



Department of Political Science

Chair International Public Policies

***Europe Meets Africa. Mandatory and voluntary
due diligence in the EU conflict minerals
regulation***

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Summary

The European Union is undertaking the final steps towards the formulation of a conflict minerals regulation, which sets up a due diligence system for economic operators sourcing and importing tin, tantalum, tungsten and gold from conflict-affected and high-risk areas. The debate over the due diligence scheme to include in the European Union regulatory framework has been remarkable, both at the social and institutional level, producing two main approaches on conflict minerals that originate from diverging rationales. After the European Commission's legislative initiative, the European Parliament asked for a mandatory system of traceability for all economic operators in the conflict minerals supply chain, while the Council of the European Union set up a voluntary due diligence scheme. A final agreement has then been reached, at the political level, among the European Union legislative institutions, as a compromise proposal has reconciled the different approaches on conflict minerals proposed in the inter-institutional debate. This dissertation aims at investigating the social and institutional positions on conflict minerals due diligence, unveiling the theoretical roots that can explain the divergences in the co-legislators' regulatory choices on this issue. Therefore, in order to provide an analysis of these positions, the legislative drafts of the European Parliament and the Council of the European Union will be analyzed in depth. The main argument, in this regard, is that the different nature and interests of the European Union legislative branches prompted the European Parliament and the Council to adopt, respectively, a mandatory and a voluntary due diligence scheme in their draft regulations. Indeed, the European Parliament provided a binding system in order to set up a measure that ensures greater efficacy in enforcing political stability and respect for human rights in conflict-affected and high-risk areas. Conversely, the Council of the European Union established an opt-in scheme with the aim of guaranteeing an economically sustainable system for small operators that safeguards the overall competitiveness of the European firms in this industry. The final focus of the research will be the compromise proposal. In this regard, a political agreement was made possible only through a measure that takes into account the mandatory and voluntary approaches, finding a mediation in the trade-off between political efficacy and economic sustainability. Therefore, the last chapter of this dissertation individuates the mandatory and voluntary elements included in the compromise proposal, explaining how the two approaches are harmonized in the new text and how the political agreement deals with the overall issue of conflict minerals.

TABLE OF CONTENTS

| | |
|---|----|
| 1. INTRODUCTION | 1 |
| 1.1. Topic, research question and hypotheses | 1 |
| 1.2. Preliminary clarifications | 4 |
| 1.3. General plan | 6 |
| 2. STATE OF THE ART, THEORETICAL APPROACH, METHODOLOGY | 10 |
| 2.1. Introduction | 10 |
| 2.2. State of the art | 10 |
| 2.2.1. Theories of regulation | 10 |
| 2.2.2. Public interest theories of regulation: why regulate? | 12 |
| 2.2.3. Private Interest theories of regulation | 18 |
| 2.2.4. Private interest and political action: public choice and rational choice institutionalism..... | 21 |
| 2.3. Theoretical approach..... | 25 |
| 2.4. Methodology | 30 |
| 2.5. Conclusions | 31 |
| 3. CONFLICT MINERALS: FRAMING THE ISSUE | 33 |
| 3.1. Introduction | 33 |
| 3.2. An African overview | 34 |
| 3.3. The United Nations in DRC: individuating the link | 37 |
| 3.4. The simplified supply chain | 41 |
| 3.5. Fallacies in the supply chain and issues linked to due diligence | 46 |
| 3.5.1. Upstream..... | 46 |
| 3.5.2. Smelters and refiners and the downstream phase | 48 |
| 3.6. Conclusions | 51 |
| 4. DUE DILIGENCE AND THE EUROPEAN CASE | 53 |
| 4.1. Introduction | 53 |
| 4.2. Due Diligence and Global Actors | 53 |
| 4.3. Due Diligence and the European Regulation on conflict minerals | 56 |
| 4.3.1. The Commission initiative, the co-legislators' amendments and the political agreement..... | 56 |

| | | |
|--------|--|-----|
| 4.3.2. | Voluntary Approach..... | 58 |
| 4.3.3. | Mandatory Approach | 60 |
| 4.4. | The EU regulation on conflict minerals: a text analysis | 63 |
| 4.4.1. | Recitals..... | 63 |
| 4.4.2. | Articles | 68 |
| 4.4.3. | Considerations: mandatory and voluntary approach in the co-legislators' drafts... | 75 |
| 4.5. | Conclusions | 78 |
| 5. | THE COMPROMISE PROPOSAL AND THE POLITICAL AGREEMENT | 80 |
| 5.1. | Introduction | 80 |
| 5.2. | Context of the proposal | 81 |
| 5.2.1. | The “trilogue” | 82 |
| 5.2.2. | Early reactions..... | 84 |
| 5.3. | Main terms of the compromise proposal..... | 85 |
| 5.4. | Considerations: mandatory and voluntary approaches in the compromise proposal | 88 |
| 5.5. | Conclusions | 91 |
| 6. | CONCLUSIONS..... | 93 |
| 6.1. | Main topic and theoretical section | 93 |
| 6.2. | The issue of conflict minerals and the fallacies in the supply chain | 94 |
| 6.3. | The EU conflict minerals regulation: mandatory and voluntary approaches in the co-legislators' drafts..... | 95 |
| 6.4. | The political agreement on conflict minerals regulation: mandatory and voluntary approaches in the compromise proposal | 96 |
| 6.5. | Will Europe meet Africa? | 97 |
| 7. | REFERENCES | 100 |

1. INTRODUCTION

1.1. Topic, research question and hypotheses

A bloody thread connects human rights abuses in many conflict-affected and high-risk areas to some of our smartphones, tablets and personal computers. These tools, now fully entered into our daily lives, contain some specific minerals found mostly in the Democratic Republic of Congo (DRC), a country that is very rich in these raw materials (Worstell, 2013; US Geological Survey, 2014). A significant part of DRC mines, indeed, are *de facto* controlled by private militias and some troops of the Congolese regular army, who exploit the local population selling minerals in exchange for weapons they use to fight other armed groups (United Nations, 2010a). This vicious cycle is perpetrating a war, formally ended but still taking place, which has provoked around 6 million deaths since 1996 (International Rescue Committee, 2007). The humanitarian tragedy triggered by the conflict is linked, among other factors, to some important raw materials, in particular tantalum, tin, tungsten and gold (3TG), also known as *conflict minerals*. Several international and non-governmental organizations (NGOs) affirm that there is a clear connection between the purchase of these minerals and the – direct or indirect – financing of armed groups and their civil war in the DRC (ActionAid et al., 2013; United Nations, 2010a). As a consequence, without any legal safeguard, the greater the demand for these minerals, the harsher the conflict in the DRC. For this reason, many international actors believe that tracing these illegally extracted, transported, smuggled, exported and then smelted minerals can lead to a stricter control on the revenues of the armed groups still fighting in the DRC. Reading up on the origin of 3TG, a ban on the purchase of conflict minerals carried out by cleaning up the supply chain of these raw materials could remove a large market share from Congolese armed groups, who would be relieved of their most important sources of livelihood. Nonetheless, considering the complexity of the conflict, traceability is not, *a priori*, a 100% effective method that mathematically ensures the control of a civil war of this magnitude. Although there are, indeed, many advantages compared to other methods, this system also presents complications, which may sometimes be even more damaging than the *status quo*. For this reason, proper implementation and policy formulation in this regard is essential to ensure success in such delicate circumstances.

Many international organizations asked for systems of conflict minerals' traceability (United Nations, 2010c; United Nations 2010d; OECD, 2013), and there have been several other due diligence initiatives in this matter, both firm-led and government-supported. These international

due diligence schemes deal with the issue of conflict minerals in different ways. There are, for instance, voluntary and mandatory measures, which either compel or encourage firms to provide due diligence. Moreover, some of these initiatives are circumscribed to a specific world area, while others are more generally addressed to conflict-affected regions. Therefore, the various due diligence initiatives tackle this problem differently according to the type of scheme devised. Triggered by other examples of legislation in this field, the European Union (EU) is also developing its own regulatory framework in this regard. In the European case, the legislative process on conflict minerals regulation is still ongoing and has been characterized by an outstanding debate between the EU legislative branches, which took different positions on the type of due diligence to provide in the European regulation. Indeed, after the European Commission (EC)'s legislative proposal, which asked for non-compulsory due diligence, the European Parliament (EP) amended the original draft significantly, making the regulation stricter and broader in its scope and opting for a system of mandatory conflict minerals traceability. Subsequently, the Council of the European Union (Council) amended the text for a second time, proposing an alternative draft that asked for voluntary due diligence. Finally, after two years of negotiations between the co-legislators, the delegations of the EC, the EP and the Council reached a general deal on a joint legislative text during an informal meeting among the three institutions (trilogue) held in June 2016 (European Parliament, 2016). The interinstitutional deal is based on a mixed system of import thresholds based on the volume of the minerals imported. Within this system, due diligence may be compulsory or voluntary according to the amount of minerals imported from conflict-affected and high-risk areas (European Parliament, 2016). Although the final text and the official inter-institutional approval is expected in late 2016, and despite some negotiations at technical level still having to be carried out, the core agreement among the co-legislators and the European Commission has been reached, and the legislative outcome shaped by the inter-institutional debate is on the last stretch to the finishing post.

The aforementioned debate and its subsequent legislative outcome are the major topics of this dissertation. Indeed, this thesis aims at investigating the legislative process that produced the June 2016 inter-institutional deal, examining what drove the co-legislators to adopt two different approaches on due diligence, what made them stand their ground for almost three years and how their approaches converged in a single regulatory framework. For this reason, a main research question determines the core analysis of this dissertation. This question aims at explaining *how the different institutional and societal interests influenced the EU co-legislators' debate and the subsequent inter-institutional political agreement on conflict minerals regulation*. In order to provide an answer to the aforementioned query, major focus will be devoted to the inter-

institutional debate and the development of the mandatory and voluntary approaches in the co-legislators' texts. According to my argument, it is not by chance that the European Parliament and the Council took diverging positions on this issue. On the contrary, specific exigencies, both at the social and at the institutional level, have determined their legislative choices. Since there are various approaches to due diligence, some of which have been advocated by the two drafts of the EU co-legislators, and considering that these approaches produce different outcomes and respond to different exigencies, the legislative positions of the European Parliament and the Council on the issue will be treated in depth in order to answer this question. My hypothesis is that there is a correlation between business/civil society rationales within the EU political environment and the co-legislators' approaches on this issue. This correlation emerges also in the debate concerning the EU conflict minerals regulation, driving the legislative branches towards diverging positions. More precisely, in this case, *the nature and the interests of the European Parliament enhance the development of a mandatory measure*, which is much more attentive towards human rights protection abroad at the expenses of the overall EU economic sustainability of the regulation. Conversely, *the Council composition and interests are likely to produce a voluntary due diligence scheme*, which takes into account the economic feasibility of the measure, particularly for SMEs, at the expenses of a less stringent system for addressing the issue of conflict minerals.

A second focus of this research examines the June 2016 political agreement. As already mentioned, the inter-institutional deal derives from the debate between two different legislative approaches, which, in turn, mirror some specific exigencies at the social and institutional level. Besides explaining the connection between these interests and the co-legislators' legislative choices, I also consider the elements that made a convergence between the aforementioned approaches possible. In this regard, I argue that mediation has been made possible by a balanced position that considered both the EP and the Council's interests, minimizing their impairments and compensating their losses through singular legislative expedients (such as, among others, the import thresholds). In other words, *mandatory and voluntary approaches on conflict minerals regulation positively influenced the development of a compromise that takes into account as many societal and inter-institutional interest as possible*, satisfying the key exigencies of the diverging positions in a comprehensive measure. This is also the reason for the joint endorsement of the co-legislators and the Commission for the compromise proposal, which is the starting point for reaching a rapid official final regulatory outcome on this matter.

1.2. Preliminary clarifications

Before discussing the main body of the dissertation, some preliminary clarifications should be provided regarding the topic and the cases chosen. With regard to the main topic, I think that the EU regulation on conflict minerals is interesting and relevant for different reasons. The first of these motivations has to do with the subject and the scope of the regulation: with this legislative initiative, indeed, the European Union seeks to promote political stability and respect for human rights in conflict-affected and high-risk areas with a measure of domestic policy (EU regulation), which damages armed groups economically without the need for any military intervention. The double direction of this regulation, which adjusts the EU domestic supply chain in order to promote peace and stability in foreign countries is, in my opinion, particularly fascinating. Another relevant aspect to consider is that this adjustment is not convenient for the European Union in purely economic terms; therefore, an investigation on the EU reasons for regulating in this field is also very interesting. A third element which conditioned my choice is the significant inter-institutional and social debate at the European level, which has been determined by vivid advocacy of different interest groups that conditioned meaningfully the co-legislators' approaches on the issue. The analysis of these approaches will be, therefore, a major topic in this dissertation. In particular, the need to reconcile economic and social rationales in order to promote a due diligence system that is, at the same time, economically sustainable and politically efficient, is an area of great interest in my research. In this respect, a final motivation also derives from the innovative nature of import thresholds within the political understanding, as this regulatory device made the convergence between mandatory and voluntary approaches possible, at least at the institutional level.

A second clarification concerns the country chosen in order to frame the issue of conflict minerals: the Democratic Republic of Congo. Since the EU regulation does not explicitly mention this country, but refers to "*conflict affected or high risk areas*" (European Commission, 2014b; European Parliament, 2015a; Council of the European Union, 2015), it could be argued that the choice I made is somehow arbitrary, or at least subjective. Yet, there are several reasons behind this decision, which need to be clarified. The first is, undoubtedly, the scale of the humanitarian tragedy. The ongoing civil war that is devastating the DRC, with its 5.4 million estimated deaths (International Rescue Committee, 2007), is the deadliest conflict since WWII (The Enough Project, n.d.). Moreover, DRC is one of the most important producers in the 3TG

(U.S. Geological Survey, 2014; Worstall, 2013); therefore, mineral traceability is a core issue in this country. In addition, the DRC case is undoubtedly the most accurately documented example of the existence of this problem, as many UN and other reports demonstrate the link between mineral exploitation and human rights abuses, which is very strong in the eastern part of the country. It is no coincidence that even the United States conflict minerals regulation is specifically addressed to the Democratic Republic of the Congo and its neighboring countries. A fourth reason, symbolic and very relevant at the same time, is the 2014 EP Sakharov prize for the freedom of thought, given to Denis Mukwege, a Congolese gynecologist and activist for Human Rights in the DRC. This initiative clearly has a significant message. At a moment when due diligence regarding conflict minerals is a major topic on the agenda of the co-legislators, the Sakharov prize shows particular concern, at the EU level, for the humanitarian crisis in that specific area of the African continent.

An additional elucidation is related to the section concerning the description of the conflict minerals supply chain. Several reports on this matter highlight the difficulties in tracing a complete, far-reaching mineral supply chain that can be valid in all circumstances (Sabour, 2010). Indeed, minerals do not follow the same path, or, at least, do not necessarily pass all the stages I will examine in this dissertation. In other words, there is not a distinctive model, but it varies on a case-by-case basis. Nonetheless, this thesis does not have the scope of enumerating every single case in which DRC-mined 3TG reach Europe; this kind of enumeration would require too much time, risking, at the same time, remaining an incomplete work. The utility of this part, on the contrary, is to individuate some key phases in which traceability has to intervene in order to produce effective outcomes. For this reason, a simplified model, based on six main steps, will be presented.

A fourth explanation is related to the choice of the two approaches. The numerous orientations in relation to traceability, in fact, are not only expressed through a voluntary/mandatory dichotomy. On the contrary, they are placed along a continuum in which other factors also matter. In the context of mandatory traceability, for instance, the obligation can occur in a specific stage of the supply chain or it may be maintained in all stages. This is an example that highlights the difference between the version of the regulation amended respectively by the International Trade (INTA) Committee of the EP and the one that has been later voted by the European Parliament in the plenary session. They are both mandatory, but in different regards. Taking into account as many factors as possible, this dual classification has been decided for two main reasons. The first

is simplification, which, as in the case of the analytical section concerning the conflict mineral supply chain, is essential to produce a functional and effective examination. The second is that this classification mirrors the two final versions of the drafts proposed by the two co-legislators. Therefore, by doing so, I can place the inter-institutional debate at the core of this research.

A fifth preliminary explication regards the June 2016 inter-institutional deal. Since a definitive, official text has not been approved and published, a text analysis of the final legislative draft is neither possible nor desirable, considering that some secondary, technical aspects of the regulation may be further discussed. However, in several circumstances, the EU legislative institutions affirmed that, although the final text will be officially published in the next few months, the general inter-institutional agreement has been already reached. In the light of these declarations, which will be documented in Chapter 5, the examination of other sources in this regard, such as press conferences, articles and a document published by some EP members that highlights the main aspects of the deal, will be taken into particular consideration. All these sources underline the presence of the aforementioned import thresholds, which is the main basis that allowed the agreement between the European Commission, the European Parliament and the Council, as well as other significant elements of the deal, which will be discussed in Chapter 5. Some aspects of the agreement, therefore, may be further modified, but the key elements of the deal are not likely to change. Having provided these clarifications, I can now proceed with the discussion of the general design of this dissertation.

1.3. General plan

With regard to the general plan, I will conduct my analysis beginning with the theoretical and methodological elements used within the dissertation. In Chapter 2, I will discuss the most important theories which explain what triggered a conflict minerals regulation in the European context and what determines the co-legislators' divergent positions in this regard. For this reason, in order to answer the aforementioned research questions accurately, I will give theoretical strength to my argument with a pertinent outline of the state of the art. Subsequently, I will schematize the theories provided through a specific theoretical approach based on the theories discussed. In this context, I will also provide a preliminary clarification concerning the nature of the European regulation on conflict minerals according to my argument. In other words, I will discuss why a similar regulation occurs in the EU environment. Such regulatory initiative at the European level, indeed, is neither obvious, nor desirable in purely economic

terms. Therefore, in order to clarify this aspect, a significant section of Chapter 2 will be devoted to the discussion of the main theories of regulation. Within this theoretical framework, I will underline the distinction between public and private interest as well as economic and social theories of regulation (den Hertog, 2010; Baldwin et al., 2010). This classification is essential in order to understand why the EU conflict minerals regulation has been formulated. The distinctions provided will be also very useful in the section dealing with political actions linked to regulation. Introducing Public Choice and Rational Choice Institutionalism, which conceive decision-making as the result of specific private/institutional exigencies, I will highlight that the co-legislators' approaches to the EU conflict minerals regulation reflect divergent interests according to their composition as well as to the political actors to whom they directly respond. Moreover, recalling the aforementioned economic/social cleavage, I will argue that the EU inter-institutional debate on conflict minerals is based on the trade-off between economic and social exigencies, which, in some cases, can arise when a regulatory initiative is undertaken. In this light, I conclude that only a compromise that places itself in a balanced position in this trade-off might reconcile these diverging interests and produce an institutionally shared legislative outcome. This conclusion will be very important in the subsequent analysis of the informal deal among the European Commission, the European Parliament and the Council on this matter.

After the theoretical chapter, a descriptive section will be also dedicated to the African context. In Chapter 3, with the help of some UN and other reports, I will contextualize the issue of conflict minerals in the background of the civil wars that are taking place in the Democratic Republic of Congo, individuating, at the same time, the link between the trade in conflict minerals and the financing of armed groups in this area. Furthermore, I will focus on the path that minerals take from the mines to the consumers. More specifically, I will trace a typical roadmap of the conflict minerals supply chain, with the help of some position and strategy papers and other documents in this matter. Considering that armed groups profit from conflict minerals at different stages of their supply chain, this roadmap is crucial because it is directly linked to the debate around the different legislative approaches on the issue. Every due diligence system should take into account the path covered by conflict minerals in order to tackle all possible interferences effectively. Therefore, the individuation of the most important issues in the conflict minerals supply chain will be particularly useful when I perform the analysis of the co-legislators' approaches. At that stage, indeed, I will also try to explain how the two drafts respond to the fallacies in the supply chain highlighted in Chapter 3.

Subsequently, a relevant part of the dissertation will be devoted to the European case. In Chapter 4, I will discuss the European draft legislation, comparing several aspects of the legislative proposals in relation to what is stated in the first two parts. Therefore, after having given some examples of other international initiatives in this regard, I will focus on the European case. A background section will contextualize the EU regulation on conflict minerals, providing a brief chronological presentation regarding the legislative developments of the draft regulation. Moreover, I will highlight the main interests of civil society and business organizations. Within the debate among the stakeholders, I distinguish two different EU approaches to traceability, which I will call "voluntary approach" and "mandatory approach". Starting from the latter, it asserts that only compulsory mineral traceability, applied to the entire supply chain, can be an effective way to minimize significantly the financing of armed groups in some conflict affected high-risk areas. Moreover, since the EU trade in the 3TG represents a significant share of the world market, a mandatory system of traceability, also applicable to other categories of companies, would consent the European Union to have a leverage effect even on non-EU markets (EurAc, 2014). The voluntary approach, on the contrary, argues that a non-binding system is much more economically sustainable because it does not undermine the competitiveness of European companies worldwide. Indeed, firms could implement feasible and proportionate due diligence measures, cushioning the costs created by mineral traceability and possible third party audits. Interest groups, political parties and EU institutions have lined up on one of the above-mentioned schools of thought. The drafts of the European Parliament and the Council are the "regulatory mirror" of these different positions, since they reflect, in regulatory terms, the main issues of the two diverging approaches. Therefore, after the distinction between these two positions, I will analyze the inter-institutional debate in the light of the mandatory/voluntary dichotomy, underlining the most relevant aspects of the co-legislators' proposals. I will perform this examination through a text analysis of the legislative drafts of the European Parliament and the Council, taking also into account the Commission's initial proposal. Recalling the discussion carried out in Chapter 2, I will argue that many diverging aspects in the co-legislators' texts are determined by the different social and political interests that the two institutions advocate. I will then highlight that these opposing exigencies create a trade-off between economic and social rationales. On the one hand, the European Parliament demonstrates its singular political sensitivity for the human rights abuses in the DRC, while devoting less attention to the possible economic infeasibility of strict mandatory requirements, in particular for SMEs and small importers. On the other hand, the Council opts for an

economically sustainable system, which risks not being effective enough in breaking the links between conflict minerals and armed conflicts.

After the analysis of the co-legislators' positions, I will consider, in Chapter 5, the Dutch Presidency intervention and its compromise proposal. The agreement reached within the trilogue on 15 June 2016 marked the end of the negotiations among the legislative decision-making institutions, reconciling the two approaches in a regulatory proposal that takes into account the different tendencies within a mediation solution. Therefore, in Chapter 5, I will highlight the main elements related to the mandatory and voluntary approaches in the final compromise. Moreover, recalling the trade-off between economic and social rationales, I will explain how the Dutch Presidency proposal balances the diverging institutional exigencies, finding a midway position in the aforementioned trade-off.

2. STATE OF THE ART, THEORETICAL APPROACH, METHODOLOGY

2.1. Introduction

This chapter discusses some important theories on regulation in order to analyze the issue of conflict minerals from a theoretical perspective. In particular, through this section, I want to provide the theoretical tools to explain why a certain type of regulation is developed at European level, explaining also the reasons why institutions involved in the legislative discussion take certain positions on a specific matter. In other words, I want to explain *how*, but also *why* the law on conflict minerals proceeded at European level. The development of such a law, in fact, should not be taken for granted: it is not obvious and it may even seem irrational in some respects. This is also exemplified by the fact that some theories of regulation explain with great difficulty the decision to regulate at the EU level in this field. Another focal point in this section concerns the debate among the institutions composing the EU legislative decision-making system. Drawing on some of the theories presented I will argue that the inter-institutional debate in the case of conflict-minerals regulation occurs for specific reasons that concern the nature, the composition and the interests of the various EU institutions involved in the legislative discussions. Subsequently, I will also provide some clarifications regarding the methodology used in the dissertation in order to analyze the case I have chosen in the light of the theories presented in this chapter.

2.2. State of the art

2.2.1. Theories of regulation

There are several theories concerning regulatory initiatives and political actions linked to regulation, which differ, sometimes sharply, according to such factors as the conception they have on the nature of the regulator or the aims and the incentives that trigger regulation (den Hertog, 2010, p.2). There is, indeed, more than one answer to the question on *why and how regulation occurs*. Consequently, there are several theoretical approaches, in the context of the theories of regulation, which can be explained by considering different assumptions. With regard to the object and the scope of the regulation, some authors distinguish *economic regulation* and *social regulation*. The first may be defined as “an array of public policies explicitly designed to govern economic activity and its consequences at the level of the industry, firm, or individual

unit of activity” (Eisner et al., 2006, p.3). The second, instead, responds to a rationale that does not belong to the economic sphere and that considers other social values, like human rights protection, social solidarity or paternalistic social sensitivity as valid triggers for regulatory actions (den Hertog, 2010, p.3; Viscusi et al., 2005). Moreover, within economic regulation, the aim of the theories can be a further distinguishing factor. If, on the one hand, *positive* theories of regulation are restricted to explaining the phenomenon of regulation on a cause-effect basis, *normative* theories of regulation, on the other hand, aim to seek the optimal type of regulation, assuming, more or less implicitly, that the latter would be also desirable (Blaug, 1993; Hennipman, 1992). Different schools of thought are also distinguishable on the basis of the conception they have of interests enhancing regulatory initiatives. Den Hertog (2010), in this regard, distinguishes two main traditions: *public interest theories of regulation* and *private interest theories of regulation*. The latter division will be considered with particular attention in this outline of the state of the art.

