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GLOBAL ENVIRONMENT NEWSLETTER

Welcome to the Winter edition of our Global Environment newsletter. This edition covers the following topics:

We hope that you find this issue of our Global Environment Newsletter of interest. If you have any topics that you would like to see covered in future editions or if you have any comments on previous issues please let us know.

EU

Conflict Minerals Regulation Adopted: *EU imposes new rules to ensure supply chains do not use minerals from conflict-affected areas*

On 17 May 2017, the European Union adopted Regulation EU/2017/821 laying down supply chain due diligence obligations for importers of certain metals and minerals originating from conflict-affected and high-risk areas. The Regulation covers Tin, tantalum, tungsten (and ores containing them) and gold (the "**Minerals and Metals**") on the basis that these are often mined in conflict affected regions. Their trade may therefore contribute to the financing of non-state armed groups in those regions.

"The Regulation imposes due diligence requirements which apply to all importers of the Minerals and Metals into the EU"

The Regulation imposes due diligence requirements which apply to *all* importers of the Minerals and Metals into the EU. An importer is defined as any party that declares to the custom authorities of a Member State Minerals and Metals that enter the EU and that are either reserved to be put on the EU market or t reserved for private use or consumption within the EU. The Regulation might therefore, for example, also apply to traders, smelters, refiners and hi-tech manufacturing companies using these minerals in products (such as processor manufacturers) which purchase Minerals and Metals outside of the EU for use within the EU's territory.

The requirements placed on importers are based on the OECD Due Diligence Guidance which has previously inspired similar legislation in the United States and China. They fall into the following four main categories:

- **Adoption of Management Systems**: importers must adopt a supply chain policy which incorporates the OECD standards, and operate a traceability policy, or chain of custody system to verify the origin of the imported materials;
- **Adoption of Risk Management Processes**: importers must conduct risk assessments based on the information provided through their management systems. For the identified risks, a prevention and mitigation strategy should be laid out. Note that these obligations would only apply to importers of minerals, but not to importers of metals;
- **Organisation of an audit** by an independent third party; and
- **Disclosing reports and due diligence information** to the relevant national authority and to downstream customers.

"the European Commission has confirmed that it will consider additional legislative proposals for downstream customers if it concludes that the Regulation is not operating effectively enough …"

Downstream customers operating beyond the metals import stage (e.g. manufacturers using, products or machinery or parts containing refined metals) do not have any obligations under the Regulation although they are likely to find the information passed on to them useful. However, the European Commission has confirmed that it will consider additional legislative proposals for downstream customers if it concludes that the Regulation is not operating effectively enough to ensure responsible supply behaviour in producer countries, or if the uptake of supply chain due diligence systems in line with OECD Guidance is insufficient. The Regulation therefore contains an obligation upon the Commission to review the operation of the Regulation by 2023 to consider these issues.

To facilitate the due diligence process, the Commission will establish a list of global responsible smelters and refiners that are considered to comply with the Regulation. In addition, it will publish an indicative, non-exhaustive list of conflict-affected areas and high-risk areas.

The Regulation also includes a procedure for recognition of supply chain due diligence schemes by the Commission. Such recognition will constitute confirmation that a supply chain scheme is in accordance with the Regulation.

Although the Regulation will only enter into force on 1 January 2021, companies should assess whether their position in the supply chain triggers obligations under the Regulation to allow timely implementation of the required internal processes. Companies that have no direct obligations are imposed should be aware of the increased amount of information that will be made available to downstream manufacturers and end-users under this regulation, and the possibility that the Commission may ultimately seek to impose additional obligations on downstream customers.

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'Best Available Techniques' Standards Published for Large Combustion Plants: *New BAT Reference Documents will impose stricter emission limits*

The Best Available Techniques Reference Documents (BREFs) for Large Combustion Plants (over 50MW) were formally adopted by the EU on 17 the European Commission has confirmed that it will consider additional legislative proposals for downstream customers August 2017. Under the Integrated Pollution Prevention and Control (IPPC) Directive, Member State national regulators must ensure that all IPPC permits of these plants comply with the conclusions on Best Available Techniques (BAT Conclusions) that form part of the BREFs within four years of their publication, i.e. by 17 August 2021.

