



EU CONFLICT MINERALS REGULATION 2021

From 1 January 2021 EU importers of certain minerals and metals will have to comply with the EU Conflict Minerals Regulation (CMR)¹. This guide introduces the CMR to actors in the commodities space and answers some frequently asked questions.

Background

What are conflict minerals?

A “conflict mineral” is defined in the CMR as any ore or concentrate containing *tin, tantalum, tungsten or gold* which is mined in ‘conflict-affected and high-risk areas’ i.e. geographical areas in a state of armed conflict, areas witnessing weak or non-existent governance and security, or areas with widespread and systematic violations of international law, including human rights abuses².

The EU has issued non-binding guidelines to help importers determine such high risk areas and is expected to publish a non-exhaustive list of relevant areas later this year.

What is the aim of the CMR?

The aim of the CMR is to use supply chain due diligence to break the link between conflict and illegal exploitation of minerals.

By ensuring that EU importers meet international responsible sourcing standards set by the OECD, the CMR seeks to prevent further exploitation of communities affected by the mining and trade of conflict minerals.

Which minerals and metals are impacted?



The CMR impacts “3TG” minerals and metals (*tin, tungsten, tantalum and gold*) originating from “conflict-affected and high risk areas”.

Will the CMR apply to my business?

The CMR is aimed at **EU-based importers** of “3TG” minerals and metals: *tantalum, tin, tungsten and gold*.

The European Commission estimates that it will apply directly to between 600 and 1,000 EU importers and will indirectly affect about 500 smelters and refiners of tin, tantalum, tungsten and gold, whether they are based inside the EU or not.

The CMR will apply to you if your EU business:

- imports, smelts or refines 3TG minerals or metals; and
- meets certain annual import volume thresholds³; or
- carries out independent third party audits.

Will the CMR apply to my business if it is UK based?

It is not yet clear what UK domestic legislation on this subject matter will look like post-Brexit. However, the UK supported the development of the CMR and the OECD Guidance, so an equivalent UK law is likely.

¹ Regulation (EU) 2017/821 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 May 2017 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 (CMR)

² Article 2(f), CMR

³ As listed in Annex I CMR and further thresholds to be confirmed by the European Commission later this year

Compliance

When does the CMR come into force?

The CMR will come in to force on **1 January 2021** in EU member states.

What are the main obligations under the CMR?

The CMR'S focus is on due diligence, requiring companies to have systems in place to identify, manage and report on risks in their supply chains.

EU importers are required to adopt a 5 step framework (one which already forms the basis of many industry schemes and standards.)

These 5 steps are:

-  Establish strong company management systems (CMR Art 4)
-  Identify and assess risk in the supply chain (CMR Art 5)
-  Design and implement a strategy to respond to identified risks (CMR Art 5)
-  Carry out an independent third party audit of supply chain due diligence (CMR Art 6)
-  Report annually on supply chain due diligence (CMR Art 7)

So what should I do in practice to comply with the CMR?

- Have a supply chain policy in place and where possible incorporate this policy into commercial contracts⁴.
- Establish due diligence and management systems to collect information such as suppliers' and smelters' details.
- Assign responsibility within your business for identifying risks and have procedures in place where a risk needs to be escalated to senior management.
- Establish a grievance mechanism through which interested parties can raise concerns.
- Engage an independent third party to carry out audits to assess your company's activities, processes and systems (unless substantive evidence can be provided that all refiners in the supply chain are CMR compliant).

What are the reporting/disclosure requirements under the CMR?

An annual report should be published containing information on supply chain due diligence policies and practices for responsible sourcing, demonstrating steps 1 to 3 of the five steps above.

The report can either be a stand-alone supply chain due diligence report or part of annual sustainability/CSR reports.

If a third party audit is carried out, the results must be made available to the relevant Member State's competent authority. In the UK, the relevant regulator is the Office for Product Safety and Standards.

Companies must make available to immediate downstream purchasers all information gained as part of their supply chain due diligence

Are the CMR's due diligence obligations new?

No. The CMR requires EU importers to adopt the 5-step framework developed by the *OECD's Due Diligence Guidance on Responsible Supply Chains*⁵. Many industry standards are already based on this Guidance. Similar due diligence requirements are also contained in the US Dodd-Frank Act⁶.

My business already complies with a scheme based on the OECD's Guidance. Is that enough?

There are a number of schemes and standards already in place which are designed to comply with the OECD Guidance. Compliance with the CMR can be achieved through participation in an existing due diligence scheme, provided that this scheme has been recognised by the European Commission. The European Commission has indicated that it will consult the OECD before recognising any scheme but currently, there is no timeframe for when recognition of schemes will begin.

Any company that uses a recognised scheme will still retain individual responsibility for complying with the due diligence obligations set out in the CMR and would therefore need to verify independently whether their suppliers' due diligence is sufficient.

How will the CMR be enforced?

Each member state is required to check EU importers' compliance with the CMR by examining documentation and audit reports. Onsite inspections of importers' premises are also permitted if required.

What are the penalties for non-compliance?

There is currently no provision for member states to impose penalties for non-compliance with the CMR. This has been a major source of criticism and will be the subject of review by 2023⁷.

Member states can order a company to address a problem within a given deadline and follow-up to ensure the deadline is met.

