

Batteries and Waste Batteries proposal

Input to policymakers amidst the legislative trilogue

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The [European Copper Institute \(ECI\)](#) welcomes the opportunity to comment upon the EU Batteries Regulation amidst the inter-institutional negotiations, particularly on the provisions related to the due diligence requirements. ECI always supports policies and schemes that ensure responsible copper mining and production and contribute to establishing a level playing field across all relevant global supply chains and regions. Metals, such as copper, are EU green transition enablers, which should occur sustainably. Therefore, before any institutional agreement is achieved on the EU Commission proposal for a regulation on “*Batteries and Waste Batteries*”, we wish to provide comments for consideration.

ECI deems the developments made through the European Parliament (EP) and the Council positions as positive overall. They are a good starting point that needs a few changes to strike better a balance between the security of supply and sustainability. In particular, ECI identified and summarised a few points for improvement below:

1. The United Nations Guiding Principles on Business and Human Rights (UNGPs) should be the essential reference for critical definitions in the Regulation, such as the value chain approach in due diligence policies, clarifying the boundaries (e.g. where the responsibilities of the involved actors are). Moreover, alignment with the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas (CAHRAs) on traceability requirements shall be pursued.
2. The role of industry-led schemes is crucial for ensuring compliance with the legislation and contributing to the global level playing field.
3. Clear guidelines on the role of international conventions (e.g. due diligence risks, environmental due diligence) are necessary to foster implementation.
4. Duplicative audits must be avoided when a site is independently audited and verified.

Extensive comments and explanations are reported in the following parts of the paper. An Annex (companion paper) can also be found to clarify further the position presented here. The document also contains proposals for improvements of a legal text (Compromise Amendments – CAMs). ECI is eager to establish a constructive dialogue with policy-makers involved in the legislative procedure and to engage further on the matter.

Introduction

The proposal COM(2020) 798 final for an EU Regulation on Batteries and Waste Batteries aims to minimise batteries' harmful effects on the environment. This covers various aspects, such as requirements to ensure responsible production of minerals and metals used in batteries. However, due to the extension and complexity of the global value chains and the variety of risks and hotspots to be checked, due diligence practices need clarity in the definitions of the legal framework, proportionality of the obligations and flexibility in the implementation and application of the rules. Although the proposal is a good starting point, ECI identified some aspects during establishing policy makers' positions that require some reconsideration to make the legislative framework simpler, balanced and effective.

Alignment with internationally applicable due diligence rules (supply chain vs value chain due diligence, traceability)

Article 39 of the EC proposal and Article 45a of the Council position define the obligations for economic operators to establish due diligence policies of the supply chain. However, the European Parliament's (EP) position extends the responsibilities of affected companies upstream and downstream of the chain, but it is not clear where the duties of each operator end. Still, reading the EP text, a company's responsibility might extend even to financial actors that finance its operations. This broadens the scope of due diligence obligations tremendously for economic operators to identify and mitigate social and environmental risks associated with producing batteries' raw materials. The concept of the supply chain is a better fit for the use of due diligence in a regulatory context. More specifically, the supply chain refers to the steps ranging from sourcing raw materials to distributing a product. On the contrary, the value chain refers to a more extensive set of activities that create value, usually at a corporate level. The two concepts cannot be interchangeably used.

However, suppose the concept of the value chain will be kept. In that case, it needs an unequivocal and precise definition. Otherwise, the implementation of the due diligence of this regulation will be complicated for the economic operators, and it will be difficult for the legislator checking the compliance. The UNGPs might definitively help here by giving better context: they provide a precise definition of a "business relationship" and help in having a straightforward approach to what is a "value chain". In such context, "business relationships" include relationships with business partners, entities in the value chain, and any other non-State or State entity directly linked to business operations, products or services. The definition is flexible and allows to use of the same concept in different parts of the chain. In addition, UNGPs definition of "business relationship" is an established concept, globally accepted and based on the severity of the adverse impact, ability to influence and type of relationship which can work up and down the value chain. This definition is flexible enough to be used by companies to determine who in their value chain needs to be subject to a due diligence procedure. Moreover, the definition is well established among companies and organisations implementing due diligence; thus, it is considered a very workable concept, allowing a smooth implementation of the legislation on batteries.

In addition, the EC proposal Article 39.2d secures a good entry point for traceability requirements for economic operators, in line with the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals in CAHRAs Annex I. p.17. And so does the Council's position in Article 45b(d), which shall be maintained.

ECI asks the EC to maintain the scope of the legislation focused on the supply chain's due diligence, not the value chain.

If the trilogue discussion converges on the value chain concept, an option that ECI does not support in this specific legislative context, at least as a minimum, the definition of the value chain of the UNGPs should be used.

ECI asks the EC to maintain the wording in Article 39.2d of the proposal.

Role of industry schemes

The provision of the EC proposal Article 39(d) acknowledges industry schemes' and multi-stakeholder initiatives' role in supporting companies in fulfilling their traceability obligations. Moreover, it is worth underlining how the industry-led schemes and other frameworks have played a relevant role in widening the use and increasing awareness of the due diligence policies. Therefore, ECI fully supports the legal approach of the text where the recognition of such schemes, under Article 72, allows compliance with the due diligence policy and traceability obligations of the entire Article 39. It is relevant to remind that it is through the creation, improvement and broad application of such schemes that the due diligence policy is now part of the managerial practice of the large companies.