"In essence, the BAT Conclusions set stricter emission limits for existing pollutants … on the one hand, and introduce new emission limits for previously unregulated pollutants"

In essence, the BAT Conclusions set stricter emission limits for existing pollutants (SO_2, NOx, TZL and CO) on the one hand, and introduce new emission limits for previously unregulated pollutants (Hg, NH_3, HCl and HF) on the European Commission has confirmed that it will consider additional legislative proposals for downstream customers the other. The content of the BAT Conclusions were heavily debated during the process of their adoption. A group of Member States including Germany, Poland, the Czech Republic, Bulgaria, Finland, Hungary, Slovakia, and Romania expressed concerns about the strictness of the emission limits (as a number of LCPs may not be able to adhere to the limits, primarily due to the costs connected with the required plant upgrades and additional control measures). These Member States also pointed out the difficulty of being able to detect emissions at the lower emission limit levels set for some of the pollutants (especially mercury). As a result, the vote on the BREFs for large combustion plants was among the closest held on any of the BREFs (65.14 % of Member States voted for their adoption, with 65 % of votes being needed for their approval).

"plant operators that cannot meet the new emission limits can request a derogation from the limits from their national regulator"

In certain circumstances, plant operators that cannot meet the new emission limits can request a derogation from the limits from their national regulator. Under the IPPC Directive, less stringent limit values can be applied to a permit where an assessment shows that the achievement of the BAT standards would lead to disproportionately higher costs compared to the environmental benefits. Irrespective of any derogation offered in relation to BAT standards,

plant operators will still need to comply with overarching emissions ceiling limits set by the IPPC Directive.

It already seems that in some Member States (such as Germany, Romania, Spain, Poland and the Czech Republic), the operators of large combustion plants are less likely to be compliant with the BAT Conclusions on BAT by 2021. These operators will need to either incur relatively high expenses in order to comply with the BAT Conclusions or to apply for the respective derogations. In any case, it seems that the relatively strict limits set by the conclusions on BAT may effectively influence the composition of the energy mix in some Member States as from 2021.

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Achieving Sustainable Finance in the European Economy: *Fiduciary duties of institutional investors and asset managers look likely to broaden*

Each year, the European Commission identifies a list of top priorities for the work it intends to undertake during that year. A key priority for the Commission in 2017, which it will carry through to 2018, has been "*a deeper and fairer Internal Market with a strengthened industrial base*". In pursuit of this priority, the Commission is committed to developing a strategy to achieve sustainable finance in the European economy.

To this end, the European Commission has recently launched a consultation on the responsibilities and duties of financial actors including directors and institutional investors, and whether such individuals should be responsible for managing long-term sustainability risks. Responses received will be used to inform the Commission's impact assessment (expected in 2018) considering "*whether and how a clarification of the duties of institutional investors and asset managers in terms of sustainability could contribute to a more efficient allocation of capital, and to sustainable and inclusive growth*".

"the European Commission has recently launched a consultation on the responsibilities and duties of financial actors including directors and institutional investors, and whether such individuals should be responsible for managing long-term sustainability risks"

As part of its commitment to developing an EU strategy on sustainable finance, the European Commission engaged a High Level Expert Group on sustainable finance ("**HLEG**") to "*help to develop an overarching and comprehensive EU strategy on sustainable finance to integrate sustainability into EU financial policy*."

In July 2017, the HLEG released an interim report recommending reform to the EU rules and financial policies to facilitate green and sustainable investments. It considered that work was needed to change the investment culture and behaviour of all market participants to achieve sustainable finance. One HLEG recommendation of particular interest to the Commission, was the recommendation to: *"Establish a "fiduciary duty" of institutional investors and asset managers that explicitly integrates material environmental, social and governance ("ESG") factors and long term sustainability."*

"[HLEG] considered that work was needed to change the investment culture and behaviour of all market participants to achieve sustainable finance"

The HLEG acknowledged that fiduciary duties (i.e. duties of care, loyalty and prudence) are already embedded into the EU financial framework. "*The central expectation [of fiduciary duty holders] is to be loyal to beneficiary*

interests, prudent in handling money with care and transparent in dealing with conflicts." However, what it considered less clear, was whether these duties extended to considering the materiality of sustainability risks.

The HLEG recognised that the long-term interests of beneficiaries include material environmental, social and governance concerns. Therefore, the obligations of institutional investors and asset managers should include and encourage engagement with clients on these issues to ensure their concerns influence investment decision making.

