

Due diligence rules for batteries: making them work for the environment and communities

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Summary

The transition to e-mobility is happening at speed, and in this context, in December 2020, the European Commission presented the world's first ever sustainable battery law, proposing a framework to develop a green, ethical and world-leading battery supply chain in Europe. The proposed regulation establishes for the first time a product-specific due diligence regime, with the aim of ensuring that battery raw materials such as cobalt, lithium and nickel are sourced according to high social and environmental standards. These new rules can have a positive global impact, however, it is crucial that the European Parliament and the Council amend and correct some shortcomings in the proposal to ensure both human rights and the environment are protected wherever possible.

Specifically, the regulation presents gaps in relation to both human rights and environmental protection. For example, currently the proposal only covers certain more severe types of human rights violations and does not provide access to justice to victims. On the environmental side, the regulation misses key environmental risks linked to air, water, soil and biodiversity damage.

T&E therefore calls on policymakers to strengthen the regulation by:

- Referencing key principles of international environmental agreements and, where this is not possible, EU environmental law, together with a better defined and non-exhaustive list of adverse environmental impacts and risks in order to strengthen the environmental due diligence requirements.
- Basing the due diligence rules of the regulation on the UN Guiding Principles and OECD Guidelines for Multinational Enterprises.
- Extending the scope to more battery raw materials namely copper, iron and bauxite, ensuring they are also sourced responsibly.
- Enabling access to justice for victims by requiring economic operators to remediate harm and by removing procedural obstacles to judicial review.

- Having economic operators gather, and base their due diligence on, all relevant information on geographic, sectoral, product and enterprise risk factors, including through consultation with actual and potentially affected right holders and with local communities, Indigenous peoples, civil society organisations and media.
- Not allowing for industry schemes to be automatically recognised, unless full compliance with the regulation can be demonstrated, regular auditing takes place, and a fair representation of civil society on their decision-making boards.

Companies are also preparing themselves to meet the due diligence requirements set in the regulation through setting up strategic supply partnerships with mining companies, launching initiatives on the ground for key raw materials and using blockchain technology to better know their operations. However, there are key actions that companies can undertake to ensure the transition to e-mobility is truly sustainable.

T&E calls on companies in the automotive supply chain and on companies in the mining and refining business to:

- Not turn due diligence into a box-ticking exercise, but instead actively engage with suppliers, business partners as well as local communities and other key actors in an effective and inclusive due diligence process.
- Not avoid or cease business in countries or with operators that may have weak governance in order to avoid possible risks of not complying with the regulation as this will further exacerbate inequalities.
- For automotive companies, establish in supply chain policies and contracts a mandatory compliance with the Initiative for Responsible Mining Assurance (IRMA) standard. All battery materials should be IRMA-sourced by 2025.
- Mining companies should conduct extensive consultations and engagement with local communities and Indigenous peoples ensuring the right to Free, Prior and Informed Consent is exercised as well as the UN Declaration on the Rights of Indigenous Peoples is applied under all circumstances.

1. Introduction

Batteries are the key technology underpinning Europe's transition towards zero emission vehicles, ultimately freeing the sector from its dependency on fossil-fuels. Shifting to mass-market production of electric vehicles (EV) will inevitably drive global battery production: in Europe alone, at least 27 gigafactories are planned or announced, with a total estimated capacity of 460 GWh in 2025 alone, enough to power around 8 million battery electric cars¹.

Until recycling of critical materials like lithium, cobalt and nickel from spent batteries is able to provide the majority of materials we need for new batteries, in the short-to-medium term as electric vehicles & renewables take off, we will need to continue to source metals from mining. The EU is developing its own resources with some potential for key metals like lithium substantial also in Europe. But for most metals - especially in the short-term - the supply will come from the rest of the world. This is where having more

¹ <https://www.transportenvironment.org/wp-content/uploads/2021/08/Battery-brief-1.pdf>

transparent and ethical sourcing practices than today is key. Europe must therefore ensure the development and ramp up of sustainable and ethical extraction and refining practices, and fast.

In order to ensure that the transition to e-mobility is truly sustainable, an ambitious regulatory framework targeted at battery supply chains is required. In December 2020, the European Commission proposed the world's first ever sustainable battery law, proposing a framework for developing a green, ethical and world-leading battery supply chain in Europe. The proposed battery regulation also establishes for the first time a product-specific due diligence regime, with the aim of ensuring that battery raw materials such as cobalt, lithium and nickel are sourced according to high social and environmental standards. This initiative is welcome as it has the potential to have a positive global impact. Although welcome, the proposal presents some shortcomings that the European Parliament and the Council must amend and correct to ensure both human rights and the environment are protected wherever possible.

This paper will first provide an overview of the regulation to then look into how to improve and strengthen the proposed regulatory framework looking at both human rights and environmental related risks in the battery value chain. The paper will then look at what car manufacturers are doing in this space before finally moving onto recommendations for both policy makers and companies.

