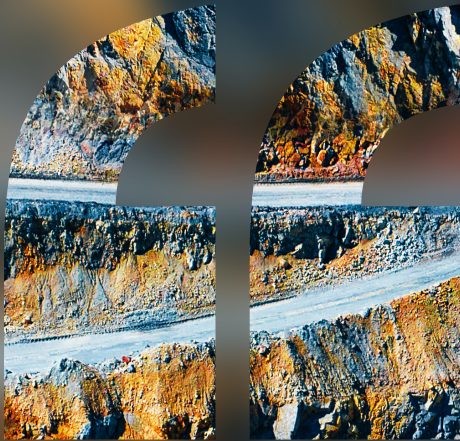


C L I F F O R D
C H A N C E



**THE EUROPEAN
CRITICAL RAW
MATERIALS ACT**



— THOUGHT LEADERSHIP

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THE EUROPEAN CRITICAL RAW MATERIALS ACT

The European Commission is proposing a new Critical Raw Materials Act to ensure that the EU has access to a secure and sustainable supply of critical raw materials which are crucial to clean energy transition. Here our experts explore the proposed Act and how it might protect EU Member States from supply risks.

The European Commission **unveiled** a proposal for a new Critical Raw Materials Act on 16 March 2023. The proposal for a Regulation¹ (which is accompanied by a **Communication**²) will now be the subject of debate in the European Parliament and Council of the EU under the ordinary legislative procedure.

At first glance, the proposal appears ambitious in terms of objectives, but the means to achieve them may be inadequate, given the non-binding nature of the key targets and questions remaining around how to speed up some of the proposed measures (such as permitting) effectively. There is also no new funding being made available.

On the same day, the Commission presented the **'Net Zero Industry Act'**³, interpreted as the European response to US clean tech subsidies stemming from the Inflation Reduction Act (IRA) and meant to underpin the industrial manufacturing of key technologies in the EU.

Why is the Commission proposing action on critical raw materials?

The aim of the proposal is to strengthen EU autonomy in the supply of key raw materials used in batteries, solar panels, wind turbines and digital technology, amongst other things. The EU is vulnerable to supply risks because these raw materials are sourced from a limited number of countries. For example, China currently provides 100% of the EU's supply of heavy rare earth elements and Turkey provides 99% of the EU's supply of boron, which is used in electric

vehicles and by the renewable energy sector.

All of this has been exacerbated by the disruption in supply chains caused by the COVID-19 pandemic and the energy crisis following the Russian invasion of Ukraine.

James Pay a London-based Partner specialising in renewable power and mining and metals transactions with a particular focus on energy transition projects says: "Important global trends like the global energy transition, the sanctions imposed on Russia, and the US Inflation Reduction Act have influenced the timing and content of the Critical Raw Materials Act."

Nicolas Cookson, Counsel, advising on projects in the metals & mining, energy, power and infrastructure sectors and co-lead of Clifford Chance's Mining & Metals Group says: "Climate change targets will be impossible to meet without a significant increase in current levels of investment in sectors ranging from wind turbines and solar panels to batteries for energy storage and EVs. EU Policy needs to be aligned with these targets if we are to have any chance of reaching them in the next decade and the Critical Raw Materials Act fits into that framework by bringing together different pieces of the legislative puzzle."

To meet growing demand (demand for lithium is expected to increase 57-fold by 2050), the Commission has proposed an ambitious set of measures for materials that are considered either 'critical' or 'strategic'. These materials are identified in lists annexed to the proposal that will be updated at least every four years. (See page 3 for the list).

1. Proposal for a Regulation establishing a framework for ensuring a secure and sustainable supply of critical raw materials, 16 March 2023, COM(2023)160.
2. Communication from the European Commission; A secure and sustainable supply of critical raw materials in support of the twin transition, 16 March 2023, COM(2023)165.
3. Proposal for a Regulation on establishing a framework of measures for strengthening Europe's net-zero technology products manufacturing ecosystem (Net Zero Industry Act), 16 March 2023, COM(2023)161.

