Mining in the spotlight: Using due diligence to protect forests and peoples from mineral extraction

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Executive summary

It’s a cyclical problem.

Climate change is forcing European economies to finally transition away from fossil fuels, but as they do so, a new danger emerges, one which could exacerbate, not mitigate the triple planetary crisis that humanity faces: a heating climate, pollution and biodiversity loss.

Electric transportation and renewable energy both require huge amounts of critical raw materials. Minerals which are often found under forests, in important biodiversity areas, and in countries with poor governance records. The rush to source such materials could therefore end up destroying some of the climate’s most valuable allies, the carbon soaking forests, other important ecosystems and the communities that have protected them for generations.

One of the tools to ensure the sustainable and ethical purchase of such minerals is EU laws requiring mandatory human rights and environmental due diligence. This discussion paper assesses and compares the following laws and considers how they could be used to improve critical minerals supply chains:

- The EU Regulation on deforestation-free products (EUDR)
- The Battery Regulation (BR)
- The Conflict Mineral Regulation (CMR)
- The Corporate Sustainability Due Diligence Directive (CSDDD)
- The Forced Labour Regulation (FLR)
- The Critical Raw Materials Act (CRMA)

It is essential to note from the beginning, however, that no law will work as a silver bullet. All of these regulations would need to be accompanied by discussion, diplomacy and partnership agreements with producer countries, negotiated and implemented with full representation of all stakeholders and rights holders. Beyond that, policy makers must put more emphasis on strategies to address over consumption and reduce resources extraction.
What is due diligence?

Before we look at the laws we must first understand due diligence itself. What does it mean and how should it work?

The answer is not always clear.

There are two different concepts of due diligence: (1) Company due diligence - due diligence as a continuous process of improvement; (2) Product due diligence - due diligence as a process undertaken before a decision is made, i.e. whether a product is permitted to be placed on the market.1

One of the potential risks of both is that companies may satisfy the criteria by simply abandoning high-risk suppliers or regions (assuming they can source the products elsewhere), rather than support them to clean up their supply chains; as a result, suppliers may switch to sell to less scrupulous buyers without changing their practices.

Mandatory human rights due diligence (mHRDD) is a relatively new concept. Company due diligence first came to prominence in 2011 with the United Nations (UN) Guiding Principles on Business and Human Rights (UNGP), and EU laws incorporating due diligence are much younger. It will take a decade or more to see real impact on the ground but it is already clear there is much room for improvement. As James Harrison notes in a recent paper, assessing the impact of mHRDD:2

The outlook is gloomy, key challenges cast serious doubt on whether HRDD processes are (and will in future) routinely uncover and address the most serious human rights issues as they affect rightsholders.

1 Towards a Taxonomy of Due Diligence Measures: Differentiating company-focused and product-focused due diligence. Professor James Harrison, School of Law, University of Warwick.

He concludes that there are three key challenges to making mHRDD effective:

1. methodological uncertainty about key aspects of the process;
2. power dynamics between critical actors who are charged with undertaking vital aspects of mHRDD;
3. a race to the bottom linked to the competition taking place between HRDD practitioners (demand for mHRDD is growing and there is a lack of skilled practitioners on which companies rely).

Harrison also proposes a few ways to address these problems:

- **Clarity.** Due diligence laws should create a clear minimum set of expectations that can help practitioners take decisions about difficult methodological issues and strengthen their position vis à vis company officials in the initial prioritisation assessment and reporting processes. For this to work laws must be very specific in spelling out the key elements of the due diligence process, which should be identified at sectoral level, and laws must spell out the minimum expectations that could empower rights holders by specifying the forms and depths of engagement expected.

- **Transparency.** Complete disclosure of companies mHRDD processes and findings so that enforcement bodies and campaigning NGOs are capable of meaningful scrutiny.

- **Staffing and resources.** Enforcement bodies must be independent, have sufficient resources, and staff with enough human rights, sectoral and country-based knowledge to identify gaps and inaccuracies in company reports and companies’ responses to those issues. This must be complemented by mechanisms for third parties to make complaints and obtain information, which empower rights holders and their representatives to identify (potential) human rights issues and for those to be properly investigated.