1.1. Context and overview of the proposal

In December 2020, the European Commission published its long-awaited proposal for the world's first ever sustainable battery law. The draft text looks at regulating important aspects of a battery's lifespan across four product categories: portable, automotive, electric vehicle and industrial batteries. Key aspects include, for example, a mandatory carbon footprint threshold for new batteries, battery collection targets and recycling targets. Crucially, it is also the first EU-wide legislation proposing a product-specific due diligence regime (Art. 39 of the regulation).

The proposed regime is largely based on the EU Conflict Minerals Regulation², which addresses supply chain risks in the context of conflict minerals namely gold, tin, tungsten and tantalum. To reflect that, the regulation asks companies to base their due diligence policies on Annex II to the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas³ and would apply to economic operators placing both EV and industrial batteries on the EU market.

INFO BOX: Placing on the market and economic operators⁴

The proposed due diligence obligations, as outlined in Article 39 (1), apply to economic operators that place a battery on the EU market.

Placing on the market

The placing of a product on the market means the first making available of a product for the purpose of distribution and/or use in the EEA territory.

² Regulation 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, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017R0821&from=EN>

³ <https://www.oecd.org/corporate/mne/GuidanceEdition2.pdf>

⁴ T&E interpretation based on a DG ENVI explanation in relation to the implementation of the Single Use Plastics Directive ([link](#)).

Economic operator

An economic operator, in the context of the regulation, means a manufacturer, an importer or a distributor.

In the context of EV batteries, an economic operator could be either a car manufacturer or a battery manufacturing company producing in the EU or outside of the EU market.

Example 1: Tesla produces and markets its vehicles with Tesla-branded batteries. Tesla would have to conduct due diligence along its battery supply chain, being both a manufacturer and a distributor.

Example 2: A battery that is produced in China (e.g. for use in a EU-made EV) would have to have its due diligence conducted ahead of entering the EU market by the company (e.g. battery producer) itself.

Example 3: A company placing an electric vehicle (including the battery) produced outside of the EU on the EU market would have to conduct due diligence on the vehicle's battery.

As it stands, the new rules cover the supply chains of four key battery materials and their chemical compounds. These raw materials are cobalt, natural graphite, lithium and nickel. In relation to these, the regulation also identifies risk categories that companies should consider when conducting their due diligence. These categories, listed in Annex X (point 2) of the regulation, cover both environmental and human rights risks such as water, air, biodiversity but also human health, occupational health and safety and labour rights, amongst others.

Further to this, the regulation, under Article 72, proposes to allow industry schemes to apply to be recognised by the European Commission, although though it is not clear what privileges would be conferred to companies who are members of such schemes or whether membership of a recognised scheme would lead to an automatic assumption of compliance by the relevant authorities.

2. Strengthening the regulation

The introduction in the proposed new Battery Regulation of an obligation for economic operators to carry out human rights and environmental due diligence is welcome. The proposal however presents several shortcomings that risk to ultimately undermine the effectiveness of the proposed due diligence regime.

In this section we will firstly explore the gaps in the proposed due diligence regime and how it can be improved and strengthened, before specifically addressing environmental risk categories and instruments that the regulation should include. Section 2.1 is a summary of key points a joint-position paper T&E have published with Amnesty International⁵.

2.1 General due diligence rules and principles

Due diligence rules and principles

⁵ The EU Battery Regulation's Due Diligence Rules (2021), [Link](#).

Currently the proposed regulation's due diligence regime refers to the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas (hereafter OECD Due Diligence Guidance), aligning with the methodology applied in the EU Conflict Minerals Regulation.

Referring exclusively to this guidance in Article 39 is, however, problematic as it only covers business activities and operations in conflict-affected and high-risk areas (CAHRAs). Consequently, this would mean that the obligation for economic actors to carry out due diligence would be limited geographically to CAHRAs only. For example, it would automatically exclude raw materials originating from the South American lithium triangle (Argentina, Bolivia, Chile) as these are countries not present on the CAHRA list⁶.

Further, referring only to the OECD Due Diligence Guidance is problematic as it only addresses risks of gross human rights abuses such as torture and cruel, inhuman and degrading treatment, widespread sexual violence, and the worst forms of child labour. Therefore, the proposed due diligence scope would exclude important risks such as labour rights (right to unionise, right to a fair wage), but also land and water rights.

The scope of the due diligence regime must be expanded to be consistent with the UN Guiding Principles on Business and Human Rights (UNGPs)⁷ and the OECD Guidelines for Multinational Enterprises (OECD MNE Guidelines)⁸ and aim to prevent any human rights harm. These instruments 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.

INFO BOX: International due diligence instruments explained

United Nations Guiding Principles on Business and Human Rights (UNGPs)

The UNGPs are a set of guidelines for States and companies to prevent, address and remedy human rights abuses committed in business operations. They were adopted by the UN Human Rights Council in June 2011, and endorsed by the European Union the very same year.

The Principles are built on the following pillars:

- The State duty to protect human rights against abuse by third parties, including business, through appropriate policies, legislation, regulations and adjudication;
- The corporate responsibility to respect human rights, meaning to act with due diligence to avoid infringing on the rights of others and address adverse impacts with which they are involved;
- The need for greater access to effective remedy, both judicial and non-judicial, for victims of business-related human rights abuse.