To achieve this across EU financial regulation regime, the HLEG considered that a number of provisions in key directives within the European Union's legislative framework would need to be reviewed, and a best practice standard in relation to corporate governance and long-term sustainability established. Further measures to assist could include embedding principles of sustainability into the investment policies and risk management frameworks of institutional investors.

"the consultation seeks guidance on whether entities should disclose sustainability factors taken into account in their investment decision-making"

Having received the HLEG's interim report, the Commission is now seeking stakeholder engagement on the suggestion that fiduciary duties be clarified to explicitly integrate material environmental, social and governance factors and long term sustainability. In particular, the consultation seeks guidance on whether entities should disclose sustainability factors taken into account in their investment decision-making, and seeks views on areas that disclosures should cover including, for example, governance, investment strategy, asset allocation and risk management.

The Commission seeks views of all market participants, and responses to the consultation can be provided up to 22 January 2018.

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INTERNATIONAL

HFC Phase Down and Mercury Phase Out on the Horizon: *Kigali Amendment on HFCs comes into force and the Minamata Convention to come into force in 2019*

Recent developments in International Environmental Law

A number of recent developments in international environmental law will soon start to have a direct impact on importers, traders and manufacturers of certain substances and products. For example, the global agreement reached in Kigali in 2016 to phase down the use of hydrofluorocarbons (HFCs) has now been ratified by 23 countries and will enter into force on 1 January 2019. The Minamata Convention on Mercury has also recently achieved the requisite number of ratifications and entered into force on 16 August 2017.

"The Kigali Amendment to the Montreal Protocol will phase down the use of HFCs by 80-85% by the late 2040s"

Global HFC phase down

The Kigali Amendment to the Montreal Protocol will phase down the use of HFCs by 80-85% by the late 2040s.

HFCs are synthetic greenhouse gases used in refrigeration and air-conditioning equipment and also for other purposes, such as fire protection, foams, aerosols and solvents. They were substituted by industry when chloroflourocarbons (CFCs) were phased out under the Montreal Protocol and, while they do not deplete the ozone layer, they are powerful greenhouse gases with a very high global warming potential. The HFC phase down is expected to avoid up to a 0.5 celsius temperature rise by 2100.

Most developed countries will start to reduce their use of HFCs in 2019 and most developing countries will freeze their consumption of HFCs in 2024 and then commence a phase down in 2029. Some developed countries, such as Australia and EU member states, have already taken early action.

The EU already began phasing down HFCs in 2015 and has a stricter phase down schedule compared with the Kigali Amendment. An EU HFC Registry monitors the phase down, and only companies with EU quotas can supply HFCs to the EU market.

Australia has also already passed legislation which will commence the HFC phase down on 1 January 2018, a year ahead of schedule and with smaller, more regular step-downs than those provided for by the Montreal Protocol. The phase down will cover imports of bulk gas, (but not gas in pre-charged equipment such as air-conditioners and refrigerators). It will be managed through a reducing import quota system, and bans on the import or manufacture of new equipment may be considered in the future.

"Most developed countries will start to reduce their use of HFCs in 2019 and most developing countries will freeze their consumption of HFCs in 2024 and then commence a phase down in 2029"

Minamata

The Minamata Convention on Mercury recognises that mercury is a chemical of global concern and aims to protect human health and the environment from the adverse effects of mercury through controlling anthropogenic releases. It bans new mercury mines and phases out existing ones. It controls mercury air emissions from certain plant and processes (such as coal-fired power plants and cement production) and releases to air and water, and phases out and down the use of mercury in certain products and manufacturing processes. It also deals with mercury storage and disposal, contaminated sites and the supply and trade of mercury.

The Minamata Convention has 128 signatories and 85 ratifications and recently held its first Conference of the Parties. With its entry into force in August 2017, the parties to the Convention are now legally bound to implement a range of measures which will start to be felt by producers and traders of mercury and mercury compounds, as well as companies who use them in manufacturing processes. For example, mercury has broad uses in everyday objects such as batteries, fluorescent lamps, cosmetics, dental amalgam and measuring devices.

"With its entry into force in August 2017, the parties to the Convention are now legally bound to implement a range of measures which will start to be felt by producers and traders of mercury and mercury compounds, as well as companies who use them in manufacturing processes"

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GERMANY

Prospects Increase for Bans on Fossil Fuel-Powered Vehicles in German Cities: *German courts rule that bans can be implemented based on current road traffic laws*

Human exposure to nitrogen dioxide (NO_2) from diesel/combustion engine vehicles is a hot topic in current German politics. Increased NO_2-concentrations in the blood can lead to a deterioration of lung function and cause respiratory diseases. The majority of these emissions are caused by road traffic, and older diesel vehicles are a key source of NO_2 pollution.