ECI supports the approach toward the due diligence policy taken by EC, a set of legal obligations and requirements for recognising industrial schemes.

Multi-stakeholder initiatives, voluntary standards and, in general, industry-led schemes should consistently be recognised as essential for complying with due diligence obligations.

Role of international conventions (risks, environmental due diligence)

The definition of adverse environmental impact is based on the alignment, full or partial, and on the compliance, exact or partial, with a set of international conventions mentioned in Annex X par. 3 of the Regulation. This provides for a solid framework for risks of significant adverse impacts. Nevertheless, the request of monitoring such international agreements on partners working with companies in the supply chain is not feasible; it will create a considerable workload whose practical benefits might be unclear or less tangible.

The international framework must be concise enough for businesses to follow to ensure the practical implementation of their due diligence obligations. In this regard, the upcoming Batteries Regulation should refrain from introducing different concepts for different risks but align primarily with the OECD Due Diligence Guidance for Responsible Business Conduct, the OECD Due Diligence Guidelines on Multinational Enterprises, and the UNGPs on Business and Human Rights. More specifically, this series of conventions covers thoroughly the core criteria used to determine saliency (severity and relevance). The rest standards should be removed or referenced only as frameworks to mitigate specific risks, not

as essential to design a due diligence system. Otherwise, their reference could be misinterpreted insofar as it would seem to require compliance with every standard.

Even more importantly, when it comes to environmental due diligence, which is still a not well-established concept, there should be provisions in the upcoming agreed legal text to allow for the development of Guidance on how concepts entailed in international conventions, such as the ones mentioned above, apply to environmental and other risks. There are no established practices or tools to assess the ecological impacts in a due diligence process at the global level; OECD is working on an instrument but, for the moment, is not mature enough to help. Therefore, it seems more practical and effective to refer to these international conventions as guidance for identifying what types of risks to consider in defining adverse environmental impacts.

In addition, when it comes to “risk”, the Council has come up with a definition in Article 45a(3b) describing it as actual or potential adverse impacts related to the social and environmental categories laid down in point 2 of Annex X. However, due diligence is founded on the concept of risk, which is about the likelihood of an actual or potential adverse impact and not by default upon a substantial negative impact. Once the likelihood is confirmed (identification of risk), the real adverse effect is assessed (probability of occurrence and entity).

ECI asks the EC to prioritise certain international conventions from Annex X par. 3 (e.g. for environmental due diligence) and keep paragraph 2 only as guidance to follow.

ECI asks the EC to highlight more firmly in the text the essence of likelihood when defining “risk” and to differentiate between the concept of risk and impact.

Checks on undertakings

The proposal of having additional “checks on undertakings”, under the changes proposed for Article 39.4b, raise feasibility and implementation concerns. This clashes with the auditing process. During an audit, the third-party verifier verifies the due diligence requirements of a company; if missing information is detected, the company is required to retrieve them from the relevant stakeholders in the supply chain. Therefore, “gathering information from stakeholders” is justifiable. However, the verifier shall not perform “checks” on other stakeholders (e.g., checking whether the other stakeholder complies with specific due diligence requirements; this provision is not part of the common practice, and it cannot be accomplished if not previously agreed in the contract or without the permission of the other stakeholder). The risk here is that the verifier will need to check many other stakeholders making the audit inefficient, expensive and, in most cases, not conclusive or useless.

The term ‘checks’ is too vague and should be removed if not appropriately defined in the context of a due diligence process. However, suppose the verifier needs to ‘check’ a stakeholder or undertaking. In that case, she/he shall physically visit this other company and maybe needs to replicate a check already done by another verifier.

The term ‘undertaking’ is not considered in the OECD due diligence guidelines about raw materials sourcing. OECD utilises as term ‘stakeholder’, which is more appropriate for the supply chain due diligence. Moreover, the term ‘undertaking’ does not have a proper definition in the legislative proposal and only relates to business interests. The term stakeholder is more general and encompasses all the necessary interests along the supply chain.

Capital-intensive, duplicative audits must be avoided unless there are risks identified, which would require on-the-ground double-checking. The modified text, as proposed by ECI in the companion paper, will make more accessible the practical implementation of the text and the compliance checks by competent authorities. It will also clarify the responsibility of the verifier in auditing an economic operator.

ECI asks the EC to replace “where relevant, carry out checks on undertakings and gather information from stakeholders” with “where relevant and necessary, gather information from stakeholders”.

ECI remains available for any additional information or clarification the EU Commission might require. Our expertise can provide helpful insight in developing the guidelines about sustainability and due diligence, for the copper sector, via the interactions of ECI with international copper colleagues in the International Copper Association (ICA) – <https://copperalliance.org/> - and with the experts in due diligence of the Copper Mark – <https://coppermark.org/> - an independent third-party verified assurance framework set up to promote the responsible production of copper.

About the European Copper Institute

Based in Brussels, the European Copper Institute (ECI) is the leading advocate for the copper industry in Europe and is the EU Regional HUB of the International Copper Association (ICA). Through a team of policy, industry and scientific experts, ECI acts to support copper's role in achieving the EU's policy goals. Our members mine, smelt, refine and recycle copper for use across the economy, in the electricity system, buildings, transport and industry.

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