⁶ <https://www.cahraslist.net/>

⁷ https://www.ohchr.org/documents/publications/guidingprinciplesbusinessshr_en.pdf

⁸ <http://mneguidelines.oecd.org/guidelines/>

OECD Guidelines for Multinational Enterprises (OECD MNE Guidelines)

The OECD MNE Guidelines are an international legal instrument with the most comprehensive set of government-backed recommendations on responsible business conduct in existence today. The guidelines recommend that enterprises conduct due diligence in order to identify, prevent or mitigate and account for how actual and potential adverse impacts are addressed. Whilst the guidelines are not legally binding on companies, they are binding on signatory governments, which are required to ensure the Guidelines are implemented and observed. The guidelines are accompanied by the **OECD Due Diligence Guidance for Responsible Business Conduct**⁹ (OECD Guidance for RBC) which provides practical support to enterprises on the implementation of the OECD MNE Guidelines. The OECD Guidance for RBC provides plain-language explanations of its due diligence recommendations and associated provisions. The Guidance is included in Annex X (3) of the regulation.

OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas (OECD Due Diligence Guidance)¹⁰

The OECD Due Diligence Guidance is specifically tailored to the mining sector as it provides detailed recommendations to help companies respect human rights and avoid contributing to conflict through their mineral purchasing decisions and practices. The Guidance is for use by any company potentially sourcing minerals or metals from conflict-affected and high-risk areas, it is global in scope and applies to all mineral supply chains. Importantly, the guidance is accompanied by a practical 5-step framework¹¹ to help companies implement the guidance itself.

Basing due diligence on relevant information

The proposed regulation requires economic operators to assess risks based on information retrieved through two means: the tracing system and the grievance mechanism.

1. Tracing system

The proposed tracing system, as outlined in Art. 39 (3) (a), 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. This is welcome and technologies like blockchain have contributed significantly to tracing raw materials as further explored in section 3. Specifically in the context of conflict-related risks, such as funding to armed groups, geographic information - linked to CAHRAs - is a main indicator for red flags which indicate a potential risk. This is a crucial first step and a cornerstone of a transparent battery value chain. This alone is, however, clearly not sufficient to identify all risks that should be addressed in the due diligence process as 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. The proposed tracing system also fails to take into account other sources of information such as potentially affected rightsholders themselves, media or civil society organisations. For this reason,

⁹ <https://www.oecd.org/corporate/mne/due-diligence-guidance-for-responsible-business-conduct.htm>

¹⁰ <https://www.oecd.org/corporate/mne/mining.htm>

¹¹ https://mneguidelines.oecd.org/5%20Step%20Framework_A3.pdf

economic operators must ensure that adequate consultation processes and stakeholder engagement takes place throughout the value chain and at every relevant stage: extraction, storage, transport, export, processing, battery manufacturing, end usage, and recycling.

2. Grievance mechanism

The second tool identified in the regulation, outlined in Art.39 (3) (b) line 22, to retrieve information is the grievance mechanism¹² which, similarly to the tracking system, will not fill the information gap unless certain steps are taken.

For a grievance mechanism to be effective, it requires proactive steps taken by the actual or potentially aggrieved party. Ultimately, 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 and/or carmakers 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 all relevant risks are identified in the due diligence process, economic operators must therefore not only use information retrieved through the tracing system and grievance mechanisms, but crucially also information obtained through consultation with potentially affected right holders, such as local communities, Indigenous peoples, NGOs, media and other sources.

Access to justice

Enable access to justice for victims by requiring economic operators to remediate harm and by removing procedural obstacles to judicial review, provisions that are, as it stands, missing from the proposal.

In line with the third pillar of the UNGPs, as outlined in the info box, economic operators should proactively engage in remediation if they cause or contribute to harm by way of actions or omissions. Economic operators should be liable for human rights and environmental harm they, or a company they control or have the ability to control, has caused or contributed to.

It is important also for the regulation to 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 (e.g. the company must prove harm did not take place), and adequate time limitations for victims' transnational claims. Crucially, the latter should take into account the fact that environmental impacts or the consequences may only be discovered long after they occur (e.g. the impact of mining on fresh water supplies).

Industry schemes

¹² A grievance mechanism is a formal, legal or non-legal (or 'judicial/non-judicial') complaint process that can be used by individuals, workers, communities and/or civil society organisations that are being negatively affected by certain business activities and operations.

The proposed regulation tasks the European Commission with the recognition of due diligence industry schemes, which would enable economic operators to comply with the due diligence requirements set out in the regulation itself as set out in Art. 72.

The Conflict Minerals Regulation, which was signed into law in 2017 and entered into force in 2021, allows for the recognition of industry-led schemes, although at the time of writing none have been formally recognised. Importantly also, the OECD conducted an alignment exercise¹³, a process by which the OECD assesses the alignment of participating industry-schemes with the OECD Due Diligence Guidance, has shown that industry schemes regularly fail to adequately ensure that their members are compliant with due diligence standards. In the case of the biofuels industry too, 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 authorities¹⁴.