A common basic assumption of the classical public interest theories of regulation is that the regulator is a benevolent authority that engages in regulatory initiatives in order to pursue public interest-related objectives (den Hertog, 2010, p.5; Baldwin, Cave and Lodge, 2012, p.15). Regulatory authorities, therefore, initiate regulation in order to address publicly undesirable outcomes when other means – such as the market – are not able to provide suitable solutions (Baldwin, Cave and Lodge, 2012, p.15). In this context, den Hertog defines the public interest as “the best possible allocation of scarce resources for individual and collective goods and services in society” (den Hertog, 2010, pag.5). When the market does not allocate these resources properly, the regulator undertakes a regulatory initiative. This situation of misallocation of resources is known as *market failure*. In order to correct these failures, public interest theories of regulation assume that the regulator possesses perfect information, which it uses in order to provide an optimal allocation of resources, curbing, consequently, setbacks impeding the achievement of public interest (den Hertog, 2010; Arrow, 1970). With regard to public interest theories of regulation, considering that regulatory authorities are benevolent agents acting in the public interest, regulation always increases social welfare (den Hertog, 2010, p.2).

Private interest theories of regulation assume that regulators have no perfect information in order to pursue public interest effectively and that every economic or political agent pursues its own interests, which do not necessarily coincide with the public one (den Hertog, 2010, p.2). Therefore, these theories assume that actors involved in regulation – which may be regulatory

authorities, but also firms, pressure groups and civil society organizations – are fundamentally orientated to maximizing their private interest (Baldwin, Cave and Lodge, 2012, p.43). The public interest assumption of perfect information is replaced by the argument of partial information: all actors are informed according to their possibilities and learn from experience. Moreover, assuming that regulation is costless, these theories argue that regulatory measures do not affect overall efficiency (Baldwin, Cave and Lodge, 2012, p.43; Peltzman, 1976). According to this theoretical approach, since regulation always relocates resources towards the most influential pressure/interest group, regulatory initiatives usually decrease social welfare, even though the actual outcome of regulations in terms of welfare can be determined by the efficiency of the political process (den Hertog, 2010, p.37).

Recalling the social/economic cleavage in the theoretical approaches on regulation, den Hertog (2010, p.28) argues that while private interest theories of regulation mainly aim at explaining economic regulation, public interest theories of regulation can describe either economic or social regulation. Indeed, it is difficult to explain regulation addressing some purely social needs as the result of the clash between private or individual interests

2.2.2. Public interest theories of regulation: why regulate?

From a public interest point of view, public authorities may engage in regulatory initiatives for several reasons. Remembering the social/economic division, also proposed by den Hertog (2010), Baldwin, Cave and Lodge (2012) classify reasons for regulation dividing them into two groups: on the one hand, there are incentives coming from “*market failure rationales*” (Baldwin, Cave and Lodge, 2012, p.15), on the other, regulation may respond to “*rights-based and social rationales*” (Baldwin, Cave and Lodge, 2012, p.22).

2.2.2.1. Market failure rationales

Starting from market failure rationales, they generally assume that regulation occurs because of a scarce, imperfect and inefficient allocation of resources in the market. The regulator, in this case, has to provide for an optimal allocation in order to maximize public utility and increase welfare. Within these rationales, according to Baldwin, Cave and Lodge (2012), there are:

- *Monopolies and natural monopolies*; in such situations, one economic operator produces for an entire industry (Baldwin, Cave and Lodge, 2012, pp.15-16). In a monopoly, public interest is not pursued, as the monopolist, in order to maximize its profits, will fix its output where marginal revenues equal marginal costs, setting the price on the demand curve for that given quantity. Therefore, the price for that product will be higher than marginal costs. In other words, monopolists prefer to produce less at higher prices. Competition or antitrust laws, which discourage monopoly and create a competitive business environment, can a regulatory answer to monopolistic systems (Baldwin, Cave and Lodge, 2012, p.16). Nevertheless, this type of regulatory answer can be problematic when a situation of natural monopoly occurs (Foster, 1992). In such cases, monopoly is desirable, as returns of scale are so large that the most efficient way to maximize public utility is through one firm that serves the entire industry (Baldwin, cave and Lodge, 2012, p.16). This is, for example, the case of the railway of electricity companies. In this case, the public interest is achieved if the regulator gives the monopoly of the entire market to one firm. In some circumstances, natural monopoly is only partial, as economies of scale affect only a section of the supply process (Ogus, 1994). If we take the example of the electricity industry, competition would be desirable in the case of energy production, rather than its transmission. Consequently, when this occurs, a public regulator has to identify and regulate the phases of the supply process that are naturally monopolistic, ensuring perfect competition in the other phases (Domah and Pollitt, 2001).

- *Windfall profits*; in these cases, a firm supplies products at a significantly lower cost compared to the rest of the industry because it owns an asset that gives more favorable conditions for producing goods or supplying services (Ogus, 1994). This asset may be the product of planned investment (in research and development, for instance) or it may simply be given by chance (Baldwin, Cave and Lodge, 2012 p.17). The public regulator, in this case, can intervene in order to make profits from the windfall of public benefit. Anyway, intervention is not always desirable. When a windfall is created by specific efforts (e.g. investments in research and development), redistribution can occur only in the case of particularly excessive profits. In the case of windfall obtained by good fortune, the regulator is more enhanced to intervene for the public benefit (Baldwin, Cave and Lodge, 2012, p.17). Anyway, even in such cases, this intervention can be problematic, because economic operators may see their property rights at risk, creating uncertainty and generally harming business (Baldwin, Cave and Lodge, 2012, p.17). For this reason, regulation in this matter should be decided on a case-to-case basis (Baldwin, Cave and Lodge, 2012, p.17).

- *Externalities*; in some case, not only do consumers pay for a specific product, but they also lose welfare because society has to bear the costs owing to other factors, not inherently linked to the product *per se*. The classical example of externality is pollution. In this case, regulation occurs because the price of a product does not reflect the true costs that society bears for its production (Breyer, 1982; Baldwin, Cave and Lodge, 2012, p.18). In such cases, therefore, regulators can oblige firms to use pollution-free methods, or impose greater costs on a ‘polluter pays’ basis (Baldwin, Cave and Lodge, 2012, p.18).

- *Information inadequacies*; if consumers are not sufficiently informed in order to evaluate product competition, the competitive system does not actually work as it should (Hayek, 1945). In some cases, indeed, the market does not provide adequate information to consumers. This can occur for several reasons, such as costs for providing information, insufficient incentives to produce information, incentives to falsify information, collusion in the marketplace or insufficient competition (Baldwin, Cave and Lodge, 2012, p.18). In such cases, public regulators must ask for disclosure requirements or provide for other types of regulation that protect consumers against information inadequacies (Baldwin, Cave and Lodge, 2012, p.18).

- *Continuity and availability of service*; in some cases, the market, alone, does not guarantee the continuous supply of goods or a service. This often happens in cases in which the demand is cyclical. An example may be air transport to a holiday island (Baldwin, Cave and Lodge, 2012, p.19). In these cases, regulation should be imposed to bear the costs guaranteeing basic services. This rationale, in some specific circumstances, may be also used in the context of social regulation. If we take the case of potable water, for example, some scholars argue that the supply of this commodity has to be guaranteed at least to a minimum standard (Baldwin, Cave and Lodge, 2012, p.19).

- *Anti-competitive behavior and predatory pricing*; in some cases, firms’ behavior creates competition issues. An example of this conduct is predatory pricing (Baldwin, Cave and Lodge, 2012, p.19). This occurs when firm supplies a product at a price that is lower than its average costs with the aim of making competitors exit the industry. By doing so, the firm can then raise its prices in order to recover its losses (Baldwin, Cave and Lodge, 2012, p.19). Regulators, in such cases, have to safeguard consumers by banning predatory pricing and anti-competitive behavior (Baldwin, Cave and Lodge, 2012, p.20).

- *Public goods and moral hazard*; there are some publicly desirable goods or services that are difficult to manage privately. The most common example, in this regard, is defence. In this case, a public intervention is the best solution because it is too costly, if not impossible, to individuate free riders and exclude them from enjoying the benefits from such goods or services. As a result, the market would not produce such commodities. Therefore, the most effective way to support economically the supply of these goods is by public taxation (Baldwin, Cave and Lodge, 2012, p.20). In cases of *moral hazard*, where someone other than consumer pays for a goods or service, regulation can also be desirable in order to impede the excessive consumption of that given commodity or service (Baldwin, Cave and Lodge, 2012, p.20; Calabresi, 1970).
- *Rationalization and coordination*; in many cases, coordination through private, market tools would be inefficient, owing to excessive transaction costs. When there are these collective action problems and firms are not able to produce in a synergic and effective way, regulation by a central and well-informed authority is desirable to rationalize production processes and coordinate the market through the establishment of networks and public channels that enable the creation of economies of scale (Baldwin, Cave and Lodge, 2012, p.20)
- *Planning*; regulation is also desirable when the utility is maximised in a given period of time, but at the expenses of future generations. In such cases, the public regulator has to take into account also the time factor, implementing far-reaching policies in order to meet the preferences of consumers even in the future (Ogus, 1994).

2.2.2.2. *Right-based and social rationales*

Many scholars argue that the economic rationale is not sufficient to explain why regulation occurs. According to this argument, social regulation must not be conceived as a second-order theoretical approach, as many regulatory actions cannot be justified by solely market failures. There are, on the contrary, many other social motivations triggering regulation, such as human rights protection (Brownsword, 2004), social solidarity (Prosser, 2006), or other paternalistic and ethical principles (Ogus, 2005). In his work on techno-regulation, for instance, Brownsword (2004) argues that any regulation on new technologies shall take into account and respect two factors: human rights and human dignity. Brownsword, therefore, considers these two important prerogatives as “the acid test for legitimacy” (Brownsword, 2004, p.210), individuating in these

elements two important rationales for regulation. Moreover, with regard to human rights and particularly to social solidarity, Tony Prosser (2006) developed an articulated theoretical approach.

Prosser (2006, p.366) opposes the common belief in economic regulation according to which only market failures can be a valuable threshold beyond which regulation is justified. The market failure approach, indeed, does not neglect the existence of regulation on social ground; anyway, according to this school of thought, social regulatory action is not objectively justifiable. In this preliminary step of his theory, Prosser argues that the market failure approach does not accurately describe the real, concrete regulatory action, as, in practice, economic regulation cannot explain the entirety of regulation. In the actual regulatory environment, regulators balance economic incentives with other types of regulatory justification. Moreover, in some circumstances, the establishment of a threshold between economic and social regulation is not easy: in the case of externalities such as pollution, indeed, it seems difficult to conceive regulation in this regard as purely economic (Prosser, 2006, p.369).

In a second section, Prosser opposes the economic argument according to which regulation is a second-choice initiative that is used only when markets are not able to allocate resources efficiently ('regulation as second-best' argument) (Prosser, 2006, p.371). In this regard, he affirms that even in cases in which this efficient allocation is achieved, regulation may be required for social purposes. According to Prosser's argument, regulation should be considered as prior, not secondary, to market allocation and as a first choice method of shaping social relations (Baldwin, Cave and Lodge, 2012, p.22). Moreover, contrarily to the economic approach, which considers that regulation has some legitimation only if it comes from a technical, rather than political process, Prosser argues that regulators do not always subordinate social means to economic achievements (Prosser, 2006, p.371-375). Moreover, social and economic rationales often compete against each other, creating regulation coming from political, rather than technical processes (Prosser, 2006, p.375).

At a third stage, Prosser (2006 p., 376-378) investigates the theoretical roots of economic regulation. According to his argument, the market failure approach essentially finds its origins in welfare economics, but social regulation has a broader academic tradition (Prosser, 2006, pp.375-378). Apart from Ogus (1994), Baldwin, Cave and Lodge (2012) and Breyer (1982), who accept social regulation as a rational answer to some public issues but do not develop a

sophisticated theory in this regard, Prosser (2006) mentions the work of Emile Durkheim (1893) and his disciple, Léon Duguit (1970), in relation to social solidarity and public service. Although Durkheim used positivist methods, the moral element has always been particularly important in his theoretical work (Cotterrell, 1999). Durkheim argues that regulation is an important index that indicates the level of social solidarity (Durkheim, 1893; Prosser, 2006), which is considered as a moral phenomenon that reduces the potentially fragmented results given by contractual relations (Durkheim, 1893; Prosser, 2006). Recalling Durkheim's work, Duguit focuses his research on public service, which he defines as an activity that needs regulation, as it is "indispensable to the realization and the development of social solidarity" and "cannot be secured by government intervention" (Duguit, 1970, p. 48).

Summarizing the main argument of Prosser (2006), he conceives social regulation as a regulatory tool that finds its legitimacy in the need to strengthen social solidarity, which is not a secondary argument to regulate, if compared to market failures. Moreover, according to Prosser's theory, social regulation provides moral legitimation for market allocations and prevents or limits social fragmentation coming from market processes. As a consequence, Prosser argues that there may be potential clashes between economic and social incentives towards regulation, and regulators often have to balance competing values (Prosser, 2006; 1997), behaving, in practice, as "governments in miniature" (Prosser, 1997, p.305).

2.2.2.3. *Criticisms: the utopic element of perfect information*

Many scholars criticized public interest theories of regulation and some of their basic assumptions. Probably one of the main criticisms in this regard concerns perfect information. Indeed, if, on the one hand, perfect information is one of the most important element justifying regulatory action for classical public interest theories of regulation, it is, on the other hand, an unrealistic assumption in practice. The classical approach to public interest theories of regulation, indeed, has been criticized for this utopic argument – also known as the *Nirvana Approach* (Demsetz, 1968) - and a new, more sophisticated approach to public interest regulation has been developed. This new school of thought has been called the "New Haven" or "Progressive School" of Law and Economics (Jordana and Levi-Faur, 2004). In contrast with the classical theories, this new approach, taking into account factors such as transaction and information costs (which in the classical theory were assumed to be zero), argues that public regulation provides a *comparatively* better solution to several market failures (den Hertog, 2010,

p.5; Whynes and Bowles, 1981). This could be a more credible solution to the argument proposed by classical public interest theories of regulation: regulators, indeed, may have comparatively better information because of the large amount of resources at their disposal. Nevertheless, these resources cannot provide perfect information *a priori*. The New Heaven's solution, therefore, may be more reasonable, as it legitimizes top-down regulation without being out of touch with reality.

2.2.3. Private Interest theories of regulation

2.2.3.1. Capture theory and Chicago theories of regulation

With the decline of classical public interest theories of regulation, new theoretical approaches have been developed. Bernstein (1955), for instance, provides a more disenchanted vision of regulation. In his 'life cycle' theory of regulation, regulatory authorities evolve through various stages, becoming eventually the protectors of a given industry rather than the public interest (Rutledge, 1955). Bernstein's theoretical approach anticipates what will later be known as the *capture theory*. This theory rejects the public interest argument of perfect information and unlimited resources, and assumes that regulation is created in order to serve the interests of a given industry (den Hertog, 2010, p.22). Posner (1974) has criticized the capture theory for several reasons. The most important criticism of this approach is that there is no clear distinction with public interest theories in a number of regards. Moreover, there is no theoretical foundation to these theories: they do not explain why and how firms capture regulatory agencies, and why consumer groups are not able to achieve this result (den Hertog, 2010, p.22). Furthermore, the capture theory does not explain the existence of undesirable regulation of firms. Examples are environmental regulation, regulation of product safety and labor conditions (den Hertog, 2010, p.22). For this reason, other, broader theories have taken root in the private-interest realm. In the 70s, the Chicago theory of regulation emerged as a theoretical approach that puts private interest at the core of regulation.

The emergence of this school of thought can be set in 1971, with the publication of 'The Theory of Economic Regulation', an academic article written by George Stigler in 1971. In this article, he affirms that regulations are shaped on industries, having the main aim of providing benefits and safeguards to firms (Stigler, 1971). Governmental authorities can provide these benefits in an easier and more effective way than any other market tool because of their enormous resources. The government, indeed, has the power of exempting from antitrust legislation and

granting subsidies (den Hertog, 2010, p.21). Moreover, governmental authorities can create barriers at entry in order to distort and limit competitiveness better than a cartel does (den Hertog, 2010, p.22), and create benefits for a specific business sector at the expense of other competitors. Den Hertog (2010), in this regard, provides the example of the suppression of transport by trucking in order to safeguard the railway industry, as well as the subsidization of airports to act in the interest of the airlines. Stigler (1971) argues that firms have the power to condition regulation because the political decision-making process gives them the possibility of exploiting politics for their own purposes (den Hertog, 2010, p.23). Individuals are not able to carry out this exploitation, as influence on the political process is expensive in terms of time and money, and does not generally provide satisfactory returns at the individual level. Only interest groups are able to influence politics for their own ends. For this reason, the most influential of these groups are more likely to shape regulations, sometimes at the expenses of weaker organizations and individuals.

Posner (1971) and, above all, Peltzman (1976) provide an extended and more refined version of Stigler's theory. Observing that in several cases regulation strongly benefits certain consumer groups, Posner argues that the actual functioning of the regulatory system does not coincide with Stigler's theory of regulation. Even if the supply of a certain service has different costs (railway in the countryside, for example, which are likely to give lower returns compared to the same service provided in cities), regulators often impose the same prices on the public. In this regard, contrarily to the public interest theories of regulation, Peltzman (1976) does not believe that this attitude comes from a benevolent regulator, yet it originates from the interest of the political class. In this regard, indeed, he assumes that politicians will choose their regulatory actions such that political support is maximized. For this reason, exclusive benefits for industries will not be taken for granted (Peltzman, 1976, den Hertog, 2010. p.24). According to Peltzman, political actors will formulate regulations based on their political interests: if votes potentially coming from an industry are higher than votes potentially coming from consumers, a regulatory action will benefit the former rather than the latter (Peltzman, 1976).

Becker provided a further extension to the Chicago theory of regulation (Becker, 1983, 1985a, 1985b). He focused his research on competition between pressure groups and the effects of such competition on regulation (den Hertog, 2010, p.26). Political pressure is particularly important, as financial returns to interest groups are directly linked to the influence these groups have on the regulatory process. For this reason, regulation and decision-making is the result of competition between the aforementioned groups. Some of them influence politics more efficiently than others

because of economies of scale in pressurizing, better ability to limit free riding and better influence on the media, among others (den Hertog, 2010, P.27). Anyway, although the most efficient pressure groups usually gain from regulation, there may be a limit to such gains (den Hertog, 2010, p.28). Each gain to the best pressure group, indeed, corresponds to losses for the least efficient group. The difference between losses for the latter and gains for the former is known as deadweight loss. If deadweight losses occur, therefore overall welfare losses are greater than overall welfare gains, the influence of the most efficient pressure group declines (den Hertog, 2010, p.28). As the welfare losses become greater, the pressure power of the most efficient group will decline and, conversely, the power of the least efficient pressure group increases (Becker, 1985a). Contrarily to Stigler's and Peltzman's theory, Becker explains why regulators often take action in non-competitive sectors at the expenses of monopolists: since losses for consumers are greater than gains to monopolists, regulators are more likely to intervene. This argument explains why regulatory authorities intervene in some market failure cases, as do the public interest theories of regulation; anyway, the reasons for regulation differ sharply, being more linked to the interests of regulatory authorities and the influence of pressure groups on these authorities (den Hertog, 2010, p.26). In other words, according to Becker's theory, market failure is not a regulatory trigger *per se*, such as in the public interest theory of regulation. Regulation, indeed, depends also on the ability of pressure groups to influence regulatory authorities (den Hertog, 2010, p.26).

2.2.3.2. *Criticisms*

Although private interest theories of regulation apparently give more concrete and disenchanted reasons for regulation compared to the idea of the public, benevolent regulator, this approach is subject to some criticism. The first of these criticisms concerns the core assumption of this school of thought: if we look at how regulators formulate and implement regulatory initiatives in practice, it is difficult to demonstrate that private interest may be the trigger for all regulatory actions. This is, for instance, the case of regulations in the areas of public health or the environment. Although, in such cases, some private interest theorists justify such regulations on the basis of the interest of firms already compliant to environmental/health standards (see, in this regard, Pashigian, 1984), this explanation appears to be weaker compared to the one provided by the public interest approach. Moreover, if we consider cases of purely social regulation (such as, for example, regulatory actions based on human rights and social solidarity), this justification seems even weaker. For this reason, den Hertog (2010) argues that private interest theories of

regulation are particularly suitable in cases of economic regulation, yet they are less explanatory when we focus on social regulation.

2.2.4. Private interest and political action: public choice and rational choice institutionalism

2.2.4.1. Public choice

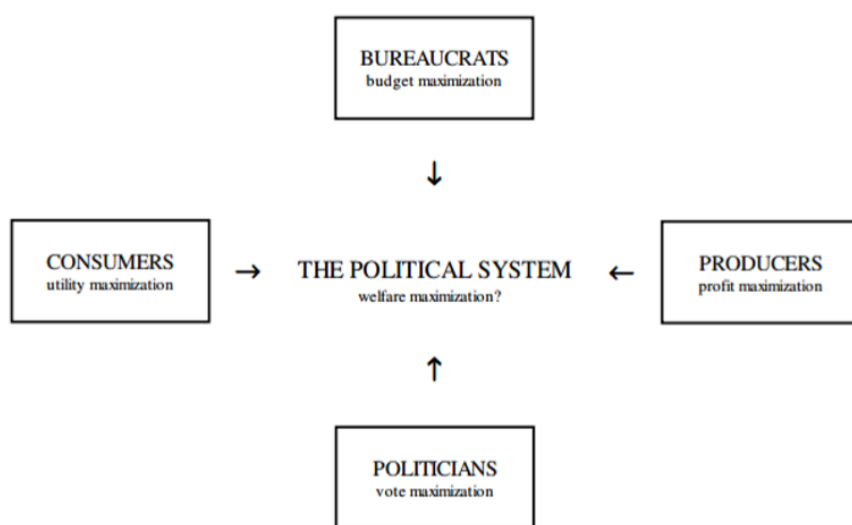


Figure 2.1. Interaction in the political system. Source: Den Hertog, 2010

There is a theoretical tie connecting private interest theories of regulation to public choice, as they both explain regulation and regulatory action as a phenomena coming from private interest. The common ground between the two theoretical approaches emerges in many regards: as with the Chicago theories of

regulation, public choice finds its roots in individual preferences of the *homo oeconomicus*, which aims at maximizing its utility. Moreover, both theories oppose the theoretical public interest approach, according to which regulators act in the public interest (den Hertog, 2010; Buchanan, 1999). Although there are several overlapping arguments between the two approaches, one essential difference is traceable: if, on the one hand, classical private interest theories of regulation are more focused on the nature of the regulation, public choice is more aimed at studying political action (den Hertog, 2010, p.30). In other words, if the former mainly examines *why* regulation occurs, the latter investigates on *how* it develops. Public choice, indeed, uses an economic approach and applies it to the political system, in order to study “the behavior of persons in their various capacities as voters, as candidate for office, as elected representatives, as leaders or members of political parties, as bureaucrats (all these are ‘public choice’ roles)” (Buchanan, 1999, p.48). All these actors try to maximize their utility and pursue their interests. In this regard, den Hertog proposes a simplified illustration (Fig.2.1) of this political system of

utility maximization, inspired by Mitchell and Simmons (1994). This model provides a basic and schematic illustration of some of the interests triggering political action. From this simplified figure, we can infer the main argument of public choice: initiatives coming from political agents are determined by their position in the decision-making system. As shown in Fig.2.1, for instance, politicians will aim at re-election, bureaucrats will opt for budget maximization, consumers will seek utility maximization and producers will wish for profit maximization. According to this approach, therefore, favorable legislation is achieved only through organized interests that are able to influence the decision-making process. As evident from the above paragraphs, the concept of utility maximization at the institutional level already emerges within private interest theories of regulation. If we consider Peltzman's theoretical approach, for instance, the institutional behavior in undertaking regulatory initiatives depends on the vote potential of each interest group.

2.2.4.2. *Rational Choice Institutionalism*

The public choice theory applies the basic principle of rational choice, according to which individuals' choices are determined by a cost-benefits calculus, to political agency. In the light of this consideration, there are many overlapping elements connecting public choice to *rational choice institutionalism*. This theory of political agency argues that actors use institutions in order to pursue their interests and maximize their utility (Hall and Taylor, 1996). Interests, therefore, are canalized through institutions, which act on the basis of what is more desirable for the political actors to which institutions respond. In order to clarify this aspect, rational choice institutionalism refers to the *principal-agent* model, which is a crucial element to understand the functioning of institutional agency and inter-institutional interaction.