- **Creating an independent oversight body.** Consideration should be given to a regulatory model which does actually change the core dynamics of the HRDD process. Such a model could be created if national authorities from across the different countries who are proposing mHRDD laws collectively set up an independent body with the lead responsibility for overseeing the HRDD process (iHRDD).³

³ "iHRDD would be the professional home of HRDD practitioners and be responsible for their training and accreditation, funded by contributions from the companies who are subject to HRDD laws. It could commission those practitioners to map out key human rights issues by sector and by country (e.g. the tea industry in Kenya). This would then create an evidence base about the key human rights issues which any company operating in that sector and country must consider."
Comparison between the different EU due diligence laws

We have compared the EU Regulation on deforestation-free products (EUDR) (in force), the Battery Regulation (BR) (in force), the Conflict Mineral Regulation (CMR) (in force), the Corporate Sustainability Due Diligence Directive (CSDDD) (approved), the Forced Labour Regulation (FLR) (pending). Given the scope of the briefing (mining), the Critical Raw Materials Act (CRMA) (adopted) is also included in the analysis.5

The EUDR, the FLR and the CMR fall squarely in the Product Due Diligence category, while the CSDDD falls in the Company Due Diligence category. The BR is very broad, focusing on security of supply, recycling and waste management of batteries - of which due diligence is just one element (chapter VII; articles 49-52). The CRMA just focuses on security of supply of 34 identified critical raw materials.

The aim, reach and coverage also differ between the laws. The FLR and EUDR apply in principle to any company accessing the EU market; the CMR applies to all companies importing conflict minerals above a certain threshold while the CSDDD and the BR apply to larger companies with a turnover of 450 and 40 million respectively. The EUDR covers seven commodities (rubber, palm oil, beef, leather, cocoa, coffee, soy) to be expanded with other agricultural commodities by delegated act, the BR covers four minerals (nickel, lithium, graphite and cobalt), to be expanded by delegated act; the CMR covers four minerals (gold, tungsten, tantalum and tin) to be expanded by delegated act. The CRMA covers 34 critical raw materials, including copper, nickel, aluminium/rauxite, manganese, and cobalt. The list is updated every three years following an assessment by Directorate General (DG) GROW.

5 A summary of a longer internal report is available upon request.
6 Article 47: This Chapter does not apply to economic operators that had a net turnover of less than EUR 40 million in the financial year preceding the last financial year, and that are not part of a group, consisting of parent and subsidiary undertakings, which, on a consolidated basis, exceeds the limit of EUR 40 million.
The mandatory due diligence processes in the laws are all based on Organisation for Economic Cooperation and Development (OECD) guidelines but differ in detail. Some focus on only three key elements of due diligence (1) information gathering; 2) risk assessment and 3) risk mitigation; others detail all the six steps listed by the OECD in the *Due Diligence Guidance for Responsible Business Conduct*. The company level at which the due diligence policy must be adopted and/or monitored and the number of years documents must be kept also differs, with the BR setting the highest standard.

How effective any of the laws would be depends a lot on staffing, capacity, resources and cooperation of the enforcement bodies. It is doubtful if this is sufficient for any of the laws. Only the FLR harmonises decision-making re: prohibition among competent authorities; the others only mention the need for information sharing, close cooperation and coordination.

Traceability requirements are an important element. For some supply chains, notably minerals and palm oil, there is a ‘choke point’ - smelters for minerals and mills and refineries for palm oil - after which it is hard to track from which mines the raw materials are coming from or on which plots of land palm oil was grown.

Transparency and traceability are closely linked. Both require relevant information to be publicly and timely available. All laws require companies and enforcement bodies to annually report their due diligence process and findings, but none of them foresee independent monitoring, which is also essential.

The EUDR and the CSDDD allow for NGOs or other legal entities to present substantiated concerns or submissions. The CSDDD also requires companies to set up a system to deal with complaints directly. In the case of the EUDR, the competent authority must respond within 30 days. The CMR and the BR do not specify the possibility of substantive concerns, but they do require companies to include a grievance mechanism as part of their due diligence process. The FLR allows for the submission of information to the Forced Labour Single Portal.

The question of whether the Commission should develop a harmonised position on the acceptance of due diligence schemes is not yet concluded. The CMR, the BR, the CSDDD and the CRMA all mention the need for Commission guidelines/implementing regulations for acceptable due diligence schemes, and it is likely that they will be based on the OECD methodology for the alignment assessment of industry programmes with the OECD mineral guidance. This methodology is, however, restricted to the CMR remit and excludes the environment. Hence, the Commission should include environmental elements when developing guidelines for due diligence schemes in the BR and the CSDDD. There appears to be no harmonised Commission-wide process to develop common guidelines or methodology to assess due diligence schemes.