Industry schemes can help companies meet the due diligence requirements set out in the regulation, however it is crucial that companies are solely responsible for their due diligence obligations and meeting the requirements set out in Art.39. Unless industry schemes, and companies adhering to such schemes, can demonstrate they fully comply with the regulation, are regularly audited, and have a fair representation of civil society on their decision-making boards, they cannot be accepted in the legal framework of the regulation. Furthermore, a situation where members of a recognised scheme are presumed to be compliant with the regulation without the necessary checks should be avoided at all costs.

2.2 Environmental Due Diligence

As mentioned in previous sections, the proposed regulation in Annex X (2) identifies four generic environmental risk categories related to the supply chains of cobalt, natural graphite, lithium and nickel and their chemical compounds. These categories are air, water, soil, and biodiversity.

The Commission also identifies in the proposal (Annex X (3)) related international instruments covering the risks referred to above, instruments which the Commission will use to develop guidelines for companies to respect when undertaking their due diligence. However, the only listed international instrument covering the environment is the Convention on Biological Diversity Decision COP VIII/28, with its voluntary guidelines on biodiversity-inclusive impact assessment.

Whilst the field of human rights law has a long track-record with a comprehensive body of internationally recognised standards, such as ones from the United Nations and the International Labour Organization, the same cannot be said for the field of international environmental law, which often presents a more fragmented picture. For this reason, and to ensure legal certainty for economic operators, the regulation should better define environmental risk categories and associated environmental instruments.

¹³ <https://www.oecd.org/corporate/industry-initiatives-alignment-assessment.htm>

¹⁴ ECA, [Certifying biofuels: weaknesses in recognition and supervision of the system \(europa.eu\)](https://www.european-courtauditors.eu/en/transport-and-environment/2016/09/02/certifying-biofuels-weaknesses-in-recognition-and-supervision-of-the-system), Transport & Environment (September 2, 2016), Sustainable biofuels certification challenged by EU auditors. [Link here](#).

For example, as aforementioned, the regulation mentions water as a risk category. This definition however is too broad and risks that water-related issues such as water use and depletion, water pollution, access to water are not adequately addressed. This risk category is important in the context of lithium extraction: the Atacama Desert for instance, part of the South American lithium triangle, is a water-deprived yet mineral rich location. Especially in fragile ecosystems it is important that the regulation addresses these specific risks with adequate instruments.

In order to identify which environmental instruments are best fit to tackle the risks identified in the regulation, T&E commissioned a study¹⁵ to Levin Sources with the aim of identifying the international instruments which would best cover risk categories, whilst providing legal certainty for companies. Additionally, T&E provided Levin Sources with a more detailed version of the environmental risk categories, which can be found in the Annex of the study itself.

The study undertook an analysis of the risk categories comparing them against international environmental standards, European Union standards and ones from private initiatives. The consultancy was asked to prioritise international agreements to which the EU and its member states are party as they are applicable globally and widely recognised. It is important to note that international agreements, although they are often addressed to states, the objectives of those can and should be translated into concrete obligations for companies via the guidelines to be developed by the European Commission under Art.39 (7). Where a gap is present, EU law or private initiatives should be considered to design said guidelines.

The following section will present T&E's recommendations of the best environmental instruments the European Commission should consider when developing the guidelines for companies.

2.2.1 Environmental instruments

1. Air

The first risk category presents specific risks linked to air quality and management such as dust and other pollutants. Mining operations specifically, with rocks being unearthed, moved, and crushed can result in a significant increase of the amount of dust and particulates in the air. Further along the supply chain, copper smelting is associated with emitting large quantities of particulate matter, trace elements, and sulfur oxides, which can have adverse effects on human health and the environment¹⁶.

Under this first risk category, Levin Sources identified one international instrument, the "UNECE Convention on Long-range Transboundary Air Pollution (1979) and Extended Protocols", which however does not have clear guidelines to companies. The convention provides a forum for Parties to negotiate and agree on binding obligations to reduce emissions. It has been extended by eight protocols which contain legally binding targets for emission reductions. In the context of supply chains of battery raw materials, the instrument is therefore too generic and not addressed to specific issues arising in the industry's specific context.

¹⁵Analysis of Environmental Instruments by Levin Sources. [Link](#).

¹⁶Stanojevic AB (2021) Air pollution emission from the copper smelter Complex Bor in Serbia. *Ann Environ Sci Toxicol* 5(1): 023-026. DOI: 10.17352/aest.000032

Under EU instruments, the research found that the “Industrial Emissions Directive” (IED) would be best fit as it provides extensive guidance for companies, regulating pollutant emissions from industrial installations. However, whilst the IED may be suitable to cover stages of a battery’s supply chain such as cathode manufacturing, it may not be suitable in the context of raw material extraction as it does not cover mining.

Therefore, under the first risk category, T&E has concluded that there is no single instrument which would duly cover issues related to air quality management such as pollutant emissions.