The principal-agent model takes its origins from the new economics of organization as a paradigm used to examine relationships within a firm (Moe 1984), then becoming a fundamental theoretical tool for the analysis of difficulties arising from many types of contractual relations (Kassim and Menon, 2003). According to this model, a party – the principal – can delegate another party – the agent – in order to carry out a task or a set of tasks. There are many reasons to delegate, such as the overcoming of collective action problems (Pollack, 1997), the reduction of transaction costs (Kassim and Menon, 2003, p.123), the need for better policies in technical areas (Egan, 1998), less instability given by too many actors (Pollack, 1997) or more displaced responsibility for unpopular decisions (Fiorina, 1977).

We can use the principal-agent model in economics as well as in other branches of social science. With regard to institutions, for instance, we can conceive them as agents to which principals delegated powers and responsibilities. A classic example of this contractual relationship in this regard is a democratically elected Parliament, to whom citizens (the principal) delegate powers and responsibilities. If the agent does not carry out its duties, principals can revoke the delegation. Considering the example provided above, citizens can replace some of – or even all – the members of Parliament in the subsequent elections. Rational choice institutionalism broadly uses this model in order to explain the functioning of institutions as well as the inter-institutional interactions. For instance, the principal-agent model has been used in U.S. studies in order to examine the relationship between Congress and executive agencies, as well as the tasks performed by congressional committees (Kassim and Menon, 2003, p.122). Moreover, International Relations scholars use this model to explain why states delegate powers to international organizations (Kassim and Menon, 2003, p.122). Apart from the U.S. political and social context, this theoretical tool has been also much used in EU studies in order to explain the differences in delegation among European institutions (intergovernmentalism vs. supranationalism) as well as the peculiarities of the inter-institutional debate within the EU political arena

2.2.4.3. *Rational Choice Institutionalism in EU studies*

In recent years, the EU rational choice institutionalism studies have grown remarkably. Many scholars applied this theory to the functioning of the EU institutions in order to explain their behavior and motivation for their policy choices in specific situations. Hix (2005), for instance, portrays the EU as a ‘political system but not a State’ (Hix, 2005, p.2) at the base of which Member States citizens make demands through several channels. If we think about the co-legislators, for instance, EU citizens elect their national Parliaments that consequently nominate government members whose ministers compose the council. At the same time, they directly elect members of the European Parliament (MEP). This dual procedure mirrors the different interest of citizens in the EU (as Member States nationals and as European citizens). Consequently, the EU institutions are likely to behave differently and to set up separated policy strategies, and this is due to the different type of delegation they received. Although a differentiated agency should be expected, Hix does not support the “strong rational choice theory” (Hix, 2005, p.12), according to which actors have perfect information and chose their strategy in isolation. On the

other hand, the EU institutions, in their interactions, have to take into account the different positions of the other actors in order to produce fruitful regulatory outcomes (Hix, 2005).

Pollack (2006) argues that the application of the rational choice approach to the EU institution brought specific instances of progress to the study of the European decision-making environment, since it is a breeding ground for the development of important theoretical impulses in the areas of the EU legislative, executive and judicial politics. According to Pollack (2006), the best-developed rational choice theories have focused on the study of the EU legislative processes. In this regard, indeed, many scholars reshaped rational choice institutionalist models in order to explicate the EU legislative decision-making process (Pollack, 2006). These studies, in particular, have mainly focused on the EP legislative politics, the voting powers within the Council and the respective powers of these two bodies in the EU legislative process (Pollack, 2006; McElroy, 2006). Concerning the European Parliament (EP), several theoretical models and empirical studies on the U.S. Congress have been adapted to the EP case, with particular focus on the voting behavior of the MEPs (Pollack, 2006). The early studies in this regard highlighted that the multinational composition of the EP did not significantly condition the attitude of its members. On the contrary, party groups mainly conditioned MEPs' voting behavior (Pollack, 2006). Nevertheless, in the EP electoral phase, the national right-left divide has been much stronger than the EU one (Hix, 2005). Remarkably, many studies have demonstrated that the EP can be analyzed as a 'normal parliament', whose members vote along party –rather than national- cleavages (Hix et al, 2002). With regard to the Council, many rational choice studies mainly examined the EU Member States voting power under different decision-making formulae, with particular focus on the qualified majority voting (McElroy, 2006). Furthermore, other studies in this regard analyze voting and coalition patterns in the Council, discussing on the possible existence of a North–South or West-East cleavage (Pollack, 2006; Hagemann, 2008).

Regarding the inter-institutional interaction in the EU legislative decision-making, a large number of studies have focused on the role of the Commission (as agenda setter), the EP and the Council. In particular, many scholars devoted their attention to the growing role of the European Parliament, which has been gaining increased powers in the last twenty years. Although, with the current co-decision procedure, the EP and the Council have, generally speaking, the same powers, there have been many arguments concerning the nature and extent of the EP's and the Council's respective influence on legislative outcomes within the rational choice school of thought (Pollack, 2006). Napel and Windgrén (2006), for instance, analyzed the strategic

behavior of the co-legislators, concluding that the Council usually tends to be more conservative than the European Parliament. According to Napel and Wingrén, this is mainly due to the Council's internal qualified majority rule. Even Tsebelis and Garrett (2000), in their analysis of the inter-institutional interaction in the EU legislative politics, argue that the co-legislators behave differently. According to their theory, this occurs because they respond to different interests and do not have the same type of control from their "constituents" (Tsebelis and Garrett, 2000, p.29): since the EP is directly elected, its members should be more responsive to public opinion compared to the Council. Considering these studies in the light of the aforementioned principal-agent model, the rational choice institutionalist theories discussed in the paragraphs above argue that there is a direct, positive correlation between the political actors delegating powers to institutions at the EU level and the institutions themselves. Therefore, as "principals" vary, also institutional behaviors tend to differ.

2.3. Theoretical approach

The European Union regulation on conflict minerals is the core case study of this dissertation. In particular, this thesis focuses on the EU inter-institutional debate that brought to the approval of a particular traceability system for conflict minerals, investigating the positions of the different institutions and their approaches on due diligence. Anyway, before understanding and studying these approaches, a preliminary issue will be raised on the nature of this regulation. Since, indeed, the European market, in merely economic terms, benefits from this status quo, as conflict minerals are cheaper compared to the same conflict-free raw materials, this initiative at the European level may seem insensate or at least not useful in purely rational terms. Therefore, at this stage, the preliminary question is: why should the EU engage in a regulation that implies obligations and burdensome costs for enterprises and consumers as well as potential disadvantages in terms of competitiveness?

I argue that the answer to this issue can be given in terms of public interest. The measure analyzed in this dissertation, indeed, is an example of social regulation, with a peculiarity: it does not directly affect EU society. Anyway, since European citizens are involved in the issue, as many purchase products whose components come from conflict-affected and high-risk areas, the need for awareness and social responsibility on the issue is strong even in the EU. Recalling Brownsword (2004), indeed, human rights are an important stimulus for regulatory initiatives, as the respect for these rights is a basic requirement for a measure to be legitimate. The case study

chosen may be interpreted as a regulatory mirror of this exigency. I argue that, in this circumstance, the sense of social solidarity analyzed by Prosser (2006) as justification for regulation goes beyond the strict conception of 'European' society, being transcontinental rather than simply transnational. The public regulator, therefore, sees human rights abuses linked to conflict minerals as socially 'undesirable market results' (den Hertog, 2010, p.17), which need to be addressed through a regulatory measure that modifies or 'corrects' the behavior of some economic actors in the supply chain.

It is difficult, if not impossible, to discuss the decision to regulate on conflict minerals as the result of private interests. As already discussed by den Hertog, private interest theories of regulation are applicable only in context of economic regulation, while social regulatory initiatives are better explained by public reasons. Considering the peculiarity of the regulation as not inherently finalized at solving an internal EU issue, this difficulty becomes even greater. If we take into account the four major political agents represented in Fig.2, no one benefits from the regulation in purely economic terms. Firms would not maximize profits, as conflict minerals are very inexpensive considering the irrelevant cost of labor. Bureaucrats would not maximize budget, as they will have to provide funds in order to ensure competitiveness and bear the costs for due diligence. Consumers would not maximize their utility, as these economic efforts by bureaucrats and, above all, firms, can cause a price rise of some of their everyday goods. Consequently, politicians would not maximize votes, considering that consumers and firms would not benefit economically from such a regulation. The reason for regulatory initiative in this regard, therefore, should be found on social grounds.

There are arguments against the public interest interpretation provided above, highlighting that many NGOs and civil society organizations had a particularly important role in raising awareness about the issue of conflict minerals, stimulating regulation on this matter. Therefore, these groups, if considered as pressure groups, were more successful in affirming their interests than others. The argument on the competition among the several pressure groups, in my opinion, is not wrong. Nevertheless, it is more functional to explain political action linked to regulation (how regulation develops and is discussed) than regulatory initiative (why regulation occurs). If we take this explication for granted, indeed, the private interest reason does not stand up to scrutiny: the cause for pressure made by civil society organizations does not exactly coincide with individuals' utility maximization, and the public interest reason seems to be more appropriate to explain the decision to regulate on this matter. Consequently, the idea of *homo oeconomicus*, in my opinion, does not fit with this empirical case.

Although, according to my argument, the mobilization of these organizations cannot be a theoretical tool for justifying regulatory initiative on conflict minerals on private interest terms, the work of these groups has been fundamental in order to provide information on the issue. This is the reason why I do not agree with the classic public interest assumption according to which regulators have perfect information and limitless resources. In this regard, the early public interest theoretical tradition uses this assumption to legitimize regulators to take actions in order to correct social or economic behaviors. On the contrary, I feel much closer to the ‘progressive school’, which reinterprets this assumption stating that the public regulator has, *comparatively*, better information. The mastery of better tools to collect information compared to other organizations is, *per se*, the legitimation for regulatory initiatives triggered by regulatory authorities on public interest basis. In the European case, in my opinion, the EC impact assessments have the specific role of legitimizing regulation: they show the analysis of the public regulator on a specific issue, examining and publicly disclosing information and specific data that emphasize the presence of a problem to be solved. By formulating impact assessments, therefore, the Commission stresses the importance of measures on specific matters and provides documentation that legitimizes its regulatory initiatives.

Another important aspect concerns the relationship between economic and social rationales in public interest regulation. These two elements, indeed, can coincide (in the case of some externalities linked to pollution, for instance) or can clash. Many scholars highlighted this relation: Prosser (2006), for instance, starting from the argument according to which regulatory initiatives on social ground are not second-order regulations, emphasizes the possible creation of trade-offs between economic and social exigencies. Even Okun (1975) focuses on this element, highlighting that a trade-off between economic efficiency and equality is “inescapable” and that these two aspects “need each other [...] to put some rationality into equality and some humanity into efficiency” (Okun, 1975, p.120). Therefore, regulatory initiatives can create conflicts among different approaches, which arise in the discussion phase characterizing the social and inter-institutional debate. The EU regulation on conflict minerals is, in my opinion, one of these cases.

Examining political behaviors and inter-institutional discussions following regulatory initiatives, my theoretical approach takes a different direction. In studying *how* – rather than *why* – regulation occurs, private interest theories of regulation are, indeed, particularly helpful: according to my argument, in the discussion phase, the interests of different groups emerges as a

fundamental driving force. In the case of mineral traceability, the debate among diverging rationales triggered by the regulatory initiative has been very strong both on inter-institutional and extra-institutional levels. Therefore, private interest have much more ground within a political discussion phase.

Recalling the trade-off between economic and social rationales, I argue that the EU conflict minerals regulation is one of the cases in which the discussion at the social and political level is performed along this trade-off, which represents the political arena in which the co-legislators enacted their debate. On one extreme, there is the exigency of guaranteeing effective outcomes from this regulation in terms of respect for human rights and political stability in the region. In other words, looking at the issue from a social point of view, the more the due diligence is mandatory, the more there is the possibility to create a safe environment for DRC miners and to avoid the financing of armed groups in the region. Nevertheless, also the economic sustainability shall be taken into account. A completely mandatory due diligence system will have burdensome consequences on the EU 3TG mining industry, as there are many costs coming from the setting up of a compulsory scheme. Therefore, some European firms might be forced to exit the market because they would be noncompetitive in the global industry. Some pressure groups defended the first interest with greater emphasis, while others demonstrated significant worry for the protection of the second. The decision on how to regulate on this matter, therefore, is crucial in the interest groups debate around this issue, as the outcome of this debate eventually will decide at what point of the trade-off regulators place themselves.

This diversity of approaches conditioned even institutions: the European Parliament, for instance, adopted a mandatory approach, showing particular care on the element of human rights protection, while the Council opted for a different formula that privileged the voluntary approach and the exigency of an economically sustainable regulation. In order to explain the reasons for such placement, I use some rational choice institutionalist arguments applied to the European Union, with particular focus on the examinations regarding the debate among the co-legislators. Analyzing the EP and Council drafts of the regulation on mineral traceability, I will highlight the Parliament's trend towards more 'progressive' legislation, compared to the Council's general conservatism, as also argued by the studies of Tsebelis and Garrett (2000). Moreover, in this regard, I will argue that this different approach is also caused by the composition of the two institutions. While the European Parliament is a purely legislative body, instead, the Council is made up of ministers of the Member States' governments, being, therefore, a legislative/executive institution. This different composition may deeply condition decision-making in the two institutions. Recalling the principal-agent theory, since the European Parliament directly responds to citizens, the element of the defense of human

rights, deeply politicized in the inter-institutional bargain phase, prevails in the EP draft. Conversely, considering that the Council is mainly made up of bureaucrats, the element of budget maximization has preeminence, as the direct principal of the actors, the government, has the main exigency of maintaining firms competitive in order not to provide financial assistance in the case of widespread loss of competitiveness. This argument overlaps the theory of Mitchell and Simmons (1994) within the realm of public choice, as politicians' vote maximization and bureaucrats' budget maximization produce two different legislative outcomes (the co-legislators' drafts) characterizing the inter-institutional debate around the issue of conflict minerals.

Summarizing the main theoretical argument in this dissertation, I affirm that it is possible to analyze a regulation on both public and private interest bases, according to what issue we want to explain. For this reason, my argument clearly distinguishes regulatory initiatives from political actions linked to regulation. The first focuses on why regulation occurs, while the second concentrates on how regulators formulate regulatory measures. In the case of conflict minerals regulation, for example, the roots for the regulatory initiatives are found in a social grounding, and the European regulator behaves like a public, benevolent regulator who takes into consideration the issue of conflict minerals. Moreover, when the European regulator decides to take initiative on this matter, a trade-off between economic sustainability-economic rationale – and respect for human rights -social rationale – emerges. The European debate develops around this trade-off, and is determined by the positions that actors have in relation to the clash between the economic and the social rationales. For this reason, I argue that when we pass from initiative to action/discussion, several interests, at a private as well as institutional level, arise. With particular reference to the EU institutional level, diverging positions are determined by the institutional nature and composition; therefore, the different interests represented by the co-legislators mirror the real or perceived needs of their direct “principals”

(governments in the case of the Council, EU citizens for MEPs). Eventually, a final equilibrium in the trade-off may result from the inter-institutional bargaining process. In the case of EU conflict minerals regulation, the 15 June political agreement based on the Dutch Presidency compromise proposal represents this equilibrium, as it takes into account the co-legislators' positions creating the basis for a shared, definitive regulatory outcome.

2.4. Methodology

As already mentioned, in order to individuate the mandatory and voluntary approaches in the co-legislators' positions, I will mainly base my analysis on the EP and Council's drafts, taking also into account the Commission's initial proposal and concluding my discussion with the examination of the main elements of the Dutch Presidency compromise text and the subsequent political agreement. With regard to the co-legislators' drafts, I provide a text analysis of both proposals which will examine the entire provision, recital by recital and article by article. Generally speaking, this type of analysis may be qualitative or quantitative. Within the former, the codification is provided through the research of the meaning of the text, which can be manifest or latent. Within the latter, the examination mainly consists in the enumeration of words and keywords highlighting certain important aspects for the analysis. In this dissertation, I will carry out the legal text analysis on a qualitative basis, decoding the most relevant provisions of the European institutions with the aim of inferring their approach to conflict minerals due diligence. Nevertheless, some attention will be devoted also to some "quantitative" aspects. For instance, during the analysis, I will take into account the circumstances in which the co-legislators' texts refer to small economic operators, as well as to human rights abuses in conflict-affected and high-risk areas. Nonetheless, there will not be a schematic and rigorous enumeration, and this calculation will be mainly approximate. The decision to exclude a pure quantitative text analysis has not been a superficial or casual choice. On the contrary, although the references made by the drafts to some specific themes will be taken into consideration, I will mainly focus on the quality of these references. In other words, I will not mainly take into account how many times regulators talk about specific interests, but *in what terms* they do that.

Moreover, I will try to proceed through an analysis of the manifest – rather than latent – content of the various provisions. By concentrating on the literal interpretation of the drafts, I will try to be as objective, neutral and rigorous as possible in individuating the most important elements of the mandatory and voluntary approaches in the co-legislators' texts and in the final compromise. Nevertheless, I will not limit my analysis to a simple coding of the Commission's, co-legislators' and compromise proposals, yet I will examine the elements individuated in the light of the entire theoretical discussion provided in this chapter. Despite the most important documents for carrying out this analysis are the aforementioned legal texts, other sources are also very important for the overall examination. Within the analysis, indeed, even informal documents will be very useful in the identification of the two approaches. In particular, position papers and

letters addressed to EU officers, published by pressure groups in order to show their engagement and lobbying activity in favor of (or against) a specific cause, will be held in high regard. In the case of the conflict minerals regulation, many elements of the mandatory and voluntary approaches in the stakeholders' positions may be found in these type of sources, which, despite being simple correspondence, act as informal *advocacy documents*, which make specific requests to regulators and express precise interests at the societal level.

The examination within this final thesis will be performed at a meso and macro level. I consider, indeed, pressure groups, the single EU institutions and the overall European Union institutional system – rather than European citizens as individuals – as the main unit of analysis on which the examination is based, investigating their specific choices in the matter of conflict minerals due diligence.

I decided to use this methodology because it has some important advantages: if well conducted, document analysis can provide completeness and depth to the entire research work. Moreover, this analytical method is particularly indicated in the case of a comparison between similar regulatory phenomena. Nevertheless, an important aspect of this methodological tool should also be highlighted: document analysis may give, to some extent, freedom or flexibility to the researcher in the interpretation phase. This element is either positive or negative. Indeed, if the researcher interprets a document too extensively, its subjectivity can jeopardize the entire analysis. Therefore, I will try to examine the documents with precision and neutrality in order to “work with what has actually been said or written” (Jørgensen and Phillips, 2002, p.21) and infer the main argument of my thesis from the text without excessive or misrepresented interpretations.

2.5. Conclusions

This chapter has been mainly dedicated to the theories supporting the analysis provided in this dissertation. In order to discuss why and how regulation occurs in the case chosen, I introduced some theories of regulation, with particular focus on the public/private and economic/social differences in this regard. Another section has been also dedicated to some theories on political action linked to regulation. In particular, I discussed the main theoretical elements of public choice and rational choice institutionalism in order to explain the behavior of institutions and other political actors in the discussion phases succeeding regulatory initiatives. The distinction

between regulatory initiative and political action is very important in order to explain how public and private interests may coexist and alternate in the study of the same regulation.

The latter concept has been further stressed in the theoretical approach devoted to the specific case analyzed in the dissertation. According to my argument, legislation on conflict minerals has been triggered on a public interest basis and responded to social, rather than economic imperatives. Nonetheless, when the discussion phase started, many interest/pressure groups influenced the inter-institutional debate and determined two main positions on due diligence. In other words, during the discussion phase, public interest leaved room for divergent private interests, which confronted inside and outside the EU institutional environment. I also argue that this debate must proceed in order to create a legislative outcome that will be as effective as possible in reconciling the different exigencies emerged in the discussion phase. The final compromise, based on a Dutch Presidency draft and approved by the trilogue, represents the result of the social and inter-institutional bargaining process, being, when officially approved by the EU legislative institutions, the regulatory outcome generated by the aforementioned debate. Another brief section of this chapter has been eventually devoted to methodology. I included this part to this theoretical chapter in order to further clarify the tools used in order to highlight the institutional behavior within the case chosen and to distinguish the mandatory and voluntary approaches in the co-legislators' drafts. The following chapters will be less theoretical and more descriptive/analytical, discussing the issue of conflict minerals and the European regulation in this matter, accompanied by a text analysis on the case chosen. Nonetheless, some important theoretical and methodological aspects discussed in this chapter will be recalled many times during the whole dissertation.

3. CONFLICT MINERALS: FRAMING THE ISSUE

3.1. Introduction

The trajectory that virtually connects one of the deadliest humanitarian tragedies of our times and some of our daily life objects is geographically, economically, culturally and historically extensive. Therefore, in order to supply a broad and comprehensive approach to the issue of conflict minerals, a description of the context in which this problem originates will be provided. In the Democratic Republic of Congo (DRC), particularly in some eastern areas of the country, human rights abuses linked to natural resources are frequent and ruthless, as a complex internal conflict among warlords and their armies gave birth to an uninterrupted humanitarian tragedy that has been ongoing since the mid-1990s. If basic knowledge on the dynamics occurring in this country is not provided, the issue of conflict minerals cannot be easily understandable and, consequently, addressed. For this reason, this chapter has the aim of framing the issue, starting from the war that gave birth to this problem in the DRC case and continuing examining the path through which minerals extracted, transported and exported through violence, rape, torture and other forms of abuses may become processed, manufactured and marketed as smartphones, computers, tablets or even jewels.

The chapter starts with a section giving a brief overview on the political, economic, social and historical events creating the context in which this problem arose and grew (3.2). This section has the aim of providing awareness on the environment that determined the creation of a system based on corruption, bribery, informal networks and smuggling. The historical outline arrives up to the most recent developments, explaining the growing role of raw materials such as tin, tantalum and tungsten in the world market and the reason why they became so important in the DRC conflict. Subsequently, section 3.3 explains a fundamental point in the entire dissertation: if, indeed, due diligence has the main aim of breaking the link between mineral exploitation and human rights abuses, this section first individuates this link. Hence, the first parts of Chapter 3 are a fundamental basis for all the subsequent developments on the issue in the following chapters. In order to identify this connection, section 3.3 examines the role of the United Nations (UN) Mission to the Democratic Republic of Congo, with the help of major documentation in this regard.

Once the link is individuated, the examination can proceed further. For this reason, sections 3.4 and 3.5 analyze another important point in this chapter: the supply chain of these minerals and

the fallacies that should be addressed in order to provide due diligence. Consequently, section 3.4 pieces together the standard path that minerals follow from mines to consumers, producing a simplified supply chain. In the light of this path, some problems will emerge as main fallacies to be addressed for providing traceability in this regard. A portrayal of these fallacies will be therefore drawn in section 3.5, which concludes the core examination phase. Finally, some conclusions will be drawn on the basis of the topics covered in Chapter 3.

Before starting with the discussion of chapter two, some clarifications should be provided with regard to the upstream and downstream sections of the supply chain, which will be broadly discussed in sections 3.4 and 3.5. The upstream phase includes all the steps regarding the extraction, trade, export and melting/refinement of minerals. After minerals become metals, the downstream phase starts. It includes the phases of components manufacturing and assembly into final products. This division is inspired by the definitions given, in this regard, by the European Commission 2014 Impact Assessment accompanying the EU regulation on conflict minerals. Obviously, not all minerals follow the same path and in some cases there are many intermediate steps. Anyway, the simplified supply chain provided in section 3.5 does not have the main aim of literally describing every single DRC mineral/metal in its roadmap, because such discussion would have been unrealistic and beyond the scope of the analysis of this dissertation. The core idea is to give an overview of the classical path followed by most conflict minerals, in order to address major problems linked to their supply chain. Therefore, even the six steps chosen are not a casualty. The division proposed in section 3.5, indeed, was elaborated according to the problems related to due diligence as highlighted by previous works of Sustainalytics and the Enough Project on the issue. These two important civil society organizations, which in several occasions documented genocides and atrocities linked to human rights abuses in order to promote responsible mineral source methods, will be frequently cited during the second part of this chapter.

3.2. An African overview

The Democratic Republic of the Congo, and in particular its two eastern provinces of North and South Kivu, is a fundamental global center of production and extraction of tin, tantalum, tungsten and gold (Global Witness, 2004). Nonetheless, only an insignificant percentage of the returns coming from these resources have been effectively ploughed back into the country (United Nations, 2010a). Revenues coming from the exploitation of these raw materials triggered

– and are still fueling – a humanitarian catastrophe in the region, as the control for some rich DRC mine sites is one of the main reasons for the continuation of a war that has provoked millions of victims, mostly civilians, in the last twenty years.