The Commission assessed more than 80 materials, based on their economic importance and supply risk. Strategic raw materials (SRMs) are key to specific sectors, such as health and defense (including microchips and batteries), that may face global supply/demand imbalances and may be subject to trade barriers from third-country producers. Critical raw materials (CRMs) are essential to the EU economy as a whole, and face the risk of serious supply disruptions.

What are the objectives of the proposal?

The proposal sets out ambitious targets to be achieved by 2030 with twin objectives:

- In order to increase its autonomy, the EU should extract 10% of its annual consumption of SRMs (compared with 3% today), process and refine 40% and recycle 15%.
- In order to reduce its dependence on third countries, the EU must not be

dependent on any single third country for more than 65% of imports of each SRM at any relevant stage of processing.

To meet these non-binding objectives, while maintaining sustainability standards, the proposal contains a toolbox of measures designed to strengthen EU capacities at all stages of the SRM value chain, and measures related to the diversification of sources of supply.

What are the key measures?

The proposal provides for the identification of Strategic Projects (in the EU but also in third countries). When categorised as such, projects would benefit from a streamlined permitting process and support in obtaining access to finance from public and private funds.

The decision to classify a project as strategic, all along the supply chain, will be made jointly by the Commission and a new 'European Critical Raw Materials Board' (the Board) made up of Member State representatives and chaired by the



The energy transition will increase demand for a number of key raw materials – for example, battery metals such as nickel and lithium, or rare earth elements critical to the electronics sector. Significant supply-side investment is required and Europe is keen to secure that a portion of that is within the EU for sovereignty purposes. The Critical Raw Materials Regulation is central to the EU Green Deal.



— **GAUTHIER MARTIN**
Partner
Paris

Strategic Raw Materials (listed in Annex I)

- | | | |
|-----------------------------|--------------------------------------|---|
| 1. Bismuth | 7. Lithium – battery grade | 12. Platinum Group Metals |
| 2. Boron – metallurgy grade | 8. Magnesium metal | 13. Rare Earth Elements for magnets (Nd, Pr, Tb, Dy, Gd, Sm and Ce) |
| 3. Cobalt | 9. Manganese – battery grade | 14. Silicon metal |
| 4. Copper | 10. Natural Graphite – battery grade | 15. Titanium metal |
| 5. Gallium | 11. Nickel – battery grade | 16. Tungsten |
| 6. Germanium | | |

Critical Raw Materials (listed in Annex II)

- | | | |
|----------------|-------------------------------|---------------------------|
| 1. Antimony | 13. Gallium | 24. Niobium |
| 2. Arsenic | 14. Germanium | 25. Phosphate rock |
| 3. Bauxite | 15. Hafnium | 26. Phosphorus |
| 4. Baryte | 16. Helium | 27. Platinum Group Metals |
| 5. Beryllium | 17. Heavy Rare Earth Elements | 28. Scandium |
| 6. Bismuth | 18. Light Rare Earth Elements | 29. Silicon metal |
| 7. Boron | 19. Lithium | 30. Strontium |
| 8. Cobalt | 20. Magnesium | 31. Tantalum |
| 9. Coking Coal | 21. Manganese | 32. Titanium metal |
| 10. Copper | 22. Natural Graphite | 33. Tungsten |
| 11. Feldspar | 23. Nickel – battery grade | 34. Vanadium |
| 12. Fluorspar | | |



If the Act is adopted, we expect to see more mining, processing and recycling projects in Europe – creating new opportunities but also requiring significant capital investment.



– **THOMAS VOLAND**
Partner
Düsseldorf

Commission. The set of criteria against which projects will be assessed includes not only their ability to strengthen the Union's security of supply and their technical feasibility but also whether they can be implemented sustainably.

To benefit from the status of Strategic Project in Europe, there will need to be demonstrable cross-border benefits. The status will be formalised with the publication of a decision by the Commission.

Developing capacity in Europe

One of the first drivers to increase EU autonomy is to develop capacity within the EU at all stages of the SRM and CRM value chains.