2. Water

The second risk category is water, which is linked to risks related to water use and depletion such as efficient use (water management) and recycling of water, groundwater use, access to water. Linked to wastewater, risks include wastewater management and water contamination at wide, across different types of water bodies. An example of water pollution is acid mine drainage; for instance as caused by the Summitville Mine in Colorado which killed all biological life in a 17-mile stretch of the Alamosa River¹⁷. It is important to note that this risk category is important in relation to mining but also to wider industrial activities such as discharging toxic waste into waterways.

Under the second risk category, T&E identified several key instruments under this risk category to be added to Annex X.

The most relevant instrument is the “Setting Site Water Targets Informed By Catchment Context: A Guide For Companies (2019)”, which was done by multiple stakeholders including the UN Global Compact, the CDP CEO Water Mandate, the World Wildlife Fund and others. Specifically, it aims to help companies set effective site water targets in a catchment context. The guide is targeted to all sectors, including mining.

A second relevant international instrument is the “Guidance for Companies on Respecting the Human Rights to Water and Sanitation (2015)” which was done by the UN Global Compact and the Pacific Institute, providing companies with practical measures on how to bring a human right lens to their corporate water stewardship strategies. Similar to the previous instrument, it is designed to be applicable to a broad range of companies, including mining companies.

A third relevant instrument is the “Ramsar Convention”. The aim of this convention is the conservation and wise use of all wetlands, including all lakes and rivers, underground aquifers, swamps and marshes, wet grasslands, peatlands, oases, estuaries, deltas and tidal flats, mangroves and other coastal areas, coral reefs, and all human-made sites such as fish ponds, rice paddies, reservoirs and salt pans. The convention is particularly important as it is the first modern treaty between nations aimed at conserving clearly defined natural resources.

In the context of water-related risks, a private sector initiative worth nothing for companies in this specific category is the “Alliance for Water Stewardship” (AWS), which is a global membership collaboration comprising businesses, NGOs and the public sector. The members adopt and promote a

¹⁷ https://earthworks.org/issues/acid_mine_drainage/

universal framework for the sustainable use of water – the International Water Stewardship Standard, or AWS Standard – that drives, recognises and rewards good water stewardship performance.

3. Soil

Soil-related risks include soil contamination, soil erosion, land-degradation as well as activities related to post-mine closures. For example, as study on the impacts of nickel mining¹⁸ on soil quality in Indonesia which linked the mining operations to decreased soil fertility of tropical tree species.

For soil, the best identified international instrument that should be added to the regulation is the “Voluntary Guidelines for Sustainable Soil Management (2017)” which provides technical recommendations for companies on how sustainable soil management can be achieved. The guidelines were adopted by the Food and Agriculture Organization (FAO) and its member countries in 2016.

Other important instruments that help address soil management, from an EU perspective, are the “Industrial Emissions Directive” and the “Land use, land use change and Forestry Regulation”.

It is important to flag however that above mentioned instruments do not cover mine-rehabilitation issues.

4. Biodiversity

Biodiversity is a cross-cutting risk category that includes damages to ecosystem services such as habitats, flora and fauna, as well as specific risks such as forests (and deforestation). In the case of lithium mining in the Atacama desert for example, the area is a habitat for migratory and resident birds including the endangered Andean flamingo. Harmful cyanobacteria usually eaten by these birds accumulate in the water polluted by lithium extraction, ultimately putting both local fauna and human health at risk¹⁹.

In the context of biodiversity risks, the proposed regulation already includes an important instrument, as mentioned in section 2.2, which is the “Convention on Biological Diversity Decision COP VIII/28 - Voluntary guidelines on Biodiversity-Inclusive impact assessment”. To strengthen this risk category, the “Framework for Corporate Action on Biodiversity and Ecosystem (2012)” should also be added. The framework is a guidance developed by the UN Global Compact and the International Union for Conservation of Nature (IUCN), providing the tools for developing, implementing and disclosing practices and policies on biodiversity and ecosystem services incorporated into corporate sustainability strategies.

Further, the regulation should also include the Natura 2000 network, the world’s largest coordinated network of protected areas, to establish no-go areas for any type of industrial activity, including mining.

5. Climate change

Climate change is one of the risks T&E advocates to be added to the risk categories. As part of the battery regulation, businesses must address their impact on climate change, namely greenhouse gas emissions,

¹⁸ Ricksy Prematuri, Maman Turjaman, Takumi Sato, Keitaro Tawaraya, "The Impact of Nickel Mining on Soil Properties and Growth of Two Fast-Growing Tropical Trees Species", International Journal of Forestry Research, vol. 2020, Article ID 8837590, 9 pages, 2020. <https://doi.org/10.1155/2020/8837590>

¹⁹ <https://www.nature.com/articles/d41586-018-05233-7>

which the mining sector alone contributes to between 4 to 7% globally²⁰. The best international agreement to address this, and to be added to the regulation, is the UN Paris Agreement which, despite not having clear guidelines for companies, is the most significant global climate agreement.