The link between minerals and political/military power is not a novelty in the region. Indeed, this attitude dates from colonial times, when the Belgian political and military élites used brutal force to exploit natural resources – minerals, but also ivory, palm oil and rubber – from this area (Global Witness, 2004). In that period, in order to survive, civilians built up a parallel shadow economic system based on smuggling inside and outside the Belgian Congo through informal networks, usually established on ethnic ties and routine corruption of local officials (Global Witness, 2004). This political and military behavior consisting in forced control over natural resources did not change in the 30 years under the Mobutu post-colonial government (1965-1997). During Mobutu's regime, natural resources exploitation in Zaire – then the DRC– was characterized by “widespread corruption, fraud, pillaging, bad management and lack of accountability” (United Nations, 2010a, p.351). The political/military elites of the regime built-up a system aimed at effectively controlling strategic mine sites: after having used, in the first years, the system of concessions to big foreign mining companies, inherited from the Belgians, Mobutu carried out a system of nationalization of these enterprises, then “distributed” them to his closest friends and allies (Global Witness, 2004). With the end of the Cold War and the ending of direct US support of the Mobutu regime, the years 1990-1993 were characterized by widespread chaos. The state and its unsustainable economic system were collapsing; several factions, mainly based on common ethnic origins, started competing for control over some Zairian areas and the informal economy grew enormously compared to the formal one (Global Witness, 2004). In the scenario of a very poor and fragmented country, Mobutu fled to Morocco. Although Mobutu's successor, President Laurent-Désiré Kabila, promised to create a democratic and economically viable state, the methods of control over natural resources were the same as his predecessor's approach (Global Witness, 2004). Under presidents Mobutu and Kabila, personalized control was mainly used in order to rule and gain revenues on diamond mines – but also coffee, cobalt and gold. Subsequently, minerals such as tin, tantalum (coltan) and tungsten became increasingly important, being deeply linked to the financing of the various factions during the armed conflicts that began twenty years ago and are still *de facto* continuing.

The Congolese wars that started in the second half of 1990s made practices of local mistreatment for the control of minerals harsher and more violent: according to a report from the United

Nations, the first of these wars (1996) led to catastrophic consequences in the case of mineral resources, and in particular:

- A heavy militarization of DRC natural resources exploitation.
- An increasing number of foreign actors becoming directly involved in the exploitation of these resources (United Nations, 2010a, p.351).

In other words, the methods used by the previous *kleptocratic* regime (United Nations, 2010a, p.351) were adapted to the new context of the civil war. Moreover, the conflict changed in its scope over time: if the 1996 war was initially driven by political, ethnic and security concerns, the 1998 conflict – also called the “African World War” – shifted its attention to natural resources, the control of which became increasingly attractive (United Nations, 2001b; United Nations, 2010a, p.351; Amnesty International, 2003a). With particular reference to the African World War, the UN Panel of Experts, in a 2001 report, affirms that the DRC involvement in the conflict was defended by top-officers serving in North and South Kivu during the first war, who “had a taste of the business potential of the region” (United Nations, 2001a, p.7). Moreover, these army officers stated that, besides political and security reasons, the conflict was moved by a parallel “hidden agenda” characterized by “economic and financial objectives” (United Nations, 2001a, p.7). From that moment on, the control over the mine sites has driven military and paramilitary groups to build up a “formal or semi-formal system of taxations, licenses and fees” together with “ ‘front’ companies and networks enabling foreign armies to exploit natural resources [...] without being visibly involved” (United Nations, 2010a, p.352). This shift in the scope of the conflict from 1996 to 1998 can also be demonstrated by the change of alliances between the several armed groups; moreover, some of the opponents temporarily overcame their divergences and became “business partners” in order to exploit a larger amount of resources (United Nations, 2001a; United Nations, 2001b; United Nations, 2010a). The conflict has been particularly complex for the DRC, as it was a civil war with an official foreign army there at the same time (Global Witness, 2004).

At the end of the 1990s, the particularly unstable situation in the Congo seemed to be close to an end. In 1999, all the parties involved in the conflict signed an agreement in Lusaka, Zambia, which imposed a ceasefire, the setting out of a UN peacekeeping operation (MONUC), the withdrawal of foreign troops and foreign paramilitary groups (Global Witness, 2004). Moreover, after 2001, when President Laurent Kabila was assassinated, his son, Joseph Kabila, became President, promising to put an end to the internal conflicts in the DRC providing also

transparency in the mining sector (United Nations, 2010a). Nevertheless, there is no clear evidence of such efforts. In addition, the Lusaka agreement did not guarantee peace and stabilization, as the conflicting factions did not apply, *de facto*, its provisions (Global Witness, 2004). With the help of a weak, sometimes acquiescent State and in the absence of effective rule of law, armed units continue exercising control in some DRC areas, where they still obtain rents at different points in the supply chain (extraction, transportation or export). In the 2000s, the conflict increased in its range and brutality, particularly in the case of coltan, for two main reasons:

- With the boom of smartphones and other electronic devices, the demand for coltan increased as this raw material became essential in many of today's miniaturized and portable gadgets. Therefore, even the price of this mineral sharply increased (Global Witness, 2004);
- Simultaneously to this increase, some high yielding coltan sites in Australia, Mozambique and Canada, closed, contributing to the so-called "supply crunch" in the industry of these minerals (Sabour, 2010).

Moreover, considering the global economic crisis and greater pressure on costs, the DRC had a comparative advantage in the production and extraction of these minerals on other countries rich in the same resources, as the cost of the labor is irrelevant and therefore conflict minerals are cheaper. Congo's neighboring countries (mainly Rwanda and Uganda) facilitate the increase in trade and export to foreign smelters through illegal smuggling operations achieved by informal networks, sometimes characterized by the same ties built up in the period of the Belgian Congo. This shadow economic system based on bribery and corruption is the channel through which minerals obtained through massacres, exploitation and other human rights abuses reach international markets, becoming components of some of our daily life objects.

3.3. The United Nations in DRC: individuating the link

As a consequence of the African World War and the subsequent Lusaka ceasefire (1999), the United Nations Security Council, with its resolution 1279, established the UN Mission to the Democratic Republic of the Congo (MONUC) on 30 November 1999 (United Nations, 1999). While, in the beginning, this mission had the task of surveilling the application of the Lusaka ceasefire, it subsequently was charged with several additional tasks. Considering that the civil war in DRC is *de facto* still taking place, the mandate of MONUC has been repeatedly extended

with Security Council resolutions (usually unanimously approved), and the mission was then renamed MONUSCO in 2010 (United Nations, 2010b). The new mandates authorized the UN forces to use all necessary means to protect civilians and humanitarian personnel under imminent threat of physical violence, supporting the DRC government in stabilizing and consolidating peace in the region. In addition, a specialized “intervention brigade” was created in 2013, extending the mandate of MONUSCO until 31 March 2014 (United Nations, 2013a). On the basis of the positions provided in a special report by the Secretary-General on the Democratic Republic of the Congo and the Great Lakes region (United Nations, 2013b), this brigade based in Goma contributed to strengthening the stabilization operations in the area. Its mandate – and MONUSCO mission – has been currently extended until 2017 (United Nations, 2016b).

The UN presence in the Democratic Republic of Congo has been particularly useful in individuating and documenting the role that minerals have in the civil war, as well as the connection between the exploitation of these raw materials and the financing of armed groups in the region. The first declaration made by the United Nations in this regard can be found in the April 2001 report of the UN group of experts, which expressly states:

“The conflict in the Democratic Republic of the Congo has become mainly about access, control and trade of five key mineral resources: coltan, diamonds, copper, cobalt and gold. The wealth of the country is appealing and hard to resist in the context of lawlessness and the weakness of the central authority” (United Nations, 2001a, p.41)

Similar statements can also be found in other UN reports of November 2001 and May and October 2002. Anyway, in order to have a clearer and comprehensive framework of this link, the UN 2010 report documenting the most serious violations of human rights between 1993 and 2003 is particularly useful, as it can be considered as a significant basis for all the subsequent documentation in this matter.

Chapter 3 of the above-mentioned UN document is devoted to the description of all the acts of violence linked to natural resources exploitation (United Nations, 2010a). In that section, after some paragraphs framing the main issue, the report specifies the violations of human rights deriving from the ongoing conflict among armed groups for the control of mine-sites. The first element highlighted is that it is no coincidence that such violations of human rights and international humanitarian law have been committed where there is major concentration of

minerals – North and South Kivu, Maniema, Orientale and Katanga- (United Nations, 2010a). According to the report, military and paramilitary groups divided control on the territory based on their power: the most powerful of them “had far-reaching strategies aimed at occupying these areas”, while smaller groups “seized the chances offered to them by collaborating with the highest bidder” (United Nations, 2010a, p.353). The most serious issue in this context is that, whatever their level of organization, armed groups exercise their hegemony at the expenses of the civilian population by seriously breaching the most basic human rights in order to terrify and subjugate locals. All armed forces used the same practices, which involve, among others, “massacres of unarmed civilians, rape, torture, arbitrary arrests and detentions, along with forced displacements” (United Nations, 2010a, p.353). Moreover, there has been common and systematic use of forced child labor in mine sites (United Nations, 2010a).

The report also highlights the increasing attractiveness of tantalum (coltan) as a consequence of the rise in the price of this mineral after its intensive use in the electronics and portable devices industry (United Nations, 2010a). In this section, the UN document refers to another important research made in this regard by Global Witness. According to this research, the DRC holds an estimated 80% of global reserves in this mineral (Global Witness, 2004). With particular reference to the North and South Kivu provinces, the 2010 UN report mentions cases in which conflicts were triggered by the presence of mine-sites (United Nations, 2010a). The battles for controlling Lulingu (South Kivu) are reported as a clear example of this attitude. Lulingu, indeed, is a small and isolated village. Anyway, the surroundings of this village are rich in coltan. Another example provided is the killing of some mineral traders in 2001 by the DRC army; local authorities also ordered the seizing of their cargo of coltan and gold, accusing them of spying for the Mai Mai (United Nations, 2010a).

Several massive exterminations have been carried out also for other minerals: according to the aforementioned UN report, the Ituri massacre, which originally was a dispute over land and eventually caused tens of thousands of deaths, became a massive carnage because of the presence of minerals in the area (United Nations, 2010a). Indeed, although, at first glance, the conflict may seem exclusively triggered by ethnic contrasts, there have been “changing and contradictory alliances” which do not coincide with a division made along ethnic bases (United Nations, 2010a). In addition, as documented by the MONUC Special Report on the events in Ituri (MONUC, 2004), the major battles in the DRC were fought in areas rich in minerals or in regions providing access to such mine sites. In this regard, even the Special Rapporteur on the

human rights situation in the DRC, in its Interim Report, declared that “despite the conflict’s ethnic appearance, its root causes are of an economic nature” (United Nations, 2003). In addition, the UN report bases these affirmations on research made by Amnesty International on the specific case of the Ituri massacre (Amnesty International, 2003b).

Another finding of the 2010 UN report is the role of mineral exploitation as a main factor that determined the prolongation of the conflict in the DRC (United Nations, 2010a). The Group of Experts, indeed, affirms that the revenues coming from natural resources were such that the civil war became “self-financing” (United Nations, 2010a, p.362). Indeed, all armed groups – including those of the DRC government – raised a parallel bureaucratic system collecting revenues and reinvesting these earnings in order to continue the conflict (United Nations, 2010a). This para-state structure involved the creation of shadow systems of taxation, licenses and fees through checkpoint or direct extortion at the mine sites, with eventual requisitions of stockpiles of raw materials (United Nations, 2010a). The UN also reports the links between commerce in minerals and the trade in arms. There is, indeed, an interconnection between the mineral sales and the purchase of weapons, which has been consolidated in the region through massive smuggling operations (United Nations, 2010a). Moreover, according to the above-mentioned research carried out by Amnesty International, there were clear and consolidated trade routes illegally exporting minerals in return for weapons. This trafficking often happened by plane (Amnesty International, 2004; United Nations, 2010a). A clear evidence of these types of operation can be demonstrated by the creation or the extension of airstrips in the mining zones in order to accommodate larger aircrafts (Amnesty International, 2004). Some local airfreight companies – including Swala Express, Bukavu Air Transport (BAT) and Kivu-Air – but also civilian flights, regularly transported coltan abroad, while return flights conveyed arms and equipment (Amnesty International, 2004).

This section only gives an overview of some of the most important findings of the United Nations about the links between the minerals and the financing of armed groups in the DRC. Many international actors, also mentioned in this section (Amnesty International, Global Witness, IPIS etc.), have provided similar documentation. Examples like those provided (such as the Itura massacre or the battles for Lulungu) occur regularly in the DRC. In order to ensure greater transparency putting an end to such episodes, it is important to identify how conflict minerals enter in our everyday life and understand the issues related to this path. Therefore, the following section deals with this issue, tracking a basic mineral supply chain and identifying the fallacies that sometimes impede transparency in this regard.

3.4. The simplified supply chain

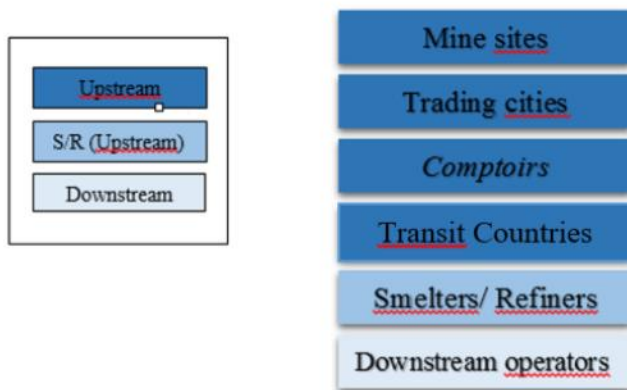


Figure 3.1. The simplified supply chain

The process begins in the mines, where soldiers effectively control the territory, tax artisanal miners and exploit locals, using women and children as transporters or sexual slaves (Sabour, 2010). Here, mining operations are “primitive, in open-cut pits, and often carried out by children (between the ages of 10 and 16), or enslaved or indentured workers” (Sabour, 2010, p.7). The presence of child labor in these mines, indeed, is estimated up to

40% (PACT, 2010). The International Peace Information Service (IPIS), which made several fieldworks on this issue, asserts that armed groups control almost 50% of the 3TG mines (Spittaels et al, 2014). Moreover, the issue is particularly critical in the case of tantalum/coltan: of the 13 major mines, 12 are *de facto* controlled by armed groups (IPIS, 2009).

This control may be imposed in different ways: direct control, taxation, autonomous digging and forced labor (Spittaels et al, 2014). According to the Enough Project, the average miner’s wage is between \$1 and \$5 a day, while military and paramilitary groups can earn up to 90% of the profits coming from the mineral trade in some areas (The Enough Project, 2009). The most important issue to stress in this phase is that there is a substantial number of non-validated mine sites, in which there are no controls and from which traders, and in particular exporters, make high profits (United Nations, 2016a). The European Commission affirmed that in 2014 only 78 DRC artisanal 3Ts-mining sites, out of the estimated 2000, have been actually validated (European Commission, 2014a). According to the UN Group of Experts, minerals coming from these mines can be easily laundered and included as a part of the “legitimate” supply chain (United Nations, 2016a). Moreover, another serious enforcement problem in the DRC legal system is demonstrated by the widespread presence of armed groups, particularly in the provinces of North and South Kivu, which violates the DRC mining provisions that explicitly prohibit armed presence in mine sites (Sabour, 2010).

From the mines, minerals arrive to the so-called “trading towns”, which are an intermediate step before the transportation to the main trading hubs in the eastern region, Bukavu, Goma – for the 3TGs – Butembo and Uvira – only for gold – (Sabour, 2010; Prendergast and Lezhnev, 2010). Here the trading houses (*maisons d’achat*) sort and process minerals. Several studies assert that only 1/10th of these houses is registered with the Congolese trading association; in the other 9/10th, registrations of minerals are in violation of Congo’s mining laws (Sabour, 2010). This is also due to the prohibitive prices that the DRC government charges for giving licenses to the trading houses (Prendergast and Lezhnev, 2010). At this stage of the supply chain, minerals are still easily distinguishable, because they have different colorations and textures according to the mine sites they come from (Sabour, 2010). Both Sustainalytics and the Enough Project affirm that if documentation occurred at this stage, traceability could be reasonably and effortlessly achievable. However, according to The Enough Project, since military and paramilitary groups control much of the transportation phase, merchants are frightened of disclosing information about the exact origin of raw materials (Prendergast and Lezhnev, 2010). Another problem that emerges at this stage is, indeed, the difficulty in collecting information, as armed groups “supervise” also trading houses, profiting from exchanges. Indeed, according to The Enough Project, they control a consistent part of the transport from the mine to the *maison d’achat* (Prendergast and Lezhnev, 2010). Their profit from trade can occur in two ways: either they exploit transporters, illegally “taxing” them and taking a consistent percentage of their profit, or they transport the 3TG themselves. In addition, gold can be easily smuggled at this stage. This mineral, indeed, has much higher value by weight (\$15,000 per pound), if we compare it with the tin, tungsten and tantalum (around \$7 per pound). Therefore, while the 3Ts have to be transported in heavy sacks or by plane, gold can easily be hidden in a backpack or pocket (Prendergast & Lezhnev, 2010). As a result, since the 3Ts are much more difficult to conceal, it would be potentially much easier to effect due diligence in the case of these minerals. Anyway, since the vast majority of trading houses is not officially registered, traceability is not easy to apply and enforce. The regularization of trading houses is, therefore, an essential requirement that must be achieved in this area.

Subsequently, minerals are bought by export companies, also called *comptoirs*, which further process these raw materials through machinery and then sell them to foreign buyers coming mainly from Belgium and Malaysia (Prendergast & Lezhnev, 2010; Sabour, 2010). The latter mostly pay exporters in advance (Prendergast & Lezhnev, 2010; Sabour, 2010). Export companies have to register with the government; anyway, since local laws are weakly enforced,

there are numerous unregistered companies, which make traceability problematic. Another issue concerns the difficulty in providing documentation concerning the origin of the 3Ts, as the only way exporters use to justify their non-involvement in the purchase of minerals from armed groups is their verbal assurance (Prendergast & Lezhnev, 2010). Although exporters deny accusations of sourcing conflict minerals, the UN Group of Experts, in its last report, revealed that DRC-based export companies “regularly purchase gold without knowing its actual origin” (United Nations, 2016a, p.2). Moreover, according to the same report, some exporters “significantly under-declare the volumes exported, with discrepancies of at least \$174 million in 2015” (United Nations, 2016, p.3). A similar ascertainment was also made by the Congolese government: in 2008, for instance, only 270 pounds of gold were legally exported, even if the estimated production is 11,000 pounds (Abedi, 2009).

After the phase in which minerals are purchased by exporters, the 3TG can take two paths: either they come directly to smelters and refiners, or they are sent to countries neighboring on the DRC (mainly to Rwanda, Uganda and Burundi) also called *transit countries*. Here minerals are transported by road, boat or plane. While a part of these conflict minerals is legally exported, and consequently taxes are paid to the Congolese government and it is easy to trace them, the majority of the 3TG exported through transit countries is smuggled and labeled as local (Prendergast & Lezhnev, 2010). Smuggling operations in these countries can be demonstrated by several statistical inconsistencies: for instance, Uganda produced officially €757.61 worth of gold in 2014, while exporting, on the other hand, €420'412.29 worth of gold (Republic of Uganda, Ministry of Energy and Mineral Development, 2015). In this regard, the Enough Project also makes the example of tin ore in 2007: in that year, Rwanda produced \$8 million worth of this mineral, officially exporting at least \$30 million of this raw material (Prendergast & Lezhnev, 2010).

Minerals can be exported independently or through the mediation of some unmarked buying houses. In Rwanda, these houses mix the DRC conflict minerals with those sourced in local mines (Prendergast & Lezhnev, 2010). Moreover, in Uganda and Burundi, in order to “protect” trade in conflict minerals, buying houses work closely with the local army or police officials, which ensure smooth business flows receiving bribes in exchange (Prendergast & Lezhnev, 2010). The high level of corruption and the direct involvement of public officials and military élites in the conflict minerals trade requires huge efforts and vigilance in these transit countries.

Here, an effective system of enforced measures for promoting mineral verifiable documentation should be applied.

At this stage, minerals are imported, smelted and refined. This is a crucial phase, as importers receive the unprocessed minerals and smelt or chemically process them in preparation for distribution to the world market (Sabour, 2010). In order for the minerals to be sold, indeed, they have to be smelted and refined into metals by metal processing companies. These companies are mainly based in East Asia for tin, in Germany, the U.S., China and Kazakhstan for Tantalum, in China, Austria and Russia for tungsten and in the United Arab Emirates for gold (Prendergast & Lezhnev, 2010). Moreover, even Switzerland, Italy, and Belgium may be processing DRC gold (Prendergast and Lezhnev, 2010).

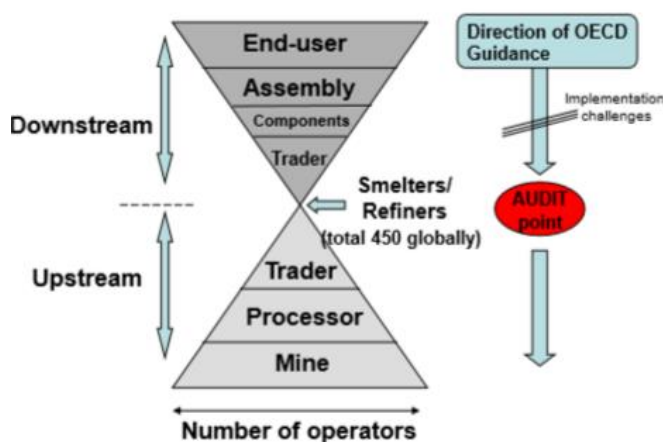


Figure 3.2. Smelters/refiners: the chokepoint of the supply chain. Source: European Commission, 2014a

When minerals are smelted and become metals, it is impossible to distinguish the source of their composite materials. If traceability intervenes before refinement through tags on minerals documented with records subjected to independent audits, then traceability of minerals is possible. If, on the contrary, this stage occurs without any traceability, the identification of a conflict mineral is unconceivable. For this reason, the European Commission describes this phase as the last stage in

which due diligence can be practicable. According to the EC estimation, only 16% (18% in the EU) of 3T smelters and 40% (89% in the EU) of gold refiners provide due diligence (European Commission, 2014a).

The European Commission defines this stage as the “chokepoint” in the conflict minerals supply chain (European Commission, 2014a). This phase marks the border between minerals and metals, upstream and downstream. It is a point of no return as it is decisive for the successful outcome of due diligence. In addition, the number of operators at this stage “shrinks” compared to the other phases (Fig. 3.2): companies that smelt, refine or chemically process minerals are relatively few, when compared to other operators (exporters, trading houses etc.). Therefore, this phase has to be conceived as the core hub of the traceability system, in which a substantial

amount of resources has to be invested. For this reason, many due diligence systems place third-party audits at this stage. Certification, indeed, is particularly needed in the first segment of the supply chain (which ends with smelters and refiners), as the financing of armed groups can occur along any of the steps in the upstream phase. If the third-party audit or any other type of traceability system came to pass before the “chokepoint” (such as, for instance, in mines or in *maisons d'achat*), there would still be the possibility that military and paramilitary groups make profits from transportation or trade. If the audit occurred after the “chokepoint”, as already explained, traceability would be unrealistic and unfeasible because of the impossibility of distinguishing the origin of minerals from metals.

As a final point, minerals – now metals – are ready to become final products. In the case of gold, the banking and jewelry industry are the next destination in the supply chain. In the case of the 3Ts, the electronics industry is the largest purchaser and consumer of DRC tin, tungsten and tantalum. This paragraph particularly focuses on the latter minerals. The now-processed 3Ts usually pass through some intermediate steps. They first become circuits and chips, then cell phones or computer components, finally being sold to the mainstream electronics companies such as, among others, Intel, Apple, Nokia, Hewlett Packard (HP) and Nintendo, where they are assembled and become parts of our cell phones, portable music players, video games, and laptop computers (Prendergast & Lezhnev, 2010; Sabour, 2010). The latter companies, in the majority of cases, do not have a system of traceability, audit and certification. Therefore, potentially, most of our cell phones, laptops and other portable devices will contain conflict minerals from the DRC (Prendergast & Lezhnev, 2010). Although electronics companies are the largest consumers of the 3Ts, there can be other destinations for these melted and refined minerals: they include tin can manufacturers, industrial tool and light bulb companies for tungsten, as well as aerospace and defense contractors (Prendergast & Lezhnev, 2010).

An important issue in this last phase of the supply chain consists in the scarce leverage effect that electronic companies have on smelters and refiners. Since few companies, compared to downstream operators, smelt and refine these minerals, firms in the “chokepoint” are aware of their weight in the supply chain. Therefore, in the absence of a top-down regulation, they do not feel compelled to comply with any type of due diligence. According to the European Commission (2014a), downstream users do not have sufficient bargaining force to lean on smelters and refiners in order to obtain information on the origin of minerals and their trading routes. If, in some cases, data are obtained, they contain errors (European Commission, 2014a).