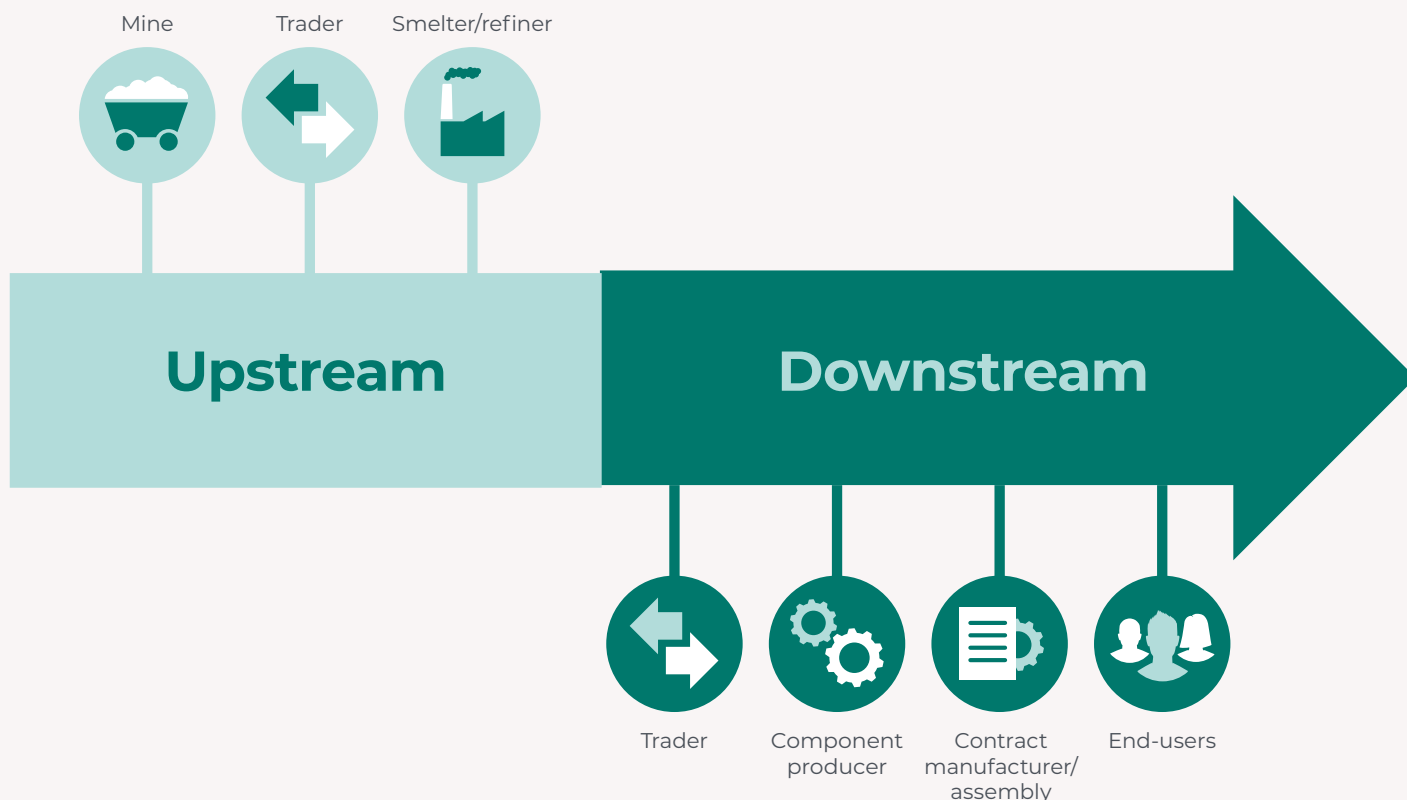
⁴ A model policy can be found in Annex II of the OECD Guidance

⁵ https://www.oecd-ilibrary.org/sites/9789264252479-en/1/1/2/index.html?itemId=/content/publication/9789264252479-en&csp_=300c00f8475f9d74e34d7a058a6a44f4&itemGO=oecd&itemContentType=book

⁶ <https://www.cftc.gov/LawRegulation/DoddFrankAct/index.htm>

⁷ Article 17(3) CMR

Is my business upstream or downstream?



How does the CMR compare to the US Dodd Frank Act?

Both require companies to disclose their use of certain 3TG metals and minerals (tin, tungsten, tantalum and gold) annually.

The CMR applies to metals and minerals originating from a broader geographic range, as it does not name specific locations but *'conflict-affected and high-risk areas.'* By contrast the Dodd Frank Act narrows its geographical scope to *"the Democratic Republic of the Congo or an adjoining country."*⁸

The CMR applies to EU importers of 3TG metals and minerals. By contrast the Dodd Frank Act requires annual disclosure by US publicly listed companies using 3TG metals and minerals which are *"necessary to the functionality or production of a product manufactured or contracted to be manufactured by the company"*.

Is my business upstream or downstream and why does it matter?

The CMR distinguishes between upstream and downstream companies and there are different rules for each category. 'Upstream' refers to the mineral supply chain from the extraction sites to the smelters and refiners, inclusive (Art 2(j) CMR). Upstream companies include miners and traders in raw materials.

'Downstream' refers to the metal supply chain from the stage following smelting and refining to the final product (Art 2(k) CMR) and includes, for example, component manufacturers.

The supply chain risk is likely to be greater for upstream companies and therefore they must comply with mandatory due diligence requirements under the CMR and should work on identifying all entities in the upstream supply chain.

The requirements for downstream companies depends on whether they are importing raw materials (in which case they must also comply with mandatory due diligence requirements) or more processed metals, in which case the requirements are less onerous. We recommend that downstream companies involved in the import of processed 3TG minerals and metals should:

- request that suppliers provide identification of upstream refiners and smelters.
- request verification that these companies have conducted due diligence and audits in accordance with CMR or OECD Guidance.
- identify specific risks or 'red flags' in smelters' or refiners' supply chains.
- where 'red flags' are identified assess the risks by evaluating whether the supply chain due diligence of the refiner meets OECD Guidance.
- pass information on to downstream customers.

⁸ Section 1502(e)(4) of the Act (emphasis added)

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