The guidance on “Adapting for a Green Economy: Companies, Communities and Climate Change (2011)”, done by the UN Global Compact, UNEP, World Resources Institute and Oxfam is also relevant in the context of climate change as it presents the business case for climate adaptation in ways that build the resilience of vulnerable communities in developing countries. As well as having clear guidelines for companies, it also applies to multiple sectors including mining.

A third instrument is “The Guide for Responsible Corporate Engagement in Climate Policy (2013)”, a guide developed by UNEP, UN Global Compact, World Resources Institute and World Wildlife Fund which sets baseline expectations for companies to provide input to governments for the creation of effective climate policies. Applying to multiple sectors, including mining, it provides practical insights on how companies can constructively address climate policy.

6. Waste treatment

Another category that is currently missing and should be added to the regulation, which is key in the context of mining and battery supply chains at large, is waste treatment.

In the mining industry specifically, the correct disposal of mining waste, or mine tailings, is a key issue that can gravely impact biodiversity, water quality, as well as human lives. Mine tailings in fact can be either disposed of in the deep-sea (a harmful practice that only five countries globally allow, amongst them Norway and Chile), can be stored in the form of dams or can be dry-stacked (which to date is the best option). Incorrect management of mine tailings in recent years has caused the catastrophic collapse in January 2019 of an iron mine in Brumadinho, Brazil²¹, disaster which killed over 270 people and contaminated significant swaths of rivers and soil with long-term effects. Only four years earlier, the failure of the Bento Rodrigues tailings dam²² at the Samarco mine, in the same state, and with the same mine owner, wreaked havoc on surrounding communities and ecosystems.

In the context of waste at large, the “Minamata Convention” should be added to the regulation. The convention, which entered into force in 2017, aims at controlling the anthropogenic releases of mercury throughout its lifecycle. Mercury is also found as a natural amalgam in copper ores and nickel-copper ones as well as being used in specific extraction-related processes. Applying the Minamata convention is important as it controls measures on waste emissions to air and on releases of mercury to land and water, as well as addressing interim storage of mercury and its disposal.

In terms of European instruments, in the context mining, the most relevant ones that the regulation should include are the “Best Available Techniques (BAT) Reference Document for the Management of Waste from Extractive Industries in accordance with Directive 2006/21/EC (2018)”, which addresses risks

²⁰

<https://www.spglobal.com/platts/en/market-insights/latest-news/coal/072720-mining-faces-pressure-for-net-zero-targets-as-demand-rises-for-clean-energy-raw-materials>

²¹ <https://www.theguardian.com/world/2019/jan/28/brazil-dam-collapse-mining-disaster-victim-search-latest-news>

²² <https://www.theguardian.com/world/2018/feb/28/brazil-dam-collapse-samarco-fundao-mining>

linked to water, air and soil pollution and has clear guidance for companies. The “[EU Mining Waste Directive](#)” (EC-BAR) should also be considered, as it aims to ensure that mining waste is properly managed to avoid damaging the environment.

Still in the context of mining waste, the International Council on Mining and Metals (ICMM) together with the UNEP and the Principles for Responsible Investment (PRI) developed the “[Global Industry Standard on Tailings Management](#)” (GISTM). The standard is directed at operators and applies to tailing facilities, both existing and future ones and was developed following the Brumadino mine disaster.

NGOs in the mining space however have highlighted important shortfalls²³ with the GISTM, such as requiring financial assurance and insurance of companies, seeking community consent at all stages of the process and ensuring reliable grievance mechanisms are put in place. In this regard, a group of over 150 scientists, community organisations and NGOs globally published the “[Safety First: Guidelines for Responsible Mine Tailings Management](#)”, which T&E recommends are also taken into account in order to prevent future disasters.

7. Cross-cutting instruments

Additional instruments that T&E would like the regulation to include in Annex X are cross-cutting and relevant in the context of environmental due diligence.

The first one is the “[Aarhus Convention](#)” on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters which establishes a number of rights of the public (individuals and their associations) with regards to the environment broadly. The Convention provides for the access to environmental information, the public participation in environmental decision making and the right to review procedures to challenge public decisions.

The second one is the “[Environmental Liability Directive \(Directive 2004/35/EC\)](#)”, which establishes a framework based on the “polluter pays” principle to prevent and remediate environmental damage.

Both instruments are important in ensuring environmental damages can be accounted for by individuals or groups of people.

2.3 Other gaps in the regulation

Addition of Copper, Iron and Bauxite to Annex X

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 itself²⁴. 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 similar²⁵. It is therefore important to include

²³ <https://earthworks.org/media-releases/statement-global-industry-standard-on-tailings-management-falls-short/>

²⁴ <https://copperalliance.org/wp-content/uploads/2019/04/fact-sheet-2.3-million-tonne-energy-storage-boost-for-copper.pdf>

²⁵ <https://afrewatch.org/wp-content/uploads/2021/09/20436iied.pdf>

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). In fact, the demand for iron and bauxite for vehicles with electric engines is projected to increase by 13 to 14 times between 2019 and 2030²⁶ and the development of current and future battery technologies could massively increase the demand for both iron (e.g. lithium iron phosphate batteries) and aluminium (Nickel-Cobalt-Aluminium Oxide and aluminium-air batteries). The extraction of these metals has also been accompanied by well-documented human rights abuses and environmental destruction²⁷.