For this reason, the OECD suggests downstream companies grouping together in order to increase their negotiating power in relation to smelters and refiners (OECD, 2013). Nevertheless, such a cooperative approach is difficult to implement due to high and likely defections.

3.5. Fallacies in the supply chain and issues linked to due diligence

3.5.1. Upstream

As seen in the above section, several problems related to traceability emerge when the conflict minerals supply chain is reconstructed. Apart from considering and deepening the fallacies already noticed, this section highlights other issues identified by important stakeholders in this matter. Starting from the first steps in the supply chain, the most important problem concerns the few transparency measures undertaken in the DRC. As already noticed, there are several non-validated mines, since the majority of miners works in "self-produced" sites and with artisanal methods. This occurs because the DRC, besides being an important 3TG producer, is the country in which these minerals can be found most easily. Particularly for tin, the DRC does not have the largest deposits of these minerals, yet it has the world's richest deposits (Worstell, 2013). Since there is no need for particular skills in order to source conflict minerals, expensive machinery is replaced by untrained local labor, which is much cheaper and easier to exploit for armed groups. Artisanal mines can indeed emerge easily and suddenly, as there is no necessity for any initial investment in massive automated machinery. This determines a high percentage of arduously traceable artisanal mines that can be controlled without difficulty by military and paramilitary groups, which in some areas have the monopoly over the source, transport and trade in these raw materials. A replacement (or regularization) in the mining methods or a better control over irregular mine sites by the DRC authorities can be significant in improving living standards and the working conditions of artisanal miners. Moreover, since the profits of armed groups increase exponentially when there is uncertainty, precarious working conditions and the absence of central government, more control and an improvement in mineral source system could significantly weaken the power of these groups.

Another issue related to traceability is the corruption of state officials and military groups. Among the armed forces controlling the mines, indeed, there are also some groups of the regular militia (FARDC), which behave like the rebels, using their same means and exploiting locals for their personal enrichment. Corruption is also accompanied by poor enforcement of certain

measures in this regard, which are systematically violated or ignored. Among others, the Congolese law banning armed presence in the mine sites and the obligation of registration for exporters and *maisons d'achat* are some of the most significant measures that are subject to continuous breaches. In addition, even the smuggling of conflict minerals, which, not being registered, are not traceable, is high because of a poor enforcement of legislation and the tacit collaboration of some State officials (Stearns, 2012; Transparency International, 2014). Moreover, smuggling deprives the DRC of significant resources, which can be used to enforce rules and fight corruption. One of the most significant factors triggering bribery in the region is the poor living conditions of many soldiers of the regular army (International Crisis Group, 2006): since, in most cases, they live below the poverty line (being paid, on average, \$50/month), this condition can incentivize soldiers to exploit locals and loot villages (Transparency International, 2014). Although President Joseph Kabila has declared many times his commitment to the fight against corruption, proclaiming a “zero-tolerance campaign” in 2009 and creating a financial intelligence unit with the aim of fighting money laundering, there is no evidence of this political will in practice (Stearns, 2012). Indeed, in spite of the launch of this apparently drastic and far-reaching campaign, only few officials have been actually prosecuted (Stearns, 2012). Better domestic regulatory safeguards are therefore desirable in order to ensure legal certainty and respect for rules, as well as to improve the living conditions of the local population and guarantee more effective and reliable due diligence systems.

An additional problem related to the upstream supply chain concerns transit countries: the DRC smuggled minerals registered as local in Uganda, Rwanda and Burundi, further complicating traceability. As already mentioned, even in these countries, there is scarce attention paid to the 3TG origins: conflict minerals are often mixed with locally sourced minerals and smuggling occurs with the complicity of corrupt military officers. In the specific case of gold, smuggling appears as a core problem. According to United Nation assessments in 2014, more than 98% of Congolese gold produced in the previous year was smuggled. Indeed, although the US Geological Survey estimates the production of 10000 kg of gold per year, between January and October 2013, only 180.76 kg of gold had legally left the country, as recorded by official export records (United Nations, 2014; US Geological Survey, 2014; Institute for Security Studies, 2016). The fight against smuggling of minerals, particularly in transit countries, should therefore become a priority for the DRC authorities as well as for its neighboring countries.

Summarizing the main issue related to the entire upstream supply chain, since armed groups do not control only mines, it is important to remember, when applying due diligence, that there may also be problems arising from minerals coming from conflict-free mine sites. As already shown in this –as well as in the last – section, sometimes armed groups make profits from transport (by direct transport or illegal taxation of transporters) or export (by direct smuggling or smuggling through transit countries) of conflict minerals. Thus, any effective model of due diligence cannot be limited only to tracing a single phase of the supply chain, but it must commit to following the entire route taken by the minerals, at least until smelters and refiners, as "contamination" from armed groups can intervene at any stage of the upstream supply chain. Moreover, this type of traceability, alone, may be insufficient to guarantee complete transparency in the supply chain: as already noted, engagement by local governments is indeed essential to achieve good results in applying due diligence.

3.5.2. Smelters and refiners and the downstream phase

As already highlighted, smelters and refiners are an essential hub in the conflict minerals supply chain. This phase has been identified by several international actors as the crucial stage in which due diligence should be implemented with particular accuracy and strength. However, only a small percentage of smelters and refiners pursues due diligence. Moreover, although many of these companies are state-owned, only few of them actually provides traceability (European Commission, 2014a). According to the European Commission, there are several reasons why most smelters and refiners do not carry out due diligence:

- Conflict minerals are relatively cheap compared to the value of the 3TG coming from conflict-free mines (according to the EC estimations, these minerals cost 30-40% less);
- In some cases, there is no sufficient awareness on the existing link between the purchase of conflict minerals and the financing of military and paramilitary groups in the DRC;
- Smelters and refiners are aware of their privileged position in the minerals supply chain, therefore they establish their own social responsibility policies, regardless of the requests coming from some downstream operators. The latter, indeed, usually affirm that they are not able to exert sufficient influence on such smelters and refiners, which often are in a better bargaining position (European Commission, 2014a).

In relation to downstream operators, the EU Executive individuates other significant issues that can negatively affect due diligence initiatives. Among these problems, one of the most significant is the complexity of the path followed by the minerals. Indeed, it is very difficult for an economic operator at the end of the supply chain – especially if it is an SME – to implement autonomous traceability initiatives, as there can be several small and changing intermediate steps between these operators and the smelters/refiners (European Commission, 2014a). Moreover, as imaginable, efforts in this direction can create very high – sometimes unsustainable – costs. Another significant issue concerns confidentiality: one of the biggest obstacles to due diligence, in fact, is that downstream operators cannot disclose sensitive information, including smelters' or refiners' names, because of intellectual property protection, contractual agreements and other types of corporate secrets (European Commission, 2014a). There are additional problems concerning the already mentioned lack of leverage of the downstream operators on smelters and refiners as well as language barriers. With regard to the latter issue, there are often several communication problems with smelters and refiners who are not able to interact in English. This is the case of most smelters and refiners operating in Asia, who make up a consistent world percentage (European Commission, 2014a). If an effective framework of due diligence in the downstream supply chain has to be provided, these problems of communication, bargaining and cooperation between operators and smelters / refiners need to be solved. Considering that, in most cases, gains from having low-cost raw materials are higher than incentives for providing due diligence (European Commission, 2014a), a top-down approach, at least for smelters and refiners, should deal with the problem of conflict minerals with greater efficacy.

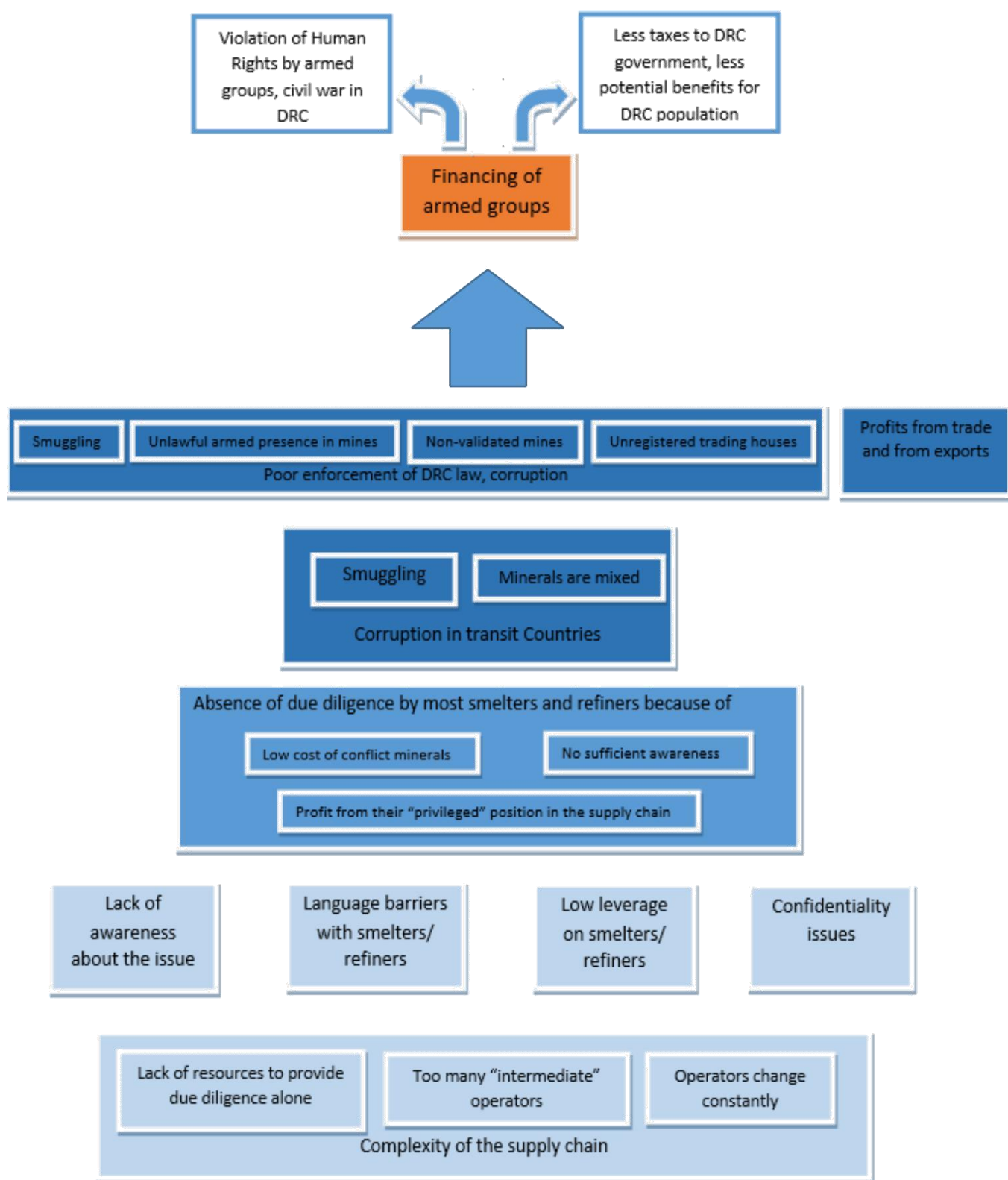


Figure 3.3. Fallacies in the conflict minerals supply chain

3.6. Conclusions

This chapter has investigated the context of conflict minerals, starting from its deepest roots (the cultural substratum in which this phenomenon has developed) and continuing through the analysis of the supply chain, from mines to consumers. In the first part of the chapter, it is concluded that there is a link between the extraction, transport and export of some 3TG and armed conflicts in the DRC. This conclusion should not be underestimated, as it is a prerequisite for every analytical step that will be developed in the following parts of the dissertation. In a subsequent phase, the chapter discusses the issues related to the supply chain of minerals from conflict, and a simplified model in this regard is provided. Through this section, several problems have emerged, both in the upstream and downstream phase. In the former area of the supply chain, the most important issues are related to the context of bribery and corruption in which minerals begin their path towards international markets. Moreover, the role of smelters and refiners characterizes the relationship between upstream and downstream, determining, eventually, the success or the failure of any due diligence procedure. Therefore, any problem linked to traceability in the downstream phase is determined by the behavior of smelters and refiners in the upstream phase. In addition, setbacks such as corruption in the DRC and transit countries, smelters' and refiners' misconduct or complexity in the supply chain encompass other significant problems, which are described in section 3.5. Furthermore, in order to have a well-organized idea of the whole range of problems discussed in the above section, a schematic representation of all these issues is provided (Fig. 3.3).

In both the description of the context and the exposition of the issues related to the minerals supply chain, a common conclusion emerges: the overall phenomenon is very complex and diversified, thus there is no single or 100% effective solution in order to address the issue properly. Each autonomous due diligence initiative, despite being virtuous *per se*, should be supported by a top-down approach initiated by a regulator who deals with the costs of due diligence, avoids cooperation problems and, when needed, increases firms leverage over other actors involved in the conflict minerals supply chain. In addition, accompanying measures are very important in order to support traceability initiatives and intervene at the local level, thus helping to address problems linked to the upstream phase. Legal safeguards that address synergistically all the issues discussed in this chapter, accompanied by local efforts towards transparency and accountability in the mining sector, are crucial in putting an end to the deadly system of production and trade in conflict minerals. If an approach in this direction is not

applied, the possibility that some daily life objects will be produced in a conflict free scenario in the near future is neither feasible, nor credible.

4. DUE DILIGENCE AND THE EUROPEAN CASE

4.1. Introduction

This chapter is dedicated to the EU regulation on conflict minerals, which is the core topic of this dissertation. Here, I briefly discuss the chronological developments characterizing the legislative initiative and its subsequent social and inter-institutional debates. In particular, I distinguish a mandatory and a voluntary approach in the stakeholders' positions, highlighting the main arguments of the two factions and the main criticisms of these pressure groups to the opposing approach. Subsequently, I proceed through a text analysis of the provision, identifying the main differences in the co-legislators' approaches. The Commission's first draft will be also taken into consideration, but greater attention will be devoted to the debate between the European Parliament and the Council. In the light of the text analysis, and considering the discussion provided in paragraph 4.3, I conclude that the European Parliament's position generally coincides with the mandatory approach, while the Council of the European Union adopts a voluntary position. Moreover, I explain the co-legislators' diverging positions recalling the theoretical section provided in Chapter 2.

Before focusing on the European case, I provide a general overview of other national, international, governmental and non-governmental initiatives on mineral traceability. This preliminary section is also very important for two main reasons: on the one hand, it contextualizes the European initiative in a broader regulatory substratum on this matter, while highlighting, on the other hand, the already existing elements that inspired – and that are, in some cases, complementary to – some fundamental aspects of the EU regulation.

4.2. Due Diligence and Global Actors

The EU regulation on conflict minerals is not an isolated case in the global scenario. Many public and private actors and some international and non-governmental organizations, indeed, enacted various due diligence systems in this regard. Starting with the private sector, many firm-led initiatives have been undertaken, such as:

- The Tin Supply Chain Initiative (iTSCi), a project launched in 2011 within the International Tin Research Institute (ITRI) that is particularly focused on the responsible sourcing of tin;
- Solutions for Hope (SFH), started in 2011 by Motorola Solutions and dealing with responsible tantalum sourcing;
- The Conflict Free Smelter Program (2010), which helps smelters sourcing conflict-free minerals in their supply chains (European Parliamentary Research Service, 2014).

There are also some relevant government-supported initiatives, such as the Conflict-Free Tin Initiative, launched by the Dutch government, as well as the Certified Trading Chains Initiative (CTC), initiated by the German Federal Institute for Geosciences and Natural Resources in 2012 (European Parliamentary Research Service, 2014). Nevertheless, the most important of these initiatives is, undoubtedly, the US Dodd-Frank Act, a broad reform of the US system of financial regulation, adopted in July 2010 by the US Congress, which in its section 1502 provides specific measures on conflict minerals. Section 1502 is the first example of national legislation addressing this issue, asking mandatory disclosure requirements for firms importing conflict minerals from the DRC and its neighboring countries (Congress of the United States of America, 2010; European Parliamentary Research Service, 2014). All the countries involved in this system of due diligence are specifically indicated by the provision (Congress of the United States of America, 2010).

Although both the United States and the European Union took, in some respects, similar regulatory actions, there are some differences between the US provision and the European legislative initiative in this matter. Indeed, while the US provision is geographically restricted to the region of the African Great Lakes, the EU proposal involves all conflict-affected and high-risk areas (European Parliamentary Research Service, 2014). This element is very important, as the territorial specificity of the US provision has been often criticized. According to its detractors, the US law, being economically burdensome but geographically avoidable, acts as a disincentive to sourcing minerals in the DRC on the part of importers, creating a *de facto* embargo of these raw materials (European Parliamentary Research Service, 2014). Since many importers sourced the 3TG elsewhere, the price of conflict minerals in the DRC diminished, instability in some areas increased and many miners joined armed groups (Bierbrauer, 2014). Another criticism of the US measure concerns the scarce African involvement in the initiative. Section 1502 of the Dodd-Frank act, indeed, emerges as an outside solution that does not

substantively encompass other measures of political and developmental aid (Dizolele, 2013). In this case, the EU tries to overcome this fallacy, providing accompanying measures or the involvement of the European External Action Service in order to enhance the stabilization process in these areas. Nevertheless, there are some differences among the various EU drafts in this regard, which will be taken into account within the next analytical sections. Despite the various criticisms, many stakeholders welcomed the US Dodd-Frank Act. In this regard, indeed, some of them argue that the US provision has been particularly helpful in triggering the regularization of many mine-sites, improving miners' working conditions (Bafilemba et al., 2014).

Other important international actors undertook significant measures with regard to conflict minerals. In 2010, the United Nations proposed a due diligence system based on five steps: strengthening company management systems, identifying and assessing risks in supply chains, designing and implementing a strategy to respond to identified risks in supply chains, designing and implementing a strategy to respond to identified risks (United Nations, 2010c). Moreover, in its resolution 1052, the UN Security Council called upon states to carry out regulatory actions in order to require due diligence for importers on the basis of the guidelines provided (European Parliamentary Research Service, 2014; United Nations, 2010d).

Even the Organization for Economic Co-operation and Development (OECD) elaborated important guidelines in this regard (OECD, 2013). The OECD due diligence guidance, indeed, currently represents a fundamental point of reference for any regulatory action on conflict minerals. The OECD guidance recalls the UN principles, but its recommendations, in this case, are more oriented towards a voluntary approach. Moreover, the scope of the recommendation is not territorially limited to the Democratic Republic of Congo, but covers all conflict-affected and high-risk areas (OECD, 2013). Since this OECD work is particularly detailed and accurate, the European Union often refers to the guidance in its conflict minerals regulation (European Commission, 2014b; European Parliament, 2015a; Council of the European Union, 2015) and even the US, in 2012, recognized it as international standard for due diligence measures (United States Securities and Exchange Commission, 2012).

Even the DRC national legislation addresses the issue of conflict minerals. The Congolese authorities actually transposed many international initiatives on this matter, and formally due diligence in DRC is mandatory for the 3TG mining sector (European Parliament Research

Service, 2014). The problem, therefore, is the scarce enforcement of existing legislation rather than the lack of legislative measures in this regard. There are several factors behind these implementation fallacies, such as corruption, smuggling and factual control of large mining areas by non-official armed forces, among others. These issues have been broadly discussed in the third chapter of this dissertation, and are one of the main reasons that determine the need for legislation in this matter by – at least – major global actors, Europe included.

4.3. Due Diligence and the European Regulation on conflict minerals

4.3.1. The Commission initiative, the co-legislators' amendments and the political agreement

Since 2010, the European Parliament, denouncing the failure in the protection of human rights and justice in the DRC, welcomed the US provision on conflict minerals, calling upon the Commission and the Council to think about a similar legislative initiative in this regard at the EU level (European Parliament, 2010). The EP reiterated this call also in its 2011 resolution on the DRC (European Parliament, 2011). In the meantime, the EU legislative decision-making system approved some initiatives that indirectly envisaged better transparency in the conflict minerals supply chain, such as the EP amendments to the EU Accounting and Transparency Directive, or the EC proposal for a directive on the disclosure of non-financial and diversity information by certain companies and groups (European Parliamentary Research Service, 2014). Nevertheless, the first step for a conflict minerals regulation has been taken between March and June 2013, when the EU carried out a public consultation on this issue. After completing the latter, the Commission undertook an impact assessment regarding a possible regulation on conflict minerals (European Parliamentary Research Service, 2014).

The first differences in the institutional approaches to the issue of conflict minerals started to emerge between February and March 2014. On 19 February 2014, indeed, the European Parliament Development Committee approved a report, which asked for a system of legally binding due diligence obligations for upstream and downstream companies (European Parliamentary Research Service, 2014). Several civil society organizations welcomed this report. Subsequently, the European Commission announced the legislative proposal on 5 March, publishing also an accompanying impact assessment. The EC position on the issue, however, differs from the EP one, as the first draft proposes a system of voluntary self-certification. While

many industrial groups (and particularly Business Europe) welcomed the Commission's draft, other pressure groups criticized the proposal. At this stage, two different factions started to emerge at the civil society as well as the institutional level. In addition, on 14 April 2015, the International Trade Committee of the European Parliament (INTA) amended the EC draft, strengthening the due diligence system in favor of mandatory traceability to be provided at some stages of the minerals' supply chain (European Parliament, 2015b). The cleavage between mandatory and voluntary traceability became larger with the vote at the plenary session of the European Parliament, on 20 May 2015. Surprisingly, in this circumstance, the system of due diligence has been further strengthened, as the EP required mineral traceability in all phases of the supply chain (Global Witness, 2015).

When the regulation passed from one legislative branch to another, the Council of the European Union expressed a slightly different position, compared to the EP one. This institution, indeed, opted for a system of voluntary disclosure, recalling the Commission's draft with some amendments that do not call into question the optional nature of due diligence. The Council contested the unfeasibility of the EP system for some enterprises, particularly in the case of SMEs and micro-enterprises. Since the co-legislators presented slightly diverging positions on the issue, the Dutch Presidency and the European Commission proposed some mixed systems in order to find the agreement of both legislative branches. After some unfruitful negotiations, an agreement has been reached on a Dutch compromise proposal. The new text set up a mixed system of thresholds based on the volume of the imported minerals, which delimit when traceability is mandatory and when it is voluntary. The volume of the imported 3TG is used as a parameter to exonerate small enterprises and, in particular, firms that do not import a significant amount of conflict minerals, which do not have to set up a costly system of traceability considering the size of the raw materials imported. This threshold system has been provided only for the upstream phase of the supply chain, while the downstream section would mainly maintain a voluntary due diligence scheme.

The final, important step at the political level was reached on 15 June 2016, when the trilogue between the European Commission, the European Parliament and the Council reached an agreement on this last system. The text proposed by the Dutch Presidency will be therefore further discussed, but not substantially modified in its main provisions. This compromise is the result of long and difficult negotiations at the institutional level, which correspond to the debate among several non-governmental, civil society, business and consumers organizations that

aligned along two different positions: a voluntary approach and a mandatory approach. The following sections provide deeper analysis of this social debate, discussing more in detail the main elements characterizing these contrasting approaches to the issue of conflict minerals.

4.3.2. Voluntary Approach

The *voluntary approach* has been particularly supported by the business environment and the industrial groups whose sectors are covered by the scope of the regulation. This position on conflict minerals considers a voluntary due diligence as highly desirable and as the only feasible and economically sustainable system. The first problem envisaged by the supporters of this approach, indeed, regards costs of such a measure. In order to comply with the regulation, indeed, many firms – and principally downstream operators – would face significant raw material cost pressures (IPC, 2013). According to this approach, these costs will be particularly burdensome, as they affect the mining sector with specific regard to some fundamental minerals. Since the European Union strongly relies on imports in raw materials, indeed, a costly mandatory approach is undesirable for European businesses (Business Europe, 2013a; Thomas, 2015). Another important element that is linked to the significant costs of compliance concerns competitiveness. Since European firms are compelled to face these costs, they will also be obliged to raise prices of the product they sell. Therefore, they will be less competitive in the global markets compared to foreign firms that are not applying due diligence (Business Europe, 2013b). This will be particularly evident in the case of small and medium-sized enterprises, which in some cases could not be able to bear the costs of due diligence. As a consequence, they could potentially be forced to exit the market (Dzinkowski, 2015; Business Europe, 2013b). A third issue concerns the impossibility, for downstream operators, to engage in a system of mandatory traceability, as transparency in the supply chain is not guaranteed at earlier stages. Due diligence, indeed, is hindered by “the lack of information infrastructure to track and trace to the point of origin” (IPC, 2013, p.6). Consequently, even in the case of economically feasible traceability, at the current state downstream operators – and in some cases also smelters and refiners – face substantial limitations to their ability to find out exactly the 3TG origins (IPC, 2013). A fourth criticism against a system of mandatory due diligence is also given by the fact that there are already existing firm-led traceability initiatives that are producing good results in this matter, and an additional regulation would mean a duplication of virtuous firms’ efforts that could create supplementary and unfair costs (American Chamber of Commerce to the European Union, 2014).