In Germany, the introduction of a ban on diesel and other fossil-fuel powered combustion engines cars in certain cities is currently under discussion as a possible measure to comply with air quality regulations, which are laid down in the European Ambient Air Quality Directive (2008/50/EC). According to the German Federal Emission Control Act, which implements the Directive, NO_2levels in the air shall not exceed an average limit value of more than 40 µg/m³ over a calendar year. The actual value has been identified to be more than double this limit in some German regions and cities for many years. As a result, the European Commission plans to sue Germany before the European Court of Justice for its failure to comply with the Directive.

"In Germany, the introduction of a ban on diesel and other fossil-fuel powered combustion engines cars in certain cities is currently under discussion as a possible measure to comply with air quality regulations"

The German environmental group "Deutsche Umwelthilfe" ("DUH") has worked to increase pressure in the fight for clean air by suing several German cities for their failure to enforce the limits in the Directive. In Düsseldorf and Stuttgart recently, the administrative courts confirmed the DUH's view that only a ban of diesel cars from cities would be sufficiently efficient to fulfill the applicable thresholds (whereas mere software updates would not sufficiently reduce emissions). The courts also ruled that such a ban could be legally implemented on the basis of the current road traffic law. The court did not, therefore, see the necessity of implementing a so-called "blue sticker" which would be placed on environmentally-friendly cars in order to keep heavily polluting diesel cars without such blue stickers out of the cities. These cases will be finally decided by the Federal Administrative Court in Spring 2018. The final verdict is eagerly awaited as it will clarify the general power to establish bans in inner cities and might result in the competent authorities establishing bans in the near future.

"The courts … ruled that such a ban could be legally implemented on the basis of the current road traffic law"

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NETHERLANDS

Rights of "Interested Parties" to Request Enforcement of Environmental Law: *Dutch Council of State sets out new rules on qualification as an interested party.*

In the Netherlands, the enforcement of environmental law is primarily the responsibility of the various regulatory authorities. However, "interested parties" ("*belanghebbenden*") are entitled to request enforcement action in case an authority does not take action to enforce. If such a request is denied,

an interested party can seek a ruling in the Dutch administrative courts to compel the authority to act.

Before deciding on the merits of such claim, the courts need to determine whether the claimant has sufficient interest to be considered an "interested party". Until recently, case law had given little guidance as to when a party qualified. Previously, the Courts had ruled that a party had to sustain "consequences of a certain relevance" resulting from the non-compliance with the applicable regulation before it could be deemed an interested party. In a decision given on 23 August 2017 (*ECLI:NL:RVS:2017:2271*) the Dutch Council of State gave some helpful guidance on the determination of "consequences of a certain relevance" ("*gevolgen van enige betekenis*").

"Before deciding on the merits of such claim, the courts need to determine whether the claimant has sufficient interest to be considered an "interested party". Until recently, case law had given little guidance as to when a party qualified"

The decision related to a dispute involving a livestock farm which operated a manure storage basin without the required permit. Neighbours living over 250 metres away complained about odours caused by the basin and requested the authorities to close it. However, the authorities (and subsequently the District Court) ruled that the distance between the neighbours and the farm was too far for the neighbours to qualify as “interested parties”.

On appeal against the District Court's decision, the Council of State rejected this approach. It took the opportunity to specify in more detail how a Court should determine whether a party has suffered "consequences of a certain relevance". It gave the following guidance:

- The starting point is that if a party is “directly impacted” (*rechtstreeks feitelijke gevolgen ondervindt*) by an activity, it will in principle qualify as an “interested party”.
- However, this status will be lost if the party cannot demonstrate that it suffered “consequences of a certain relevance”; such consequences will not exist if the effects on the impacted party are of such limited nature, that a personal interest in the matter is deemed absent. For this assessment the relevant factors are: distance, visibility, spatial consequences and environmental impacts (odour, noise, light, vibrations, emissions, external safety risk). The factors may need to be considered alone or in combination. Also the type, intensity and frequency of the impact can be relevant;
- Environmental regulations often regulate environmental impacts on the basis of distance (*afstandsnormen*). However, such regulations are not relevant to assess whether a party qualifies as an "interested party". Such regulations are only relevant for the substantive assessment of the matter;
- Whether a party qualifies as an “interested party” can vary depending on the nature of the relevant administrative dispute (e.g. depending on whether it concerns a permit application or an enforcement matter);
- In relation to procedure, claimants have no obligation to demonstrate their interest. It is the duty of the competent authority to determine this (subject to the supervision of the administrative courts). Only where there is doubt can a party be requested to explain the impacts it has experienced.