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 include in Annex X (1) copper, iron and bauxite which are regularly contained in batteries.

3. What companies are already doing

Car manufacturers

With the transition to EVs happening at speed, and the topic of material extraction being of public concern, carmakers are beginning to better understand and take an active role in their supply chains, namely beyond Tier 1 suppliers and further upstream to mining and refining.

As outlined in a previous T&E report looking at car manufacturers' EV readiness level²⁸, companies are increasingly launching and engaging in initiatives related to their mineral supply chains.

For example, they are entering long-term partnership agreements with mining companies which allow them to have a say on the ethical and environmental conditions of materials supplied for their vehicles. Volkswagen for instance has established long-term strategic supply chain partnership for lithium, sourcing from Ganfeng and CATL respectively. Similarly, Tesla recently announced a strategic supply partnership with BHP²⁹ on nickel from Australia to address potential shortages.

²⁶ 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

²⁷ 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-of-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

²⁸ Commitments but no plans: how European policymakers can make or break the transition to zero emission cars (2021), [Link](#).

²⁹ <https://www.bhp.com/news/media-centre/releases/2021/07/bhp-enters-into-nickel-supply-agreement-with-tesla-inc>

Carmakers are also increasingly adopting blockchain technology to trace any red-flags in their supply chain and increase overall traceability of key raw materials, with Volvo and Daimler both using Circulor, and VW using Minespider for example. VW is also part of the ‘Responsible Sourcing Blockchain Network’³⁰, an initiative together with IBM, Ford, LG Chem, and other companies which focuses specifically on cobalt tracing.

Companies are also actively participating in specific voluntary initiatives to promote sustainable sourcing. These initiatives may be focused on specific raw materials, such as the ‘Responsible Lithium Partnership’, which aims at sustainably sourcing the raw material from Chile³¹ and of which VW and Daimler are part of. Another mineral-specific initiative (cobalt), that the Swedish manufacturer Volvo Cars is part of, is the ‘Better Mining’ platform that aims to improve the working conditions on artisanal and small-scale mining sites. VW is also part of the ‘Cobalt for Development Initiative’³², a cross-industry initiative launched by Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH³³. The pilot project intends to strengthen legal compliance and improve health and safety conditions of artisanal and small-scale workers in the Democratic Republic of Congo as well as social well-being.

Importantly, car manufacturers like Daimler, BMW and Ford are also joining the Initiative for Responsible Mining Assurance (IRMA)³⁴, a multi-stakeholder led organisation that offers independent verification and certification of mines against a comprehensive standard covering both social and environmental risks. All three car manufacturers announced that they are making the standard one of their key criteria for making future supplier decisions and supplier contracts.

Battery manufacturers and Tier 2 suppliers

Crucially, battery manufacturers and battery-component suppliers are also actively getting involved in initiatives related to their supply chains, something that will enable companies to meet the proposed new due diligence requirements from day 1. For example, the Swedish battery manufacturer Northvolt announced³⁵ it would only source directly from miners, enabling them to better trace their materials and identify promptly any environmental or human rights abuses. Another manufacturer that is taking steps to manage their supply chain is LG Chem, for example by establishing in 2020 a responsible sourcing policy for raw materials, based on the OECD Due Diligence Guidance.

Similarly, materials technology company Umicore, introduced a Sustainable Procurement Framework for cobalt³⁶ increasing traceability of materials in their supply chain by carrying out comprehensive due diligence.

³⁰ <https://www.rcsglobal.com/blockchain-traceability/>

³¹

<https://www.business-humanrights.org/en/latest-news/chile-responsible-lithium-partnership-aims-to-promote-sustainable-development-contribute-to-the-reduction-of-negative-impacts-and-strengthen-human-rights/>

³² <https://www.electrive.com/2020/11/19/volkswagen-joins-cobalt-for-development-initiative/>

³³ The GIZ is a German development agency in the field of international development cooperation and international education work.

³⁴ <https://responsiblemining.net/>

³⁵

<https://www.euractiv.com/section/energy-environment/news/northvolt-will-source-directly-from-the-miners-to-ensure-clean-supply-chain/>

³⁶ <https://www.umicore.com/en/sustainability/value-chain-and-society/sustainable-cobalt/>

Overall, there is a trend that shows companies in battery supply chains to be more engaged with their supply chains. This demonstrates that companies are highly aware of the need to better know their supply chains, in order to comply with not just the due diligence requirements of the Battery Regulation, but also those in the Germany Supply Chain Due Diligence Law³⁷ (for German companies) as well as meeting customers and investors' expectations.

Volkswagen, for example, has this year published for the first time its 2020 Responsible Raw Materials report³⁸ which analyses key raw materials in the company supply chain such as the ones identified in the battery regulation but also ones like leather and rubber. Notably, the report assesses the raw materials against social and environmental standards flagging red flags and it is based on key OECD standards such as the OECD Due Diligence Guidance for Responsible Business Conduct, the OECD-FAO Guidance for Responsible Agricultural Supply Chains, and the OECD Due Diligence Guidance³⁹.