Most opposition to an EU mandatory system of traceability is justified through the criticisms of the unintended consequences created by section 1502 of the Dodd-Frank Act. According to this approach, therefore, the US measure is the proof that rigid legislation on conflict minerals does not help to solve the issue, rather than the opposite (Business Europe, 2013b). Considering this provision and its effects, indeed, the voluntary approach stresses the possibility of off-putting consequences and socio-economic problems originating from a mandatory system, such as “trade embargos, unemployment, social unrest, deterioration of the livelihood of people in conflict-affected areas” (Business Europe, 2013b, p.1). Moreover, considering that the Dodd-Frank Act focused almost exclusively on the role of the private sector, the political, security and humanitarian aspect has been underestimated (IPC, 2013, p.3). According to this approach, indeed, an almost exclusive focus on the private sector does not help to solve the issue, as this type of legislative initiative, alone, is not sufficient to ensure respect for human rights and the rule of law in the region (IPC, 2013, p.3).

In the light of these criticisms, and considering that other important firm-led initiatives – such as the aforementioned Tin Supply Chain Initiative – have already been effective in contributing to a solution of the issue, the supporters of voluntary due diligence envisage a bottom-up approach that takes into consideration all the issues mentioned above. Moreover, together with voluntary due diligence, this approach also suggests other important measures in this field, such as

- The creation of a “governance angle” (Business Europe, 2013b, p.1); considering that a top-down approach obliging firms to provide traceability is inefficient, unsustainable and probably not practicable, a multi-stakeholders system in which the private sector and civil society are involved is much more desirable (Business Europe, 2013b). According to this approach, the active participation of other actors directly dealing with the issue, accompanied by the exchange of good practices among stakeholders, could stimulate concrete and feasible actions in this matter (Business Europe, 2013).
- The EU regulation as a supplementary measure; considering that many international actors already provided some regulatory initiatives on conflict minerals, the European regulation should not be inharmonious toward these measures. On the contrary, the EU regulation on mineral traceability should take into account the standards already in force, supporting existing voluntary initiatives with particular regard to the OECD Due Diligence Guidance (IPC, 2013; Business Europe, 2013b; Applied Materials, 2014).

- The EU regulation as “a base for a comprehensive approach” (Business Europe, 2014, p.1); the issue of conflict minerals does not just concern trade. According to the advocates of the voluntary approach, indeed, it is mainly a political rather than an economic problem. Therefore, the regulation of conflict minerals should be integrated with other measures that address the issue on the field through the promotion of good governance and security (Business Europe, 2014).
- The creation of incentives; in order to circumvent problems of scarce cooperation, the EU should provide incentives to companies, avoiding obligations and sanctions in case of non-compliance (Applied Materials, 2014).
- A clear indication of “conflict-affected and high-risk areas”; in this regard, clarity is essential in order to provide sufficient information to firms about their duties and responsibilities (Applied Materials, 2014; Business Europe, 2014). If the term leaves room for ambiguity, this element could represent an additional cost to unaware companies (Applied Materials, 2014; Business Europe, 2014).
- The involvement of other regions in the world; considering that extra-European areas are the epicentre of conflicts linked to these raw materials, the European Union should promote security and the rule of law in these areas with the collaboration of local authorities. By doing so, the European provision will result as a joint, rather than external, intervention (Business Europe, 2014).

4.3.3. Mandatory Approach

Contrarily to the voluntary position, the *mandatory approach* argues that a bottom-up solution is not enough to address the issue of conflict minerals adequately. Particular support to this approach comes from major civil society and non-governmental organizations that advocate this issue or are actually operating in conflict-affected and high-risk areas. Considering that existing examples of due diligence have not been sufficient to establish a conflict-free supply chain, these stakeholders argue that a voluntary system of certification would be too weak and ineffective and seek to set up a system that compels firms and other economic operators to do so (Africa Europe Faith Justice Network et al., 2014; Emmott, 2014). Another argument of the mandatory approach lies in the already existing systems of due diligence in other sectors. Considering, indeed, the

cases of the EU regulation in other matters – such as timber, money laundering, eco-management etc. – they affirm that mandatory traceability is not, *per se*, an unknown system in the European legislative environment (Amnesty International et al., 2015). More generally, the focus of the mandatory approach is more concentrated on human rights abuses rather than on economic feasibility.

The Dodd-Frank act is considered as a point of reference even for the advocates of this approach. Nevertheless, according to the mandatory argument, it justifies the need for a compulsory –rather than voluntary- traceability. Contrarily to the voluntary position, indeed, the supporters of the mandatory approach highlight the benefits brought by the US measure (Africa Europe Faith Justice Network et al., 2014; Actionaid et al., 2013; Global Witness, 2013). According to some studies on this matter, indeed, section 1502 of the Dodd-Frank act strongly contributed to the rapid demilitarization of many tin, tantalum and tungsten mines (Bafilemba et al., 2014). Moreover, as a consequence to the US law, armed groups sell conflict minerals for 30 to 60 percent less in order to make the purchase of these raw materials more attractive (Bafilemba et al., 2014). Therefore, even if, in the very short term, mandatory traceability may not totally eliminate this financing, it drastically reduces it: since the purchase of conflict minerals becomes illegal, so it is much more difficult to import it, armed groups have to necessarily lower the price of these raw materials, gaining less from the sale. Another aspect to be considered concerns the particular commercial relations between Europe and the United States: considering that in the latter case due diligence is already mandatory, in the case of a compulsory system, the EU would develop the same responsible sourcing standards as its transatlantic partner/competitor (EurActive, 2014; Africa Europe Faith Justice Network et al., 2014). In addition, the mandatory approach does not see compulsory due diligence as a trade restriction or embargo. On the contrary, it gives incentives to unlawful mines, trading houses and exporters to turn legal (Africa Europe Faith Justice Network et al., 2014). This is particularly true in the case of mineral traceability extended to all conflict-affected and high-risk areas: in this circumstance, indeed, there would be no legally searchable conflict minerals. For this reason, this aspect of the European measure is particularly appreciated by the supporters of the compulsory position (Actionaid et al., 2013; Amnesty International et al., 2015).

Schematizing the main aspects of the mandatory approach, the supporters of this position seek, more specifically:

- A concrete top-down approach; an opt-in system that makes firms choose whether to provide due diligence or not, even if set up by the European regulator, is not, *de facto*, a top-down approach, as there is neither obligation, nor sanctions for non-compliant companies (Africa Europe Faith Justice Network et al., 2014). Voluntary due diligence, therefore, is the only regulatory tool that may ensure a real top-down approach that obliges – rather than incentivizes – economic operators.
- OECD as technical guidance, but mandatorily enforced; like the supporters of the voluntary approach, even the mandatory position promoters acknowledge the importance and the accuracy of the OECD due diligence. Nevertheless, there is the exigence to translate these guidelines into legal text, used in order to give assistance and clarification to the EU companies and, in particular, downstream operators (Amnesty International et al, 2015).
- The adoption of a risk-based approach; an approach that requires companies to evaluate actually and potentially negative impacts coming from their market operations can effectively address critical junctures in the minerals supply chain, protecting responsible business and avoiding embargoes at the same time (Actionaid et al., 2013).
- Effective accompanying measures; considering that due diligence is one of the many tools that can be used to end conflict in high-risk areas, other measures focusing on development cooperation and foreign policy – rather than foreign trade – may increase the effectiveness of the regulation. This will result in a comprehensive and coordinated approach to conflict minerals, that will be, at the same time, helpful in addressing possible problems arising from the change in business operations (Amnesty International et al., 2015).
- Public disclosure; besides mandatory traceability, public disclosure could enhance the credibility of the due diligence system. Moreover, this initiative would befit the scope of the EU transparency agenda (Actionaid et al, 2013).
- Possible, future extension of the material scope; although the current proposal is limited to the 3TG, the scope of the regulation could be broadened in the future. By doing so, with gradual regulatory action, the EU could make a similar provision more economically sustainable, avoiding, at the same time, the possible exploitation of other minerals as conflict-financing resources. The regulation, therefore, should include a clause that allows other raw materials to be

added in its scope in the future, as has been provided for in the US case (Amnesty International et al., 2015).

4.4. The EU regulation on conflict minerals: a text analysis

After the discussion on the social debate, I turn, in this section, to the inter-institutional debate. In other words, I would like to understand how do European legislative institutions conceive due diligence on conflict minerals and which factors determine their different conceptions. Probably the most relevant way to show and understand these divergences comes from the regulation itself. For this reason, in the following subsections, I make a comparison among the EC, EP and Council's draft regulations, with a particular focus on the co-legislators' proposals. The document analysis performed in this part of the chapter considers the main recitals and articles of the EU law on conflict minerals, broadly explaining the most important diverging elements among the institutional actors involved in the discussion of the regulation.

4.4.1. Recitals

Although recitals are not operative dispositions (they precede articles), they have a fundamental role in the overall regulatory framework, as they present the context prompting the legislators to provide for a regulatory initiative in a specific matter. By doing so, recitals explain the main issue, justifying, clarifying and sometimes interpreting several aspects concerning the articles of the legal text. In this regard, many scholars affirm that, although recitals do not have legal value *per se*, they have the fundamental role of creating legitimate expectations. For this reason, their role should not be underestimated, as recital can, in some cases, even dominate the operative provisions when the legal text is interpreted (Klimas and Vaičiukaitė, 2008). Moreover, recitals can have an important function in the case of ambiguity. Considering their explanatory role, they can reassure all players about the interpretation of operative provisions and their effects (Klimas and Vaičiukaitė, 2008). Even in the case of this regulation, recitals provide important clarifications on the nature and the different conceptions of due diligence, as well as the context that gave rise to this regulatory initiative. In addition, references to the difference between the mandatory and voluntary approaches can already be traced in this preliminary section. I therefore proceed, in the paragraphs below, with the analysis of the various recitals stressing the differences between the position of the European Parliament and the Council, with important references to the Commission's draft.

In both versions, Recital 1 of the Regulation clearly highlights the importance of “breaking the nexus” between conflicts and minerals illegally exploited as a “critical element in guaranteeing peace, development and stability” (European Commission, 2014b; European Parliament, 2015a; Council of the European Union, 2015). The recognition of the need to break these links implicitly identifies the existence of a connection between the exploitation of minerals and the ongoing conflicts in some high-risk areas. This recognition provides a first, important legitimacy to act through a regulatory initiative that eliminates, as much as possible, the existence of this nexus. In the subsequent recitals, further elucidations are made about the issue and the areas interested in it (rec.2), some important international actors’ initiatives in this matter and the role of the EU in relation to these initiatives (rec. 3, 4 and 5). Apart from very small modifications, both versions maintain the same text as proposed by the European Commission. However, in recital 5, the European Parliament decided to make an important clarification with recital 5a, which states that the regulation on traceability is not the only way of controlling the financing of armed groups, but it needs the joint intervention, at EU level, of further “foreign and development policy actions” (European Parliament, 2015a). After recalling the previous EC (recital 6) and the EP (recital 7) initiatives on the subject of conflict minerals and due diligence, recital 8 emphasizes the role of civil society organization, which “have raised awareness” on the issue of conflict minerals (European Commission, 2014b; European Parliament, 2015a; Council of the European Union, 2015). Compared to the Council's version, which has not made changes from the Commission's draft, the text of the European Parliament in recital 8 further highlights the issue of the several breaches of human rights, with particular emphasis on women's rights, who are subject of frequent rapes and other abuses. As already mentioned in the second chapter of this dissertation, sexual abuses in the DRC are widespread, as they are used as a tool for morally weakening enemies and subduing and intimidating artisanal miners who are forced to work for armed groups (United Nations, 2010b). This parliamentary emphasis, in my opinion, is not accidental: it should be remembered that, in the same year, the European Parliament has shown specific attention to the issue through the Sakharov Prize awarded to Denis Mukwege, a gynecologist and activist for human rights specialized in the reconstruction of internal physical damages caused by rape. For this reason, further details of the recital 9 in relation to this issue are a confirmation of this EP sensitivity.

If, up to this stage, there have not been particular differences between the two drafts, in recital 9 the first cleavage between the two approaches starts to emerge. Despite appearing in both texts,

the text of recital 9 defines the traceability process as an "on-going, proactive and reactive process" in which companies make sure that their purchases do not finance military and paramilitary groups, the EP goes further. The Parliamentary assembly of the EU, indeed, adds, in its draft, a supplementary recital (9a), which specifies that the regulation reflects the need for traceability "along the entire supply chain from the sourcing site to the final product" (European Parliament, 2015a). This wording represents a breaking point, distinguishing the EP text not only from the Commission draft, but also from the INTA Committee preliminary version of the regulation, which requested traceability only for smelters and refiners. Although, as already analyzed, the latter are a key element in the supply chain of conflict minerals (see, in this regard, Chapter 3), they are not the only hub. For this reason, in the ninth recital, the European Parliament position distinguishes itself from all the other EU institutions involved in the drafting of this Regulation, as the mandatory element – which will be further analyzed in the coming pages – is also associated with the element of the entirety of the supply chain. Moreover, the obligatory character of the regulation is also anticipated in this recital, as the requirement to provide information publicly about their due diligence initiatives applies to "all companies who first place covered resources, including products that contain those resources on the Union market" (European Parliament, 2015). Nevertheless, recognizing the difficulties in implementing what has been affirmed in this recital, the European Parliament adds that the due diligence measures must be proportionate to the size of the companies, their weight and their role in the Supply Chain. However, that statement does not appear particularly specific about what, in practice, is meant by "tailored" obligation. This, indeed, may appear as an insignificant, even contradictory specification. However, it is important that the EP recognizes, in its draft, the issue of proportionality. This recognition, indeed, is implicitly linked to the problem of the economic sustainability of due diligence and will be a meeting point between the different positions as well as a first step for the future compromise that will be proposed two years after the approval of this draft.

After the recognition of the importance of third party auditing for firms' credibility and the improvement of due diligence for upstream operators (recital 10), recital 11 emphasizes the role of public reporting. Moreover, both the EP and Council drafts make an important addition to this section: with recital 11b, indeed, the co-legislators recognize the efforts that some economic operators in the industry of the 3TGs have already put into practice (European Parliament, 2015a; Council of the European Union, 2015). For this reason, if firm-led initiatives have already been undertaken in this regard, the above-mentioned recital states that the Commission

could exempt such "virtuous" firms from the burden of a double auditing – thereby avoiding double costs. The issue of costs for businesses becomes even more apparent in recital 12 of this Regulation. Here, indeed, the Commission, the European Parliament and the Council drafts recognize the practical difficulties that some economic operators – and particularly SMEs – may have in the implementation phase, owing to the costs of auditing, administrative costs and the consequences which that Regulation might have on the competitiveness of European companies worldwide. Nevertheless, there is an important difference between the Commission's draft and the position of the Parliament and the Council: while the EU executive, in fact, proposed as a solution through its "monitoring" in such circumstances, the co-legislators point out that the Commission will have to provide financial assistance to SMEs through the COSME programme (European Parliament, 2015a; Council of the European Union, 2015). This programme, with a 2.3 billion budget at its disposal, enables small and medium-sized enterprises to benefit from the support of the European Union, which provides easier access to loans, guarantees and equity capital, creating an environment favorable to the competitiveness of European enterprises (European Commission, n.d.). As recital 9, this recital is a major turning point, because the issue of costs is a determining factor in the mandatory/voluntary dichotomy. It must therefore be noted that the co-legislators, in this case, have given the Commission the burden of bearing the costs deriving from due diligence.

Recital 13 deals with smelters and refiners. In the third chapter of this thesis, the important role they have in the traceability process is emphasized, as due diligence is not practicable after this phase and may be incomplete before it. In all versions of this recital, the importance of this stage and the unfeasibility of due diligence in the following stages is highlighted. Moreover, the EP and the Council drafts recognize the problem of recycled materials, which "have undergone even further steps in the transformation process" (European Parliament, 2015a; Council of the European Union, 2015). In order to address this issue, all drafts propose a list of responsible smelters and refiners. At this point, another issue, which has also been discussed in the second chapter, emerges: since the 3TGs, from their mining sites, can reach Europe via third countries, and smelters/refiners are mainly based in extra-European areas, it is important that the measures on traceability also consider such countries. This time, the Council position faces this problem with greater accuracy: if, in fact, the Commission and the European Parliament proposed a "Union lists of responsible smelters and refiners", the Council clarifies, in order to avoid legal uncertainty, that the Regulation should set out a "Union list of global responsible smelters and refiners" (Council of the European Union, 2015). This has been provided in order to avoid an EU

self-discrimination for its economic operators originating from the misinterpretation of the provision, which would make the regulation even less sustainable on economic terms. Furthermore, in addition to the above-cited list, the Council proposes a supplementary list of responsible importers (Council of the European Union, 2015). Also in recital 13, the co-legislators refer to an important precedent in the context of conflict minerals: the OECD due diligence guidance. In accordance with this guidance, smelters and refiners should undergo an auditing process by third parties. This auditing appears an important requirement to be included in the aforementioned list. In addition, the European Parliament decided to add another recital (13a), which specifies that due diligence for smelters and refiners (and, therefore, the inclusion in the list) should be mandatory (European Parliament, 2015a). This statement may appear redundant at first sight, considering that recital 9 (and the text of the regulation) asks for mandatory traceability throughout the entire supply chain. Nevertheless, I believe this clarification has been made for two main reasons: to avoid legal uncertainty which may result from a misinterpretation of recital 13 and to further emphasize the role of smelters and refiners in the traceability process. Since the Council does not ask for a mandatory due diligence system, this additional provision is present only in the EP text.

The following recital (14) states that Member States have the task of ensuring the proper application of the rules of due diligence, establishing, at the same time, measures applicable in case of infringements. Instead, the Commission has the task of ensuring the correct implementation of the rules laid down in Regulation (recital 15). However, the Council added, in its draft, a sentence in reference to the application of the advisory procedure in the implementing phase (Council of the European Union, 2015). According to this procedure, the EU executive, before the application of its implementing acts, is obliged to consult a committee in which each Member State is represented (Council of the European Union, 2015). Moreover (recital 15a), both the EP and the Council drafts provide for a two-year transitional period with the aim of leaving time to importers in order to adapt their systems to the new regulation. However, in addition to what is stated above, in the EP version, this period has also to be functional for the setting up of a third party audit system by the Commission while the Council proposal suggests that the Commission recognizes due diligence schemes enacted by governments and other stakeholders (European Parliament, 2015a). Another addition to this recital (15b) provides regular financial assistance and political commitments toward the areas affected by the problem of conflict minerals with the aim of ensuring “policy coherence” and “incentivize and strengthen the respect for good governance, the rule of law but above all ethical mining” (European

Parliament, 2015a). The amendment of the European Parliament on the Commission's version, also adopted by the Council, is linked to what has been said with regard to recital 5a: traceability cannot, alone, ensure stability in conflict-affected and high-risk areas. If this goal has to be achieved, it is important therefore to provide adequate assistance through development aid, both in financial and –if needed- political terms. In this regard, the Council makes another significant addition: while the EU Parliamentary Assembly exclusively envisages the European Commission as the subject involved in such aid, the Council has also included the EU High Representative for Foreign Affairs and Security Policy (Council of the European Union, 2015). This addition is consistent with the purpose of this Regulation: if, on the one hand, this is a measure of internal EU policy that deals with foreign trade, on the other hand, the diplomatic and humanitarian side of the issue is also important. As a result, the role of the High Representative in this area is highly desirable. This role is also emphasized by the addition, in the Council draft, of recital 17, which clarifies that this regulation “incidentally covers areas falling within the Union policy in the field of development cooperation” (Council of the European Union, 2015).

Finally, recital 16 states that two year after the application of the regulation, and subsequently every three years, the Commission should provide a report about the effectiveness and the functioning of the regulation. In broad terms, the three versions are very similar, apart from one element. While the EC and the Council draft, at the end of the recital, state that the report may also be accompanied by “legislative proposals, including mandatory measures” (European Commission, 2014b, Council of the European Union, 2015, rec.16), the European Parliament confirms its position towards a mandatory traceability, referring, in the same passage, to further mandatory measures (European Parliament, 2015a).

4.4.2. Articles

Article 1 of this regulation sets up the objectives and the overall aim of the regulation. In the first section of this article (1.1), there are no specific differences between the versions of the two co-legislators. It is important to note, however, that there is a major difference in relation to the Commission's draft: if, the latter's text refers to "due diligence self-certification" (European Commission, 2014b), in the case of the EP, Article 1.1 speaks of "due diligence certification" (European Parliament, 2015a), while the version of the Council merely refers to "due diligence" (Council of the European Union, 2015). As a consequence, these changes in the co-legislators' texts exclude the self-certification system, opting for other types of due diligence. Note,

however, that there is an inconsistency within the EP text: If, in Article 1, the European Parliament excludes the term “self-certification” from the text, this vocabulary has been maintained in Recital 14. In that case, the Commission's version of the recital has not been changed by the EP, while the Council has deleted this phrase (leaving only the word "certification") in full compliance with Article 1. The second section of this article represents the main hub in the analysis of the entire regulation. If, indeed, up to this point, the references to the different approaches to traceability have been clear, but somehow mild, in Article 1.2 the cleavage between the two drafts (and, therefore, the two approaches) has explicit and particular importance. This article, referring to the object and purpose of the proposal, establishes the basic, fundamental difference between the voluntary and the mandatory nature of due diligence in the two drafts. The EP proposal, indeed, states that the regulation “lays down the supply chain due diligence obligations of all importers who source minerals and metals” within the scope of the Regulation (European Parliament, 2015a). The Council draft, on the other hand, mentions “importers who choose to declare themselves as responsible importers of minerals or metals containing or consisting of tin, tantalum, tungsten and gold” (Council of the European Union, 2015). This last version of the proposal resembles the Commission’s draft, which refers to “importers to choose to be self-certified as responsible importers of minerals or metals” (European Commission, 2014b). In this context, the version of the European Parliament distinguishes from the Council and the Commission ones, as it expressly states that all importers are subject to the requirements of Regulation. By this statement, it follows that the obligation does not derive from the importers’ choice – as it occurs, by contrast, in the other versions, where importers "choose to be self-certified" (EC) or "declare themselves as responsible importers" (Council). Furthermore, in order to provide a better and more accurate interpretation of Article 1.2, the European Parliament also refers to the OECD Due Diligence Guidance. This mandatory version of the OECD guidance befits with one of the main elements of the mandatory approach at the stakeholders’ level.

In Article 1.2a, the co-legislators provide an important addition to the Commissions’ draft. According to this article, indeed, metals that are "reasonably assumed to be recycled" must be excluded from the scope of the Regulation. However, in clarifying this exemption, the Council provides a more accurate text, as it clearly defines the basis for the “reasonability” to which Article 1.2 is referred. In this regard, the Council proposal refers to Article 7(5), which states that in order to prove the origin of the metals, the responsible importer must prove, through specific documentation, that these metals are truly recycled, describing, at the same time, “the supply

chain due diligence measures it exercised in making that determination” (Council of the European Union, 2015). Furthermore, the co-legislators proposed an additional section in Article 1.2 of this Regulation, which, however, does not treat the same subject. In the version of the European Parliament, in fact, Article 1.2b makes a distinction between upstream and downstream in the Supply Chain, stating that traceability shall be tailored to that distinction. The concern of the Council in its version of Article 2b, instead, is the exoneration of stocks from the obligations of the regulation, if they have reached their current form prior to 31 January 2013. Moreover, the EP also adds Articles 1.2c and 1.2d. The former gives further clarification on the need for a flexible system of traceability that considers the “position of SMEs”, recognizing, as already done in recital 12, the effective potential difficulties that these enterprises may have in enacting the obligations (European Parliament, 2015). The latter deals with downstream companies and asks for “reasonable steps” to recognize and solve any problem in their supply chains for the 3TG in conflict-affected and high-risk areas. In addition, both make reference to the above-mentioned OECD Due Diligence Guidance.

While Article 1 of the Regulation describes the purpose and the object of the regulation, the second article deals with the definitions. Article 2, indeed, provides the description of essential concepts for the correct interpretation of the entire measure, such as "conflict-affected and high risk area", "minerals", "metals" and "smelters and refiners", among others (European Commission, 2014b; European Parliament, 2015a; Council of the European Union). Even in Article 2, the definitions given reflect the characteristics of the two legislative approaches. In the case of the EP, for example, the definitions of “responsible importer” and “self certification” are eliminated, as there is no need for them in a mandatory system of traceability (all importers have to be responsible and there is no self-certification). The Council, on the other hand, maintains these definitions, with a little modification: while in the EC draft, responsible importers “choose to self-certify”, in the Council proposal, they “declare” their conformity to the obligations of the regulation. The characteristic of self-certification, indeed, is not present in the Council version; for this reason, even the definition in this matter has been changed into “declaration of conformity” (Council of the European Union, 2015). Furthermore, the Council provides additional clarification in relation to the “mining by-product”, which means the isolation of a mineral obtained from the processing of another mineral that is out of the scope of this regulation (Council of the European Union, 2015). This elucidation demonstrates greater accuracy by the Council’s draft in this matter.