Exploration

As exploration companies, producers and Member States have looked less at the contents of the EU's subsoil in recent decades, the Regulation requires Member States to draw up / revamp national programmes aimed at exploring what CRMs may be available in their territories. The first programme is to be drawn up within one year of the Regulation coming into effect. Most importantly, Member States will be required to publish findings and report on progress.

Permitting

A recognised obstacle to new extraction and processing projects in Europe is often the unpredictable and lengthy nature of the permitting procedure.

For projects that are already under appraisal, these deadlines are reduced to 21 months for extraction and nine months for processing and recycling projects. In the absence of a decision within this time frame, a project is considered to be approved. However, the text specifies that this is without prejudice to administrative appeal procedures, which are, in practice, likely to cause delays.

To further simplify the process and increase efficiency, the text provides for a 'one-stop shop' under which Member States are required to designate a single national competent authority in charge of examining permit applications.

The proposal is expected to disrupt national procedures as it integrates critical material considerations.

Mathias Elspass, a Partner and head of the firm's German Energy & Infrastructure Group says: "While the Critical Raw

Materials Act is an EU instrument, permits are a matter for national governments. The ability to reduce the time required for a permit to be granted may vary from country to country. Indeed, the decision to proceed with a project may in part be determined by the national permitting process." The proposal provides for a streamlined process for Strategic Projects in order to shorten time frames and improve investment security. The Commission has proposed ambitious deadlines: new extraction projects should obtain the required permits within 24 months, and processing and recycling projects within 12 months.

Financing

The Regulation proposes that Member States and the Commission should work with financial institutions to explore new and existing sources of financing and EU funds. One of the proposed actions is for the Commission to work with the European Investment Bank (EIB) and other EU Invest implementing partners to find ways to increase support for investment in the CRM supply chain, including through the establishment of blending operations (a mix of EU grants and bank loans).

The Commission acknowledges that public support in the form of State aid may also be necessary for effective project roll-out where private financing alone is insufficient.

With regard to financing, it is important to note that the proposed measures aim to co-ordinate existing financing mechanisms and do not involve any new financing rules or additional resources.

To ensure better co-ordination of the different sources of financing, a dedicated sub-group of the Board, composed of experts from the Member States and the Commission as well as relevant public financial institutions, will be set up.

Sourcing outside Europe while promoting more autonomy

Due to its limited geological resources, the EU will never be self-sufficient in the supply of CRMs and SRMs and imports will continue to be essential.

To avoid supply chain disruption due to geopolitical considerations, the proposal sets the goal not to be dependent on a single country for more than 65% of imports of any SRMs. Any support to a

project will be assessed in the light of this diversification benchmark.

International trade will play a key role in diversifying the EU's supply of CRMs and SRMs, and the Commission has committed to "strengthen its global engagement with reliable partners to develop and diversify investment"⁴. It will do this in various ways, including through free trade agreement negotiations (for example, an update to the EU-Chile Agreement includes a raw materials chapter and something similar may be included in the EU-Australia agreement that is currently being negotiated), and within the framework of its Global Gateway strategy (the EU version of China's Belt and Road Initiative), which could finance projects outside the EU.

The Commission has also stated its intention to establish a "Critical Raw Materials Club"⁵ for like-minded countries willing to strengthen global supply chains. It is unclear how this might differ from the **Minerals Security Partnership** set up in 2022 that includes Australia, Canada, Finland, France, Germany, Japan, Korea, Sweden, the United Kingdom, the United States and the European Commission.

Standardisation and preparedness

One of the levers to prevent supply chain disruption is improving EU preparedness. The proposal includes provisions for the oversight of crucial raw material supply chains, as well as the sharing of information and potential co-ordination regarding stocks between Member States. In addition, some companies that manufacture strategic technologies using SRMs, designated by Member States, will be required to conduct a mapping exercise and stress test of their supply chain at the company level every two years.

In the same vein, the Commission has proposed a system of joint purchasing of both processed and unprocessed materials, under its supervision. Under this system, the demand of interested undertakings using SRMs would be aggregated and Member State authorities and the vehicle would seek offers from suppliers to match that aggregated demand. The raw materials to be covered

by this mechanism are still to be defined. The aim is to allow Member States and companies to build 'strategic stocks' and be prepared for potential supply chain disruptions and market volatility.