Other companies are, however, further behind in scaling up their efforts to implement supply chain due diligence, underlining the need for binding rules in this space. Recommendations on how companies can ensure they are ready to meet the requirements set out in the battery regulation are outlined in section 4.

4. Conclusions

4.1 Recommendations to policy makers

The EU Battery Regulation is a unique opportunity for Europe to play a leading role in efforts to secure a just and sustainable mobility system.

To summarise what was outlined in this paper, T&E recommends that policy makers:

- Strengthen environmental due diligence requirements in the Battery Regulation by referencing key principles of international environmental agreements and, where this is not possible, EU environmental law, together with a better defined and non-exhaustive list of adverse environmental risks.
- Establish in the regulation that company due diligence rules are based on the UN Guiding Principles and OECD Guidelines for Multinational Enterprises.
- Extend the scope to more battery raw materials namely copper, iron and bauxite ensuring they are also sourced responsibly.
- Enable access to justice for victims by requiring economic operators to remediate harm and by removing procedural obstacles to judicial review.
- Have economic operators gather, and base their due diligence on, all relevant information on geographic, sectoral, product and enterprise risk factors, including through consultation with actual and potentially affected right holders and with local communities, Indigenous peoples, civil society organisations and media.

³⁷ <https://www.business-humanrights.org/en/latest-news/german-due-diligence-law/>

³⁸

https://www.volkswagenag.com/presence/nachhaltigkeit/documents/supply-chain/Volkswagen_Group_Responsible_Raw_Materials_Report_2020.pdf

³⁹ See info box in Section 2 for further information on these OECD standards.

- Not allow for industry schemes to be automatically recognised, unless full compliance with the regulation can be demonstrated, regular auditing takes place, and have a fair representation of civil society on their decision-making boards.

Further to this, additional recommendations to policymakers should ensure that the upcoming European Commission proposal on Sustainable Corporate Governance applies to all industries, including the fossil fuel industry with an equal level of ambition to the recommendations made in this paper.

For the EU territory specifically, policymakers should include the mining sector in the upcoming revision of the Industrial Waste Directive. The directive's requirements on air, soil and water protection should address extraction and refining operations and set best practices in this context. The EU should also ensure that future review of the "EU Mining Waste Directive", and the related Best Available Techniques (BAT) Reference Document for the Management of Waste from Extractive Industries, adequately addresses the issue of mining waste as today the directive is not in line with global best practices.

4.2 Recommendations to companies

Whilst the proposed new regulation will play a key role in ensuring the transition to e-mobility is truly sustainable, companies also have an important role to play.

It is important that companies do not turn due diligence into a tick-boxing exercise, as the real purpose of any due diligence process should be to achieve a positive impact and change on the ground with regards to human rights, the livelihood of communities but also the environment and climate. For this reason, it is important that companies engage with suppliers, business partners as well as local communities and other key actors in an effective and inclusive due diligence process.

Equally, it is important that companies do not avoid or cease business in countries or with operators that may have weak governance in order to avoid possible risks of not complying with the regulation. This would ultimately lead to excluding and damaging small producers, who will find it harder to comply with due diligence rules. This is also important in the context of initiatives on the ground, as recently highlighted by Afreewatch⁴⁰.

As mentioned in section 2.1, whilst industry schemes play an important role in ensuring companies are able to meet due diligence requirements, they should not be regarded as safe harbours for a company from a legal perspective. It is crucial that the legal responsibility, and consequences, stay with the company itself without a presumption of conformity.

In the context of mining specifically, T&E recommends car manufacturers establish in their supply chain policies and contracts a mandatory compliance with the Initiative for Responsible Mining Assurance (IRMA) standard. The standard, which is a multi-stakeholder initiative, happens at each individual mine site (rather than at company-level) and follows a thorough step-by-step approach, as opposed to a pass or fail one, providing each mine with an individual score. Car manufacturers should have all of their battery materials - and beyond - IRMA-sourced by 2025.

⁴⁰ <https://afreewatch.org/wp-content/uploads/2021/09/20436iied.pdf>

Finally, mining companies should provide greater contribution to ensuring a just and green transition. Namely, all mining companies should change their operations and pledge commitments aligned with net zero goals. Specifically on Scope 1 and 2 emissions, companies should phase out internal combustion engine vehicles (for mining and for distribution) and ensure direct access to renewable energy on all sites. Companies should apply best available techniques across their sites globally, including the management of tailings, and restoration of sites post-mine closure. Finally, it is crucial that companies conduct extensive consultations and engagement with local communities and Indigenous peoples ensuring the right to Free, Prior and Informed Consent is exercised as well as the UN Declaration on the Rights of Indigenous Peoples is applied.

Similarly to what seen in the offshore wind sector⁴¹, a coalition of NGOs and industry in the mining sector should also take place to allow for a meaningful dialogue to happen.

Further information

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<https://windeurope.org/newsroom/news/wind-energy-and-environmental-protection-go-together-new-coalition-agrees/>