Article 3 of the regulation disciplines the certification system of the importer. The European Parliament, in this case, does not make amendments to the draft of the Commission, which establishes a system of "self-declaration" submitted to the competent authorities of the Member State, accompanied by documentation certifying the due diligence as well as a third-party audit (European Commission, 2014b; European Parliament, 2015a). In the Council's draft, however, "self-certification" becomes "declaration as a responsible importer", and the sentence referring to "third party audits" is deleted. At this point, the proposal of the Council seems to exclude the audit option: however, in subsequent provisions (Article 6), this method is confirmed. Article 4 is linked to Article 3, as it lays down the management system obligation for responsible importer. The only significant difference among the various versions of this article can be found in the EP draft, which added Article 4.1 setting up further clarifications in relation to recycled minerals in accordance with Article 1.2a (European Parliament, 2015a).

Article 5 deals with risk management obligations. Even in this case, no significant amendments have been made among the various drafts. In accordance with this article, importers must identify and solve problems of due diligence in the supply chain, put into practice a strategy to assess these problems through reports and risk management measures, implement risk mitigation efforts and undertaking additional risk assessment in case of changed circumstances while continuing trading or temporarily suspending trade (European Commission, 2014b; European Parliament, 2015a; Council of the European Union, 2015. art.5.1). In these circumstances, importers shall consult and agree on a common strategy "with suppliers and affected stakeholders, including local and central government authorities, international or civil society organizations and affected third parties" (European Commission, 2014b, European Parliament, 2015a, Council of the European Union, 2015. art. 5.2). The strategy of risk mitigation shall comply with the OECD due diligence guidance (European Commission, 2014b; European Parliament, 2015a; Council of the European Union, 2015. art.5.3). Moreover, the Council added Articles 5.4 and 5.5., according to which the identification and assessment of these potential risks shall be implemented on the basis of third-party audit reports, in accordance with Article 6, and then report findings of the risk assessment to its designated senior management, implementing a subsequent strategy (Council of the European Union, 2015).

As already mentioned in this paragraph, Article 6 disciplines third-party audits, that shall be independent, competent, accountable (6.1c) and in accordance to the scope of the regulation. These audits, therefore, refer to the actions undertaken by the responsible importer in relation to

the supply chain due diligence. Both co-legislators add to this article a second section (6.2), which specifies that responsible importers providing evidence that their smelters and refiners are conform to the obligations of the regulation are exempted from carrying out third-party audits (European Parliament, 2015a; Council of the European Union, 2015). This evidence, in the Council's version, is given by the fact that importers source minerals exclusively from the EU listed smelters and refiners, as disciplined by Article 8 (Council of the European Union, 2015).

Article 7 deals with the so-called "disclosure obligation". According to this obligation, importers must necessarily include details relating to their company, a statement of compliance with Article 4, 5, 6 and 7 and an independent third-party audit by a fixed deadline (31 March for the EP, 31 May for the Council). In line with the Commission's draft, the European Parliament confirmed the requirement for a disclosure obligation also relative to previous years, which has been eliminated, on the other hand, by the Council's proposal. Moreover, according to both proposals, this disclosure should not only be submitted to the Member State competent authorities, but must also be directed to its immediate downstream purchasers and to public opinion. In the latter case, the publication on the website of the firm's own due diligence policies is particularly appreciated, as such publication must be carried out "as widely as possible" (EP artt.7.4-7.5; Council artt. 7.3-7.4). Furthermore, in accordance with the definition of "mining by-product" provided in Article 2, the Council requires importers who claim to derive their metals from minerals non covered by this regulation to provide evidence of this determination (Council of the European Union, 2015). In addition to Article 7, the co-legislators approved a section providing a list of responsible importers, which has to be adopted and made publicly available by the Commission. The approval of this list shall be made in accordance with Article 13 (opinion of a committee through advisory procedure), that will be examined at a later stage. Subsequently to Article 7a, the co-legislators have both added an Article 7b. The two versions of this article, however, differ both in scope and subject. The European Parliament, confirming its approach to mandatory traceability, in its Article 7b, requires smelters and refiners settled in the European Union to mandatorily comply to the European system of due diligence, or "a system of due diligence recognized as equivalent by the Commission" (European Parliament, 2015a). If they do not comply to the EU obligations in this regard, Member States' competent authorities, after a notification to the defaulting firm, shall impose penalties that can be retired only after smelters and refiners comply with the provisions of the regulation (European Parliament, 2015a). The Council's Article 7b, on the contrary, deals with the recognition of other supply chain due diligence schemes, which may be submitted to the Commission by Member States, relevant

industry associations and other stakeholders (Council of the European Union, 2015). The Commission may approve -and therefore recognize - these schemes in accordance with Article 13.2 of this Regulation (advisory procedure). Such schemes can still be revisited by the Commission, in case it is found that, during the implementation phase, there are complications related to the scheme itself (Council of the European Union, 2015). Moreover, in the Council's proposal, the EU Executive shall establish an up-to-date register of such schemes, also publishing this register on its website () (Council of the European Union, 2015, artt. 7a.5 and 7a.6).

While the above article deals mainly with importers, Article 8 provides a list also for smelters and refiners. This article is also present in the Commission's version. As in the case of Article 7, the Commission has to adopt and publish this list; anyway, with regard to Article 8, the adoption of the list should be carried out after the OECD Secretariat has been consulted (European Commission, 2014b; European Parliament, 2015a; Council of the European Union, 2015). Moreover, in the event of a later non-compliance with the obligations of this regulation by smelters and refiners, the EU executive must delete them from the list.

Article 9 sets up obligations concerning competent authorities, their functions, their individuation by each Member State and the Commission obligation to publish an updated list of these authorities (European Commission, 2014b; European Parliament, 2015a; Council of the European Union, 2015). Generally speaking, the proposals of the European Commission, the European Parliament and the Council do not present substantial differences in this regard. Even in the case of Article 10 – ex-post checks on responsible importers – there are no diverging positions among the co-legislators. Nevertheless, the Council includes an additional paragraph (10.5) compared to the EP and the EC, with the aim of providing greater clarity with regard to the above-mentioned checks. Through this section, indeed, the Council requests the Commission to prepare a handbook containing implementing guidelines that indicate to the Member States' competent authorities the appropriate steps for proper implementation of Article 10 (Council of the European Union, 2015). Article 11 is connected to the latter article, since it deals with records made by competent authorities on the basis of Article 10. Following the supervisory phase, indeed, these authorities should record the results of their checks, keeping those results for at least five years (European Commission, 2014b; European Parliament, 2015a; Council of the European Union, 2015). Even Article 12 deals with competent authorities, with particular reference to cooperation among them. This article states that the aforementioned authorities are

obliged to share information and cooperate. Such cooperation, however, must be carried out in compliance with European legislation on data protection and disclosure of confidential information (European Commission, 2014b; European Parliament, 2015a; Council of the European Union, 2015). In addition to the EC draft, the co-legislators set up implementing guidance for economic operators, and in particular SMEs, with the aim of providing further clarifications on how to best identify conflict-affected high-risk areas (European Parliament, 2015a; Council of the European Union, 2015). Even this article, as well as other provisions in the regulation, explicitly refers to the OECD due diligence guidance. Moreover, the role of the OECD is also important with regard to the preparation of the implementing guidance, as it has to be consulted, together with the EU External Action Service, by the EU executive. Article 13 addresses the issue of the committee procedure. As expressed by this measure, the EU executive shall be assisted by a Committee, as determined by the regulation on the Member States' control of the exercise of implementing powers conferred on the Commission (EU 182/2011). Article 14 gives to Member States the competences for laying down rules applicable to infringement (European Commission, 2014b; European Parliament, 2015a; Council of the European Union, 2015). Even in the case of Article 14, all proposals are substantially identical.

Article 15 disciplines measures related to reporting and review. According to this provision, Member States shall submit their reports by a determined date (30 June for the EP, 31 August for the Council), which testifies the implementation of the regulation during the previous year. Moreover, in accordance to the EP draft, the Commission shall provide a report, based on the Member States' reports, which shall be submitted to the co-legislators every three years (European Parliament, 2015a). The latter provision has been deleted in the Council's version of the regulation. This is not the only difference between the two drafts in relation to this article. The European Parliament, indeed, adds to its proposal Article 15b, regarding accompanying measures. The provision of such complementary initiatives is related to what has been said by the European Parliament in recital 5 of its draft. Indeed, since due diligence is not the only tool for bringing stability in the 3TGs conflict-affected and high-risk areas, it is important that the regulation shall be accompanied by other measures in order to ensure the overall effectiveness of the regulation (European Parliament, 2015a).

Another reason why the European Parliament has provided for the insertion of Article 15b concerns its approach to due diligence. Since, in the EP proposal, traceability is mandatory, many companies will have to incur burdensome costs. For this reason, according to the EP draft,

the Commission shall provide measures that can offset these costs (European Parliament, 2015a). In this article, the European Parliament tries to “tailor” the mandatory approach to the situation of small economic operators. Anyway, the EU Parliamentary Assembly does not set actual measures for addressing the issue of the costs, opting for a simple transfer of this task to the EU Executive. Finally, Article 16 deals with the entry into force of the regulation.

4.4.3. Considerations: mandatory and voluntary approach in the co-legislators’ drafts

The text analysis provided in the above section shows that, within the regulatory action phase, the EU institutional legislative decision-making system has not a joint idea on how regulating on conflict minerals. The European Commission, the European Parliament and the Council of the EU, indeed, present many differences in their legal text, and the co-legislator positions, in the discussion phase, mirrors the stakeholders’ debate in many respects. Before considering the significant differences among the different proposals, I would like to point out that the drafts encompass many similar elements as well. Apart from the literal presence of many identical parts, the Commission, the European Parliament and the Council share some important contents that give a specific slant to the entire provision. An example is the frequent reference to the OECD Due Diligence Guidance in all drafts, which the EU considers, in many circumstances, as a model and uses as a technical support. The particular consideration given to the OECD guidelines confirms the statement according to which it is currently a consolidated international standard, as it is a point of reference for major international actors, Europe included. Moreover, the consideration of the OECD Due Diligence Guidance has been also a basis of mutual agreement between the mandatory and voluntary stakeholders’ approaches and this convergence has been mirrored by the co-legislators’ drafts. Furthermore, it is important to notice that the OECD does not just have a passive role in the operative phase of this regulation; in many cases, indeed, the Commission shall consult this international organization when it enacts some provisions of the regulation. Other important similarities between the co-legislators’ drafts are the provision of a list of smelters and refiners, the setting up of a risk management system, the particular attention devoted to the avoidance of double efforts in case of “virtuous” firms and the dispositions with regard to recycled materials. Nevertheless, although many of these aspects are included in the co-legislators drafts, some of them are particularly stressed either by the European Parliament or by the Council, depending on the approach used by each of the legislative branches.

Despite the aforementioned similarities, the drafts also present substantial diverging elements. Probably the most relevant difference between the co-legislators' drafts is Article 1.2. This provision is a regulatory watershed distinguishing the mandatory and voluntary approaches in the two texts. As already mentioned, the Parliament disposes mandatory traceability, whereas the Council sets up a voluntary system of due diligence. The division between the two approaches is not an isolated case within the text. However, although many articles and recitals refer to this diverging aspect in the two drafts, Article 1.2 is the concrete disposition that clearly determines this division. Other important peculiarities distinguishing the drafts confirm the direction of the EP and the Council, respectively towards a mandatory and voluntary position. In the following paragraphs, therefore, I will briefly mention these distinctive elements in the two proposals.

Starting with the European Parliament, the first element that has to be highlighted is the particular care devoted to human rights abuses in conflict-affected and high-risk areas. In many dispositions, this topic is treated with greater accuracy and emphasis compared to the Council's draft. For this reason, besides Article 1.2, the mandatory element is reiterated in various parts of the text. Another distinctive aspect of the EP measure concerns accompanying measures. With this additional provision, the European parliamentary assembly aligns with another request of the mandatory approach advocates. Even the Council, in its draft, highlights that due diligence is not the only method to ensure stability in conflict-affected and high-risk areas. Nonetheless, in this regard, the Council is less accurate than the European Parliament, just considering the involvement of the EU External Action Service but eliminating the EP amendment. The parliamentary emphasis on the need of more stringent measures to tackle humanitarian tragedies in some world areas, however, is sometimes stressed at the expenses of the overall clarity and economic feasibility of the provision. In some passages, indeed, the EP proposal is much more imprecise, sometimes even ambiguous. With regard to the costs for SMEs, for instance, the European Parliament acknowledges the possible difficulties that these enterprises may incur; nevertheless, there is no clear regulatory answer to this issue. The references to "tailored" or "proportionate" measures, made, for instance, in Article 1.2 or in recital 9 of the EP draft, are not clear enough. It is, indeed, not specified how the regulation is tailored, considering that due diligence is compulsory to all companies, regardless their size (and the costs they have to deal with) and their position in the supply chain. It may be argued that the EP actually provides some accompanying measures also for SMEs. However, its approach is less concrete on this issue, compared to the Council draft. Through the above-mentioned measures, indeed, the European Parliament simply delegates the European Commission in order to address the problem of

economic unsustainability, regardless of the feasibility and the costs of possible provisions in this field. Summarizing the main argument, the European Parliament is more stringent towards economic operators, but less precise on the economic sustainability of the measure.

The Council's draft, on the contrary, sets up a less stringent opt-in due diligence system. The top-down approach that obliges enterprises to provide traceability, in this case, enters into force only if economic operators decide to declare themselves as responsible importers. Therefore, compliance is not determined by the provision *per se*, yet it is subject to the firms' will. However, greater attention is dedicated to other elements, such as the economic sustainability of the regulation, and several dispositions show this political sensitivity. With regard to disclosure obligations, for instance, the Council opts for less stringent regulation even in this matter, recognizing the difficulty downstream operators incur when they investigate the conflict minerals' supply chain. Compared to the EP draft, the Council proposal gives greater clarity to enterprises operating in the sectors covered by the regulation in many other regards. The concept of mining-by-product, for instance, is introduced and disciplined in order to avoid ambiguity, and there is an additional provision regarding ex-post checks that calls upon the Commission to develop a handbook with the aim of creating clearer guidelines for Member States' competent authorities in the implementation phase. Even the provisions concerning exoneration from the scope of the regulation in case of recycled materials, despite being also included in the EP draft, is more precise in the Council text. Another example of this care for economic sustainability is the inclusion of Article 7b in the Council draft, which further specifies that the Commission can recognize other, alternative due diligence schemes. This provision has been included in order to avoid double efforts (and therefore double costs) for enterprises that already provide due diligence, but through different means. Contrarily to the EP proposal, the Council draft is less accurate in providing complementary regulatory initiatives in the matter of developmental aid: despite the role of the High Representative being highlighted, indeed, specific measures are not included in the legal text.

In the light of the theoretical analysis provided in Chapter 2 of this dissertation, this differentiated approach finds its explanations in the different interests pursued by the co-legislators in the regulatory action phase. As already highlighted, indeed, the European Parliament opts for a stringent, binding regulation, which shows more care for human rights safeguards. By doing so, the parliamentary assembly of the EU acts as a spokesperson for those major civil society organizations that asked for a system of mandatory due diligence. This

legislative approach adopted by the European Parliament, therefore, mirrors these interests at the expenses of the objectives pursued by economic operators in the extractive sector. This choice, from a private/institutional interest point of view, seems to be the most rational approach to the issue, considering the composition of the European Parliament and its pure legislative nature since it is directly elected by the EU citizens. The Council of the European Union, on the other hand, seems much more careful towards small and medium-sized enterprises compared to the European Parliament, as it sets up a more feasible system that does not necessarily impose high costs to economic operators. In its regulatory action, the Council sacrifices a more stringent regulation in this matter in favor of a system that upholds European competitiveness. Even in this case, the Council preference can be explained under a rational choice institutionalist point of view. The Council, indeed, discusses and amends legislative initiatives, as a common legislative branch does, but it is made up of members of national executives that do not pass from direct elections. Moreover, at the technical level, laws are discussed within the Coreper by States' attachés and experts, who are bureaucrats rather than professional politicians. They receive directives from the central, national government and elaborate negotiating strategies. Consequently, national governments – rather than voters – are the direct principals in this case, and the major interest of this institution is represented by budget – rather than vote – maximization. In order to avoid excessive costs, the Council stresses the importance of economic sustainability, at the expense of a stricter system for avoiding financing armed groups in conflict-affected and high-risk areas.

4.5. Conclusions

After a short preliminary section, this chapter has broadly discussed the EU regulatory measure on conflict minerals. In particular, I concentrated on the stakeholders' positions, distinguishing a voluntary and a mandatory approach towards due diligence. Subsequently, a broad section has been dedicated to the core analysis of this chapter: the texts proposed by the EU legislative decision-making institutions, with particular focus on the co-legislators' approach. Through the text analysis, I individuated a double parallelism between the Parliamentary draft and the mandatory approach, on the one hand, and the Council proposal and the voluntary approach, on the other. Moreover, recalling the analysis provided in the second chapter of this dissertation, I explained these diverging positions through rational choice institutionalist rationales.

Several interests emerged during the legislative discussion phase, highlighting a trade-off between economic and social/human rights exigencies. On the one hand, the regulation is

required to be as effective as possible in opposing armed groups financing, ensuring, on the other hand, EU economic operators' competitiveness in the 3TG global market. This tension between economic and social efficiency has contributed enormously to the enhancement of the interinstitutional debate at the European level. The double exigency of ensuring economic stability in the 3TG mining sector and human rights protection in conflict-affected at high-risk areas is difficult to balance in a single legal text, as the two interests can be mutually exclusive in many regards. Anyway, in order to produce a legislative outcome, a compromise will be reached in this regard. If the European legislator would want to achieve this objective, an acceptable solution for the EU institutions should be found, and an equilibrated compromise proposal ought to be located in a balanced position in the trade-off between efficacy in ensuring human rights and sustainability for EU economic operators.

5. THE COMPROMISE PROPOSAL AND THE POLITICAL AGREEMENT

5.1. Introduction

The last compromise proposal on conflict minerals regulation, elaborated by the Dutch Presidency of the Council of the European Union and then informally approved by the European Commission and European Parliament delegations in June 2016, is a turning point in the inter-institutional debate around this issue. This chapter is devoted to the description of the main elements of this compromise, accompanied by analytical comments and considerations that take into account the information known so far about the final draft. Moreover, the entire analysis will be performed in the light of the division between mandatory and voluntary approach, which has been provided in the last chapters of this dissertation. Chapter 5 includes a first section that contextualizes the compromise proposal and the subsequent political deal in the background of the trilogue negotiations during the Dutch Presidency. This preliminary section is provided in order to give a general idea of the context in which the new draft has been developed. Within this section, important clarifications will be provided concerning the so-called “trilogue” between the European Commission, the European Parliament and the Council of the European Union. This sub-section highlights the peculiarities of this informal institution (the trilogue) and the motivations that usually push the co-legislators to use this expedient during legislative processes. Moreover, a second brief sub-section will be devoted to the discussion on the initial reactions of some institutional and non-institutional actors involved in the debate over EU conflict minerals regulation. This part has been provided in order to give a preliminary idea about the feedbacks given by some members of the institutions directly involved in the bargaining process as well as by stakeholders who have influenced the inter-institutional debate in the last two years.

After the background sections, the following discussion will regard the main elements of the proposal. Considering the lack of transparency that characterized negotiations, a full compromise text is unavailable at the moment. Nonetheless, since discussions on some technical aspects are still likely to continue in the following months, a text analysis at this stage risks being useless. The subject analyzed in this section, therefore, will be the *main terms of the compromise*, which are highly unlikely to be modified in substance, considering that the political deal is based exactly on these elements. For this reason, instead of the legal text, the sources used in this phase are official institutional press conferences, newspapers articles and a document published online

by an EP group that highlights the key points of the deal. After the enumeration of the main terms of the political understanding (5.4.), an analytical section will critically evaluate the aforementioned elements in the compromise proposal. In particular, the decision to distinguish mandatory and voluntary due diligence on the basis of import thresholds will be treated in depth. A final section (5.5) will eventually summarize the key argument of this chapter, including some general conclusions on the final compromise, based on the information and the analysis provided.

5.2. Context of the proposal

After almost three years of negotiations, the Dutch Presidency of the Council of the European Union elaborated a compromise proposal with the aim of overcoming the impasse created by the co-legislators' mandatory and voluntary approaches. This new draft has the main aim of finding an equilibrium between the economic and social rationales in future EU conflict minerals regulation, encouraging both economic sustainability in Europe and effective respect for human rights abroad. The compromise was reached after several unfruitful informal negotiations launched on February 2016 by the European Commission, the European Parliament and the Council of the European Union (EU Trade Insights, 2016). At the basis of the compromise, there is a singular regulatory device consisting in a specific threshold system that makes due diligence mandatory for firms importing 3TG from conflict-affected and high-risk areas up to a certain amount (Littenberg et al., 2016). Through this expedient, "all but the EU smallest importers of tin, tantalum, tungsten, gold and their ores will have to conduct due diligence checks on their suppliers" (European Parliament, 2016). Therefore, the decision to set up thresholds determining either mandatory or voluntary due diligence has been elaborated in order to make the regulation economically sustainable for small importers without undermining excessively the overall efficacy of the measure in ensuring political stability and ending armed conflicts in conflict-affected and high-risk areas.

The role of the Dutch government in reaching this deal has been fundamental. Its Presidency of the Council, which started in January 2016, has been particularly committed in this regard, seeking to conclude the discussion of the proposal before the end of its term (Conflict Minerals Platform, 2016a). The Dutch sensitivity to this issue is particularly evident at the national level, as many government-supported due diligence schemes (such as the aforementioned Conflict-free Tin Initiative), some of which have been managed at the level of the royal family (de Ruyt et al.,

2016), have been promoted since early 2010s. According to its programme, the Netherlands Presidency of the Council declared also to “launch trilogue talks between the Council, the Commission and the European Parliament” in this regard (Conflict Mineral Platform, 2016a). Nevertheless, the firsts of these talks have not been particularly fruitful (de Ruyt et al., 2016). Only in the latest weeks of the Dutch Presidency, a compromise proposal has been jointly considered as a good basis for an inter-institutional compromise, which was reached, on an informal level, by the European Commission, the Council and the European Parliament on 15 June. A particularly strong lobbying activity was registered until that date. On the eve of the political understanding, for instance, the Dutch Presidency received an open letter signed by 130 civil society organizations asking for mandatory due diligence in the entire supply chain (Global Witness et al., 2016). The inter-institutional agreement has been eventually reached on a mixed system based on the above-mentioned import thresholds. Although a complete, official final text on conflict minerals has yet to be determined, the new political agreement, reconciling the mandatory and voluntary positions at the institutional level, gives a green light to the adoption of a definitive proposal in this regard in the coming months, after some conclusive technical negotiations (European Commission, 2016).

5.2.1. The “trilogue”

A faster compromise between the co-legislators has been made possible through resort to an informal meeting between the representatives of the three legislative institutions. This unofficial type of consultation is called “trilogue”. In order to elucidate on this informal procedure, this section briefly explains the role of the trilogue in the legislative decision-making system at the EU level.

According to an EP definition, trilogues (or trialogues) are “informal tripartite meetings on legislative proposals between representatives of the Parliament, the Council and the Commission” which aim to “reach agreement on a package of amendments acceptable to both the Council and the Parliament” (European Parliament, 2014, p.19). The use of these informal meetings was introduced after the establishment of the co-decision procedure, in order to respond to practical necessities arisen with the growing legislative work under this new decision-making system (Häge and Kaeding, 2007, p.344). In the first phase, trilogues were used after the co-legislators’ second readings, in order to prepare the conciliation committees (Shackleton, 2000). Moreover, in recent times, considering the benefits of these meetings in terms of rapidity

and efficacy, trilogues have been increasingly used within the EU legislative system, and the Council envisaged an extension of the trilogue procedures to the second and first readings in order to facilitate the discussions between the co-legislators (Farrell and Héritier, 2003). In this regard, euobserver.com, an online newspaper specialized in EU affairs, estimated the use of around 1000 trilogues in 2013 alone (Fox, 2014).

A “standard” trilogue is usually made up of the Permanent Representative and the working group chair of the rotating Council Presidency (for the Council), the chairman of the relevant EP committee, rapporteur and -possibly- shadow rapporteurs from other political groups (for the European Parliament) and an EC director or director-general (for the European Commission) (Häge and Kaeding, 2007, p.344). The main working field in which the experts of the three legislative institutions base their negotiations are the so-called “four-column documents”, in which the first three columns present the positions of the Commission, the European Parliament and the Council, while the last one contains the compromise proposal (European Parliament, 2014, p.19). Trilogues can be hosted either by the European Parliament or by the Council and are chaired by the host co-legislator. Within the debate, the European Commission has the role of the mediator between the European Parliament and the Council, with the aim of facilitating an agreement between the two institutions (European Parliament, 2014, p.19).