Improving sustainability and circularity

Another objective of the proposal is to reduce the environmental footprint of the EU's consumption of CRMs and SRMs, both for domestic production and imports.

Strategic Projects that receive support must be implemented sustainably, not only from an environmental perspective, but also respecting human rights. Indeed, compliance with the proposed Corporate Sustainability Due Diligence Directive (CSDDD)⁶, Conflict Minerals Regulation and other EU legislation and international guidance on human rights due diligence will play a part in the decision to award the status of Strategic Project.

To enhance the circularity and efficient use of CRMs, the Commission will establish value chains for recycled materials. Member States will be required to implement programmes to improve the collection and recycling of waste to recover CRMs. This will be progressed on two fronts. First, Member States will need to take various measures to increase the recovery of CRMs from waste products for re-use, and also increase the re-use and recyclability of such products. Secondly, EU extractive industry operators will be required to assist Member States in identifying the potential for recovery of CRMs from extractive waste at their facilities.

Michael Coxall, London-based Knowledge Director in Clifford Chance's Environment Group says: "The provisions on extracting CRMs from waste products should be a key plank of the circularity policy, but the obligations to be placed on Member States are vague and are likely to be seen as a lost opportunity."

The Commission may also force companies to declare the environmental footprint of the raw materials they work with, if this is "necessary and proportionate to contribute to the Union's climate and environmental objectives". The stated ambition being to apply European standards to production abroad.



The EU is not alone in terms of action in this space and we anticipate new US guidance that will address battery and critical mineral component sourcing requirements for electric vehicles to qualify for the tax incentives provided for under the US Inflation Reduction Act. Like the EU, the US is seeking to support local industries central to the energy transition and safeguard national security.



— **MICHELLE WILLIAMS**
Partner
Washington, D.C.

⁴ European Commission **press release**: "Critical Raw Materials: ensuring secure and sustainable supply chains for EU's green and digital future", 16 March 2023.

⁵ Details are set out in the Communication accompanying the proposal.

⁶ **Proposal for a Directive** on Corporate Sustainability Due Diligence Directive and amending Directive 2019/1937 (COM(2022)71).



This is a very aspirational plan that will likely be watered down or rationalised by the Member States during the legislative process. It is uncertain whether it will effectively address the threat of investment leakage posed by the US IRA. Perhaps these are just ambitious targets backed by soft law measures.



— **EPISTIMI OIKONOMOPOULOU**
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Paris

However, on the domestic front, the ability to develop capacity could trump environmental factors. Indeed, Strategic Projects may, on a case-by-case basis, be designated as projects of overriding public interest, allowing for their authorisation despite concerns about the environmental impact.

This demonstrates the tension between the proposal's stated objectives of making access to CRMs easier, and other EU legislation that seeks to protect natural habitats in the EU, or imposes additional criteria and requirements when materials are sourced outside the EU.

Gail Orton, Clifford Chance's Head of EU Public Policy: "It is difficult to see how the twin objectives of protecting the environment and significantly increasing extraction projects in the EU can be reconciled. The controversy will not end with the adoption of this Act but will arise each time a new project is proposed."

What happens next?

The proposal will be sent to the European Parliament and Council of the EU for approval according to the ordinary legislative process under which both institutions must agree on the final wording of the legislation before it can be adopted.

This requires a majority in the European Parliament and a qualified majority of Member States in the Council. The European elections in the spring of 2024 create a timing challenge for the institutions, as they must either swiftly pass the legislation in early 2024 before the legislature ends or carry over the proposal to the new legislature.

We should expect changes to the text during the legislative process. In particular, Member States may push back on some of the more ambitious targets, for example in relation to sourcing of certain materials outside the EU. We should also expect significant concerns to be raised by environmental NGOs who fear a negative impact on the environment.

How can businesses provide feedback on the proposal?

Stakeholders have until 15 May 2023 to **submit** their views on the proposal to the Commission. Should you wish to discuss making a submission, please contact a member of the team listed at the end of this briefing or get in touch with your usual Clifford Chance contact.



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