"the ruling of the Council of State facilitates the assessment of the relevant facts in the context of enforcement claims and hence will be helpful for all stakeholders"

In this case, the Council of State ruled that the claimants qualified as interested parties, because they experienced odours from the basin and, hence, were directly impacted. Thereby it was not relevant that the impact was intermittent, depending on such factors as the direction of the wind and the quantity of manure stored in the basin.

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The assessment of whether a party is an interested party remains dependent on the facts in each case, but the ruling of the Council of State facilitates the assessment of the relevant facts in the context of enforcement claims and hence will be helpful for all stakeholders.

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UK

Update on Brexit and Environment and Climate Change: *The UK Government responds to concerns on potential weakening of environmental law Post-Brexit, and to EU proposals on the EU Emissions Trading Scheme*

Since the 2016 referendum, the UK Government has consistently confirmed its position that Brexit would not lead to a lowering of environmental standards or weakening of climate change targets in the UK. An important tool in making sure this happens is the Government's proposed European Union (Withdrawal) Bill which aims to copy over existing EU environmental law as at "exit day" into UK law. This Bill is currently progressing through the Parliamentary process and would include powers for the Government to correct legislation that could not be simply copied over (for example because of references to EU bodies or other EU laws). The Department for Environment and Rural Affairs (Defra) believes that around 100 statutory instruments would be needed to correct environmental legislation in this way.

Addressing concerns over maintaining environmental standards

Despite the Government's position and the proposed Bill, various concerns about the future of environmental law in the UK have been raised by stakeholders, including that:

- the exercise of copying over powers could lead to gaps in environmental protection or opportunities for the Government to weaken environmental standards;
- the influence of the European Commission in compelling the UK to uphold environmental standards would be lost; and
- various important principles in EU law would not be replicated in UK law: these include the "precautionary principle" which adopts a preventative decision-taking approach in policy decision-making when looking at risk, and the "polluter pays principle".

In various statements during Autumn 2017, the Environment Secretary, Michael Gove, has responded to these concerns by making a number of proposals aimed at ensuring that not only would environmental standards in the UK be maintained by Brexit, but enhanced. These include:

- confirming that Defra will consult on its programme of statutory instruments necessary to correct environmental law.
- consulting in 2018 on the creation of a new independent environmental body (possibly in the form of a "commission") to supervise the enforcement

"the Environment Secretary, Michael Gove, has [made] a number of proposals aimed at ensuring that not only would environmental standards in the UK be maintained by Brexit, but enhanced"

of environmental law and ensure the Government upholds relevant standards.

- adopting a new national policy statement which includes the EU environmental principles mentioned above; this would guide government decision-making and could provide the basis for judicial review against ministerial decisions on environmental issues in appropriate circumstances.
- the long-delayed 25-year national Environment Plan will be published in late 2017 or early 2018. The Government is also reportedly considering the adoption of a new Environment Bill which could back up this new plan.

"The EU and the UK have made separate proposals to deal with the impact of the UK leaving the EU before the end of Phase III of the EU ETS"

EU and UK proposals on the EU Emissions Trading Scheme (EU ETS)

The EU and the UK have made separate proposals to deal with the impact of the UK leaving the EU before the end of Phase III of the EU ETS. The EU proposes to prevent new UK allowances issued from January 2018 being used for compliance in order to protect the integrity of the carbon market. In order to avoid problems with the EU's proposed approach, the UK has made a counter-proposal to bring forward the compliance deadline for 2018 emissions to 22 March 2019, and suspend the allocation/auction of EU ETS allowances in January 2019. Further detail on these proposals is contained in our briefing: Emissions Trading: EU and UK Seek to Mitigate Brexit 'Cliff Edge' – November 2017. In a vote on 30 November 2017, EU Member States (represented in the Climate Change Committee) accepted the UK's approach but only on the basis that surrender of allowances takes place at the earlier date of 15 March 2019. The UK Government has now amended its domestic regulations to implement the 15 March date.

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