**But even the most demanding standard in the world is no substitute for legislation, regulation and judges to ensure that companies respect fundamental rights and protect the environment.**

*What happens if a company receives a poor rating following a voluntary assessment process? Our power is to make information public. But, ultimately, governments have the most important role to play.*

Pierre Petit-De Pasquale, Director of the Initiative for Responsible Mining Assurance
Effectiveness

To be effective, laws must have the following five qualities:

First, they must **be sufficiently specific**, including identifying the key elements of the HRDD process that must be undertaken. Although the EUDR has learned from the EU Timber Regulation and the US Lacey Act by demanding a due diligence statement before products enter the EU market, making prosecution a lot easier, none of the laws are very specific about the required process. In principle a harmonised approach on due diligence requirements across different laws could be beneficial as long as demands are clear and are improved based on lessons learned. It could also be argued that by including ‘timber’ as an agricultural commodity in the EUDR, the EUDR has been made needlessly more difficult to implement.

Second, the **supervisory authorities** (and for some laws the customs agencies) which monitor and enforce the laws **must have the independence, skills, power and resources to do their job**. This remains to be seen – but it is difficult to see how e.g. the Netherlands could with reasonable costs check 9% of all cocoa imports and 9% of all suppliers from high-risk areas as required by the EUDR. It remains likely that enforcement will remain weak.

Third, there must be **strong and easily accessible complaint mechanisms** for third parties. This remains to be seen but although all laws require companies to publish annual reports, they mostly don’t spell out what should be in these reports; all allow for submissions of one kind of another but only the CSDDD has a remedy mechanism.

Fourth, **penalties**. Here progress is being made as the EUDR and CSDDD require significant penalties, which have spurred at least some companies into action, so we are told. But it is still early days and depends on effective enforcement.

**Fifth, and probably most importantly, is looking at the power balance.** There are power imbalances in the supply chain (e.g. between practitioners and corporations; within corporations; between companies and their suppliers) that risk undermining mHRDD effectiveness but this goes deeper, and we should also look at power imbalances between and within the EU and producer countries. Hence it is important to assess who is empowered/strengthened by these mHRDD laws and who is not.

Power imbalances are difficult to solve solely through a law and that is why it is important to integrate all into a wider ‘partnership approach’ to address the root causes of the issues that these mHRDD laws aim to solve. It should also be combined with policies ensuring natural resources are produced and consumed in a more equitable way, which respects planetary boundaries. In the transport sector for example, we should refrain from replacing fossil-fuel vehicles with electric-vehicles on a one-to-one basis but invest in car-sharing and public transport.
Which due diligence law would best tackle mining?

The rapidly increasing demand for mineral resources is intensifying industrial and artisanal mining across the tropical biome, violating labour laws and causing environmental degradation.

Gold has a big forest footprint but only falls under the Conflict Mineral Regulation if it is from conflict areas, notably Central Africa. Nickel and cobalt also have a forest footprint but are already included in the Battery Regulation meaning that from 2025 onwards, companies must conduct and report on due diligence on their imports. Nickel, copper, aluminium/bauxite and manganese all also fall under the scope of the Critical Raw Materials Act. All commodities, including coal or iron ore, also fall under the Forced Labour Regulation and the Corporate Sustainability Due Diligence Directive.

There has been some talk about also including critical or strategic minerals into the EU Regulation on deforestation-free products. There are, however, many reasons not to. Adding minerals to the scope of the EUDR is not like just adding another agricultural commodity – which can be done by delegated act – it would mean ripping up the law and replacing it with something that would allow it to tackle both agricultural products (including timber) and mining products. This would look very different and be much more complicated.

Reasons not to include mining in the EUDR include:

- It would challenge the integrity and the effectiveness of the EUDR implementation
- It would require opening up the whole EUDR legal text – not just a delegated act
- The impact of mining is much broader than just forest conversion
- By their nature critical minerals will not be banned (but could require high due diligence) and are therefore no fit for a prohibition law

Note that the FLR also makes an exception for critical minerals (article 20.5)
Conclusion and recommendations

The Battery Regulation seems to be the best tool to use from 2025 onwards to tackle the critical raw materials nickel, cobalt, graphite and lithium, with others possibly added by delegated act. From 2028 onwards the Corporate Sustainability Due Diligence Directive and the Forced Labour Regulation could also be used for these and other critical raw materials. It is important, however, not to consider any of these regulations as a silver bullet, they will need to be implemented hand-in-hand with more innovative demand side measures to reduce over consumption and Strategic Partnerships between the EU and producer countries. To find out more about Strategic Partnerships see Fern’s reports A Partnership of Equals and Getting the incentives right.

Further possible discussion points could include:

- Whether or how the Commission should develop harmonised guidelines on acceptable due diligence schemes and what should be in them.
- How to ensure enforcement bodies are well resourced and have the right skills and set-up.