schemes."

Collaboration between various actors in the sector can be helpful and necessary to ensure transparency throughout the supply chain, or at times to effectively address certain human rights and environmental risks. Such collaboration may occur through industry schemes, as well as government-led due diligence schemes. Art. 39 (2) (d) should therefore not focus only on industry-led initiatives but allow any collaborate efforts. Even when collaborating with others on due diligence, an economic operator remains solely responsible for implementing due diligence on risks linked to its operations. Industry schemes must avoid giving the impression that participation in an

¹⁷ Bloomberg, *Mining billionaire's SPAC readies funds for clean-power push*, 31 December 2020, www.bloomberg.com/news/articles/2020-12-31/billionaire-friedland-s-spac-readies-funds-for-clean-power-push?srnd=green

¹⁸ ECCHR et al, *Case Report - The safety business: TÜV SÜD's role in the Brumadinho dam failure in Brazil*, October 2019, www.ecchr.eu/fileadmin/Fallbeschreibungen/Case_Report_Brumadinho_ECCHR_MISEREOR_20191014_EN.pdf; Business & Human Rights Resource Centre, *Brumadinho dam collapse: Lessons in corporate due diligence and remedy for harm done*, 28 January 2019, www.business-humanrights.org/en/blog/brumadinho-dam-collapse-lessons-in-corporate-due-diligence-and-remedy-for-harm-done/; Human Rights Watch, "What do we get out of it" *The human rights impact of bauxite mining in Guinea*, 4 October 2018, www.hrw.org/report/2018/10/04/what-do-we-get-out-it/human-rights-impact-bauxite-mining-guinea; and Inclusive Development, *Re : Complaint concerning IFC loan to the "Compagnie des Bauxites de Guinée" (CBG)*, 20 February 2019, www.inclusivedevelopment.net/wp-content/uploads/2020/12/CBG_CAO-Request-for-Mediation_FINAL-EN.pdf

¹⁹ This list reflects recent approaches adopted under the EU Taxonomy Regulation and the proposal for a Corporate Sustainability Reporting Directive, but attempts to be more comprehensive.

industry scheme is sufficient for compliance with due diligence obligations; and the Regulation must not consider formal recognition of due diligence schemes as enabling compliance with the Regulation.

The Conflict Minerals Regulation allows for the recognition of industry-led schemes, although at the time of writing, none had been formally recognized. In that context, the OECD alignment exercise, a process by which the OECD assesses the alignment of participating industry-schemes with the OECD Conflict Minerals Guidance, has shown that industry schemes regularly fail to adequately ensure that their members are compliant with due diligence standards.²⁰ Also, in the case of the biofuels industry, the European Court of Auditors found that the standards presented by voluntary schemes as a basis for their recognition were not always applied in practice and that they were not ultimately verified by the authorities.²¹

Companies are solely responsible for their due diligence obligations and meeting the requirements set out in Art.39.

²⁰ OECD, *OECD alignment assessments of industry and multi-stakeholder programmes*, 2016, www.oecd.org/corporate/industry-initiatives-alignment-assessment.htm

²¹ European Court of Auditors, *Certifying biofuels: weaknesses in recognition and supervision of the system*, 21 July 2016, www.eca.europa.eu/en/Pages/NewsItem.aspx?nid=7172; Transport & Environment, *Sustainable biofuels certification challenged by EU auditors*, 2 September 2016, www.transportenvironment.org/discover/sustainable-biofuels-certification-challenged-eu-auditors/