An important feature of trilogues is that they take place behind closed doors. Since the level of information during ongoing negotiations is very low, the procedure is characterized by a general lack of transparency. For this reason, many campaigners argue that trilogues are neither just nor democratic (Perez, 2016; Dolan, 2015). Moreover, in September 2015, a coalition of 18 civil rights organization sent an open letter to the President of the European Parliament, the President of the Commission and the Council Secretary-General in order to end an “unacceptable democratic deficit in the EU decision-making” (EDRi et al., 2015). In this regard, many theorists and academics presented their approach towards this informal institution. Häge and Kaeding, for instance, argue that this procedure usually enhances the leading role of the Parliament during the inter-institutional debates, as this legislative branch has better resources for concluding early negotiations compared to the Council (Häge and Kaeding, 2007, p.357). Moreover, during this procedure, the EP –which usually opens its discussions to the public-gains output legitimacy (which results from rapidity and efficiency in producing legislative outcomes), losing, on the other hand, input legitimacy (given by transparency in the legislative process) (Häge and Kaeding, 2007, p.357).

With regard to the conflict minerals regulation, the agreement on a common approach was reached after three unproductive trilogues, which started on February 2016 and ended with the aforementioned June compromise. In this regard, the Dutch particular predisposition to find a rapid political deal is fully coherent with the Presidency willingness to end the negotiations on the issue before the end of its term. Moreover, considering that, in general, every rotating Presidency tends to conclude as many legislative debates as possible during its semester (European Parliament, 2014, p.19), the crucial role of the Dutch delegation in the preparation and the success of the trilogues is even more clearly understandable. Finally, bearing in mind that the positions of the Parliament and the Council were so divergent, the trilogue talks have been fundamental in order to reach an agreement without further delay. Therefore, if, on the one hand, these informal meetings may have lacked transparency, on the other hand, they have been more rapid and efficient than the standard procedures, laying the foundations for a swift regulatory outcome in this regard.

5.2.2. Early reactions

The political deal triggered broadly positive reactions at the institutional level. The trade Commissioner Cecilia Malmström, for instance, affirmed that the new compromise “will help trade to work for peace and prosperity, in communities and areas around the globe affected by armed conflict” (European Commission, 2016). Even the European Parliament expressed its satisfaction with the Dutch Presidency proposal (European Parliament, 2016). In this regard, Judith Sargentini, a Green Party Member of the EP (MEP), defined the compromise as a “breakthrough” (Lewis, 2016), while affirming, at the same time, that this is a “partial response” that could be further modified in the near future (Lewis, 2016). Moreover, according to Rapporteur Iuliu Winkler, “this framework paves the way for an effective and workable EU Regulation that will make a real impact on the ground” (European Commission, 2016). Nevertheless, not every member of the European Parliament has the same opinion on the June political deal. This is the case of Maria Arena, a Belgian socialist MEP, according to whom “the EU is rapidly becoming the weak link in the mineral supply chain. While this [the new agreement] is an important step, the EU should have gone much further to make full use of a unique opportunity to make a real difference” (Banks, 2016).

The general enthusiasm at the EU institutional level has not always been shared by many civil society organizations. Some of them, indeed, argue that the compromise may allow for the

continuation of the conflict among armed groups in conflict-affected and high-risk areas (Amnesty International, 2016), while others see the new proposal as a “missed opportunity” for definitively curbing armed conflicts linked to the 3TG (Africa Europe Faith and Justice Network, 2016). The new proposal, indeed, does not require downstream operators to provide mandatory due diligence, being mainly focused on the upstream phase -smelters and refiners included- (Conflict Minerals Platform, 2016b). According to Iverna McGowan, Head of Amnesty International’s European Institutions Office, the new compromise “a half-hearted attempt to tackle the trade in conflict minerals which will only hold companies importing the raw materials to basic checks” (Amnesty International, 2016). Other sources express different opinions on the issue. This is the case of 3E, a Verisk Analytics company specialized in the provision of data and services concerning supply chain obligations, which argues that the new European law would be strong enough to create a significant leverage effect on conflict minerals supply chain, helping U.S. firms already providing due diligence under the Dodd-Frank Act (Wallerstedt, 2016). Even if the current deal excludes part of the conflict minerals supply chain from due diligence obligations, it is a first step towards further actions in this matter, and further measures in this regard are not excluded in the near future. The European Commission confirmed this approach, declaring its engagement in carrying out “other measures - including the development of reporting tools - to further boost supply chain due diligence by large and smaller EU ‘downstream’ companies” (European Commission, 2016).

5.3. Main terms of the compromise proposal

As already mentioned during this dissertation, the full, definitive text of the compromise has not yet been published. Nevertheless, EU institutions’ press conferences, press releases and many other reliable sources anticipated the main elements on which the final text will be based. Among these sources, a document is particularly important in individuating the most important provisions at the basis of which the compromise was reached. This document presents the political understanding following the 15 June trilogue and has been published online by the Greens in The European Parliament in order to provide transparency on the ongoing negotiations (London Mining Network, 2016; *Political Understanding following the 15 June trilogue*, 2016). Although the literal presentation of the final text is not provided, the document on the political understanding published by the Greens gives a clear outline of the main regulatory turning points of the compromise proposal. This document, as well as other researches on this matter based on press conferences, press releases, Commission, Parliament and Council proposals and one-on-

one conversations carried out by various stakeholders (Littenberg et al., 2016), will be the main sources used in order to present the elements below.

The compromise proposal includes, among others, the following terms:

- Significant role of the OECD due diligence guidelines; the new political understanding does not call into question the importance of the OECD guidance. This approach confirms the role of this document as an international model on addressing the issue of conflict minerals, already conferred to the OECD guidelines by the United States Security and Exchange Commission (2012). In the European case, this role will be particularly highlighted in article 5 and 6 of the regulation, which would deal, respectively, with risk management obligations and third party obligations (*Political Understanding following the 15 June Trilogue*, 2016).
- Recognition of due diligence schemes; another central point of the deal will be the recognition of existing and future due diligence systems, in order to enhance good practices without double efforts and costs for economic operators. The acceptance criteria for “alternative” due diligence schemes will be established in line with the aforementioned OECD due diligence guidance. These criteria will be either included into the regulation or adopted as a package through a delegated act (*Political Understanding following the 15 June trilogue*, 2016).
- Import thresholds; the upcoming regulation will cover all 3TG imported from conflict-affected and high-risk areas exceeding a specific annual threshold. This provision has been established in order to make due diligence effective and workable at the same time (*Political Understanding following the 15 June Trilogue*, 2016). The thresholds will cover minerals and metals according to type and distribution of imports in the industry. The coverage will regard the vast majority of imported volumes in each of the 3TG. As a consequence, only small upstream importers will be exempted from mandatory due diligence. Although thresholds for reporting have not yet been officially declared, it is expected that the regulation will cover more than 95% of minerals imported (Littenberg et al., 2016). Since import thresholds are addressed exclusively to upstream importers, there will be no mandatory requirements for manufacturers and importers/sellers of finished products that may contain metals derived from conflict minerals. Nevertheless, although the downstream supply chain will not be covered by the due diligence obligations, the Commission will develop specific performance indicators in order to encourage downstream companies to report voluntarily on their sourcing practices (de Ruyt et al., 2016).

- Exemption from due diligence in specific circumstances; the exemption of mandatory traceability in some particular cases, recalled in the Council and/or in the EP drafts, are reconfirmed in the compromise. There are basically three circumstances in which exemption occurs: grandfathering, by-product and recycled metals (*Political Understanding following the 15 June trilogue*, 2016). With regard to grandfathering, which is a clause that exempts some entities from full obligations deriving by a regulation on the basis of preexisting practices, the compromise proposal states that stocks are excluded from the scope of the regulation, if importers demonstrate their creation before a specific date (31 January 2013 according to the Council draft). Concerning “mining by-product”, a system by which some specific metals are not derived from minerals covered by the regulation, the compromise proposal confirms the Council provision, which exonerates metals obtained through a “by-product” method from the obligations set up in the regulation. Even recycled metals are exempted from mandatory due diligence, as established in the EP and Council’s drafts.

- External expertise to individuate conflict-affected and high-risk areas; according to the compromise, the Commission will call upon external experts in order to provide a list of conflict-affected and high-risk areas. These experts will be selected among the best-quality external expertise, which will create a list in consultation with the interested parties. The aforementioned list will be indicative and non-exhaustive in nature, and will be included in a specific Commission Handbook, which will be mainly addressed to economic operators in this field. Even companies that do not source minerals or metals in the areas indicated in the list shall maintain their compliance with the due diligence provisions established in the regulation.

- Review clause; the European Commission shall periodically review the functioning and the effectiveness of the Regulation. Moreover, the EU Executive shall discuss the review report with the co-legislators. The review operated by the Commission shall include an independent assessment on all the 3TG downstream operators using due diligence practices and shall also calculate the economic impact of thresholds on small and medium-sized enterprises. On the basis of the report and the aforementioned discussions, the Commission may provide further legislative proposals in this matter, which can include additional mandatory measures (*Political understanding following the 15 June trilogue*, 2016).

- Transitional period: a transitional period after the end of the negotiations will be also confirmed in the compromise in order to let economic operators covered by the measure adapt to

the obligations set up in the regulation (*Political Understanding following the 15 June trilogue*, 2016).

5.4. Considerations: mandatory and voluntary approaches in the compromise proposal

Considering the characteristics of the compromise proposal described in the section above, there are many aspects that should be highlighted with respect to the analysis carried out up to this moment. The most remarkable element of the political deal is, in my opinion, the establishment of thresholds. I think that this regulatory device is particularly innovative in dealing with the key issues highlighted in this dissertation, as it takes into account the main interests of the mandatory and voluntary approaches addressing the fallacies in the conflict minerals supply chain with from an all-embracing slant. In the paragraphs below, I consider the presence of import thresholds in the regulation from a mandatory and voluntary point of view in order to explain the elements of innovation and the balancing function of import threshold in the overall measure.

Starting with the mandatory approach, thresholds establish due diligence obligations in the upstream phase, smelters and refiners included. This is the section in the supply chain where armed groups usually gain revenues coming from extraction, transportation and/or exportation. In this phase, instability and corruption are the breeding ground for a system of bribery and smuggling, which is the channel through which conflict minerals reach downstream operators. As a consequence, mandatory certification at that specific stage of the supply chain is particularly important. Moreover, considering that the due diligence obligations, as things stand at the moment, will also cover smelters and refiners, greater efficacy in addressing the issue of human rights abuses in conflict-affected and high-risk areas is ensured. As already argued in chapter 3, this category has a “privileged position” in the supply chain, owing to its key role in the transformation of minerals into metals and to the small number of economic operators that compose it. Considering that smelters and refiners are aware of their weight in the conflict minerals supply chain and often profit from their position, avoiding any type of voluntary due diligence effort (European Commission, 2014a), the importance of a mandatory system in this phase is clear. Furthermore, bearing in mind that, according to the EC 2014 public consultation on the issue, downstream operators have scarce leverage on smelters and refiners in asking for responsible sourcing (European Commission, 2014a), the need for a top-down approach at this stage of the supply chain seems to be even stronger. At this point, however, an argument against the threshold, on a mandatory approach point of view, lies in the partial nature of the coverage.

Indeed, there will still be some space for conflict minerals in the upstream supply chain. Nevertheless, considering that thresholds set up obligations on the quasi-totality of the cases, the number of these raw materials is almost irrelevant.

If we see thresholds from the voluntary position, the exoneration of small importers from due diligence obligations is particularly relevant for the overall economic feasibility of the measure. These small operators, indeed, are the most vulnerable category to mandatory obligations, as they have to bear burdensome costs for providing due diligence even if they do not significantly influence the conflict minerals supply chain. This is the reason why the voluntary position of the Council has been particularly careful in highlighting the sensitive situation of small and medium-sized economic operators (Council of the European Union, 2015, rec.12, 16). Even the European Parliament, in its draft, talks about due diligence schemes that should be “tailored on a company’s size, leverage and position in the supply chain” (European Parliament, 2015a, rec.9a). Anyway, since in the parliamentary draft mandatory due diligence is extended to all economic operators, the EP draft does not concretely provide this type of adaptation. Therefore, recalling the EP wording in recital 9a, this current compromise proposal lays down “tailored due diligence obligations”, which take into account the specific condition of small and medium-sized economic operators.

Outside the mandatory and voluntary approaches, another aspect should be mentioned about import thresholds: they do not exonerate small and medium-sized enterprises *a priori*, yet they are addressed to small *importers*. This element is not secondary, and this distinction is not just a matter of terms. Small and medium-sized enterprises, indeed, are not necessarily small importers of conflict minerals and, conversely, big companies may import small quantities in the 3TG. According to the EU definition, the determination of an SME depends on its size -in terms of number of employees, turnover and balance sheet- and its resources –such as ownerships, partnerships and other linkages- (for more information on the EU definition of small and medium-sized enterprises, see European Commission, 2015). The focus, in this case, is on the quantity of minerals imported -and consequently covered by the regulation- rather than the enterprise size or resources. At this stage, it can be argued that the use of import thresholds, which focus more on minerals than on firms, is somehow unbalanced in favoring the mandatory approach, at least with regard to the upstream phase. Even if this is partly true, the establishment of a system that exonerates SMEs *a priori* would have been, in my opinion, as unfair as useless in addressing the issue. It would be unfair because, as mentioned above, a big enterprise importing an irrelevant quantity of tin, tantalum, tungsten or gold would be subjected to

burdensome costs, while a small or medium-sized enterprise importing an enormous quantity of the 3TG would not be covered by due diligence obligations. Moreover, it would be useless for the scope of the regulation because, as SMEs would be automatically exonerated from mandatory traceability, there would be a simple diversion of conflict minerals towards these companies, which would become a sort of “fast track” for the conveyance of these raw materials to Europe. With a system of threshold based on imports, this eventuality is unlikely to occur: on an annual basis, as an enterprise starts importing minerals above the aforementioned threshold, mandatory due diligence automatically enters into force.

With regard to the downstream phase, economic operators are not covered by compulsory requirements in matter of responsible sourcing. Therefore, the EP call for due diligence obligations on the entire conflict minerals supply chain has not been met with the Commission and the Council. Regarding this aspect, the voluntary approach clearly outbargains the mandatory approach. The exclusion of the downstream economic operators from due diligence requirements means, in practice, that conflict minerals can still enter the European markets in the form of finished products. Nonetheless, the voluntary element in the downstream phase is very relevant in terms of economic feasibility: downstream operators, indeed, generally have much more difficulty in grasping information on the origin of 3TG in their products. Recalling what has been said in Chapter 3 on this issue, when the supply chain arrives at its final stages, it is almost impossible to identify the exact provenance of certain minerals that can be part of a metal that may be, in turn, part of the final products downstream companies deal with. More generally, the complexity of the supply chain due, for instance, to the lack of resources to provide due diligence or to the presence of too many constantly changing “intermediate” operators between smelters/refiners and downstream companies are important factors that can sometimes undermine the possibility of providing information on conflict minerals. Furthermore, with regard to the downstream phase, it could be also argued that the European Parliament also secured some pledges from the EU Executive. Indeed, it is true that the EP obtained the engagement of the Commission in “encouraging” big downstream operators to report on their sourcing practices through “a new set of performance indicators to be developed by the EU Commission” (European Parliament, 2016). However, considering that nothing has been specified in this regard yet, it is not possible to draw conclusions on how much the mandatory approach matters in the provisions regarding the downstream supply chain.

Another significant element in the compromise proposal is, in my opinion, the establishment of a review clause. This regulatory device is also very important, as it highlights a *progressive* approach towards EU conflict minerals regulation. Indeed, in order to reconcile economic sustainability and regulatory efficacy in breaking the links between minerals and armed conflicts, European legislators opt for a more gradual change. This aspect is also evident in the document published by the Green Party MEPs and in other sources that mention the review clause. Hence, the periodic EC assessment provided by the clause, which will be the basis for possible future modifications of the regulation, shall take into account, in particular, two factors: the effectiveness of the regulation in breaking the links between minerals and armed conflicts and the impact of the measure on the business sector, with particular attention devoted to SMEs. In other words, it has to evaluate whether and to what extent the most important interests of both the mandatory and voluntary approaches have been achieved. Therefore, according to the review clause, further mandatory measures will be formulated if the regulation does not have the desired effect (Littenberg et al., 2016).

Finally, several additional aspects of the compromise proposal ensure greater legal certainty for European firms. These are, among others, the avoidance of double, impossible or useless due diligence efforts (in the case of stocks, recycled minerals or “by-product” methods), the creation of a list of “conflict-affected and high-risk areas”, the recognition of other due diligence schemes and the establishment of criteria for such recognition. Even the creation of a Commission Handbook for economic operators and the various references to the OECD due diligence guidance may be very useful in this regard. In fact, all these elements do not exclusively belong to one of the two approaches. Nevertheless, the Council’s draft has been much more attentive and precise in this regard, in an attempt to provide better information to enterprises and improve the economic feasibility of the measure. While, indeed, the provision on recycled metals is contained in both the EP and the Council drafts, other measures regarding “mining by-product” and grandfathering have been formulated and provided exclusively by the Council.

5.5. Conclusions

The compromise proposal of the Dutch Presidency and the political agreement reached among the European Commission, the European Parliament and the Council of the European Union has been the dominant topic of this chapter. In the first section, I described the context in which the compromise draft and the political understanding developed, with specific references to the role

of the trilogue and the general reactions to the deal. Then, a discussion on the main terms of the compromise and an analytical section related to this discussion has been provided. In particular, the main elements of the compromise proposal have been examined with reference to the analysis supplied in the fourth chapter of this dissertation. Moreover, I also explained, in broad terms, the regulatory answers that the Dutch Presidency draft provides in relation to the fallacies in the conflict minerals supply chain discussed in Chapter 3. According to my argument, many elements in the compromise proposal have been formulated bearing in mind economic and social rationales on the issue, in an attempt to reduce undesirable outcomes from both a mandatory and a voluntary point of view.

The compromise proposal provides a different balance between the upstream and downstream phases. In particular, with regard to the upstream supply chain, there is a predominance in the mandatory element, as the vast majority of economic operators will be compelled to apply due diligence. At the same time, particular care is devoted to small economic operators, which are exonerated from mandatory reporting. This exemption, however, is unlikely to undermine the overall efficacy of the measure in relation to the issue of conflict minerals, as thresholds will cover the quasi-totality of importers. On the contrary, in the downstream phase, there are no mandatory obligations on economic operators, and the voluntary approach clearly prevails over the mandatory position. In this case, the balance between economic and social rationales is still unclear. On the one hand, propelling measures will be provided in order to incentivize big operators to disclose information and use conflict minerals due diligence. On the other, since the nature of these measures have not been disclosed yet, it is not possible to have complete awareness of the type of balance envisaged.

In the next months, additional technical work will be carried out under the Slovak Presidency of the Council of the European Union. The premises for the final formal agreement have been set. Nonetheless, it must not be forgotten that official approval has yet to come, therefore “nothing is agreed, until everything is agreed” (*Political Understanding following the 15 June trilogue*, 2016, p.1).

6. CONCLUSIONS

6.1. Main topic and theoretical section

The EU regulation on conflict minerals has been broadly discussed during this dissertation from various standpoints. In order to understand and explain why this regulation is promoted at the European level and what societal and institutional interests drove the bargaining process between the EU legislative branches, a broad theoretical section has been provided. Within this section, I distinguish public and private interest theories of regulation, which explain the origins of regulation in, respectively, public and private interest terms. Another distinction operated in the theoretical section concerns economic and social theories of regulation. The first theoretical category conceives regulatory initiatives as measures undertaken in order to answer specific economic exigencies. Within this theory, regulations coming from social exigencies are conceived as second-order measures. On the contrary, the second school of thought debates this conception, arguing that economic interests, alone, are not able to explain the vast majority of regulatory initiatives, and that social solidarity, human rights protection and paternalistic and ethical principles may be fundamental regulatory drivers in several circumstances. A third clarification operated in the preliminary theoretical section refers to regulatory phases. According to the latter, besides the starting phase and the study of the causes determining the undertaking of a regulation, political and institutional behaviors triggered by regulatory initiatives also matter, as they are crucial in the discussion phase that conditions and determines the final regulatory outcome. Therefore, I also distinguish regulatory initiative from action/discussion within theories of regulation. Particular attention, in this regard, is devoted to some theories of political and institutional action: public choice and rational choice institutionalism.

The aforementioned literature review is the starting point and the academic basis for elaborating a theoretical approach that looks at the EU conflict minerals regulation in the light of the theories discussed. According to my argument, in the regulatory initiative phase, public interest based on social rationales -respect for and promotion of human rights abroad, in this specific case- has been a main driver in the decision to regulate in this matter. Nevertheless, when the subsequent discussion phase was launched, many interests grouped together along two different approaches, and a significant debate started among several EU and foreign stakeholders. The various political actors advocated on different regulatory models, basing their activism either on economic or on

social rationales. In particular, some stakeholders asked for a voluntary due diligence system in order to make the regulation economically sustainable for EU companies, while others called upon the co-legislators to promote a mandatory traceability scheme with the aim of ensuring more stringent and effective economic restrictions to armed groups. The EU institutions in charge of discussing the regulation followed one of the two approaches. Recalling the theoretical section, and in particular public choice and rational choice institutionalism based on the principal-agent model, I argue that the co-legislators' choices –and, consequently, their drafts on conflict minerals regulation- have been conditioned by institutional interests, in accordance with their nature and composition. In conclusion, in reference to the final compromise, I highlight that the two approaches represent the extremities of a trade-off between the economic and the social rationales, and that if a regulatory outcome emerges, it will have to fall into a balanced and jointly acceptable position along the aforementioned trade-off.

6.2. The issue of conflict minerals and the fallacies in the supply chain

Subsequently, another chapter frames the issue of conflict minerals in the case of the Democratic Republic of Congo. This section does not have the only scope of providing information concerning the link between trade in minerals and the financing of civil wars. On the contrary, it also aims at giving basic elucidations concerning the trading routes of these raw materials. By doing so, the most relevant issues related to the conflict minerals supply chain are highlighted. This part is very important in order to explain why stakeholders ask –and institutions opt- for different approaches on conflict minerals and tend to address this problem through diverging regulatory answers. Indeed, the examination of the fallacies in the conflict minerals supply chain demonstrates that the issue is not simple to tackle, as different types of due diligence regimes, while addressing part of the issue, may also create losses and complications.

In the case of the two approaches, if a mandatory position, on the one hand, ensures respect for due diligence obligations, it may force, on the other hand, small economic operators to exit the market, as they would be unable to reach information or to bear the costs of responsible sourcing. As a consequence, the most marginal actors in this financing process, who in the majority of cases contribute to this financing indirectly and, above all, unconsciously, would be the first subjects endangered by the regulation at EU level. Conversely, through a voluntary approach, small economic operators would not be harmed, as the system would depend on their will to comply. Nevertheless, a pure opt-in due diligence regulation would risk being ineffective

in tackling the problem, because, as analyzed in Chapter 3, some economic operators, particularly in the upstream phase, would continue to use low-cost conflict minerals profiting from their position in the supply chain. As fallacies in the supply chain are explained, the trade-off between economic sustainability and efficacy in ensuring respect for human rights in the future conflict minerals regulation starts to emerge.

6.3. The EU conflict minerals regulation: mandatory and voluntary approaches in the co-legislators' drafts

The EU regulation on conflict minerals, which is the main topic in this dissertation, has been then analyzed in Chapter 4. Within this chapter, a preliminary section refers to some important already existing global due diligence schemes and describes the context in which the social and inter-institutional debate on the EU conflict minerals regulation has been developed at the European level. Moreover, in this background section, the mandatory and voluntary approaches are exemplified in the position of many stakeholders, who made significant advocacy on the basis of their specific interests on the issue. On the one hand, non-governmental and civil society organizations asked for mandatory due diligence in order to obtain the compulsory engagement of economic operations in tackling the issue of conflict minerals effectively. On the other hand, the business sector has aligned itself with a voluntary position with the aim of obtaining a flexible system that leaves the decision to provide responsible sourcing up to companies. Therefore, this discussion shows that the two extremes of the previously mentioned trade-off has been reflected also by the position of the main social and political actors in this matter.

Subsequently, the discussion was turned to the text of the regulation. At that stage, a text analysis of the co-legislators' drafts was performed, taking also into account the original Commission proposal. Within the EP draft, several elements of the mandatory approach have been traced, such as the establishment of a mandatory due diligence system, accompanying measures, greater concern for human rights protection in both recitals and articles. Moreover, the analysis also shows that the Parliamentary draft does not set up flexible measures that take into account the situation of some economic operators, with particular reference to small and medium-sized enterprises. Indeed, although the EP version of the regulation highlights its concern for these companies, it does not provide any economically sustainable regulatory device that deals with this issue. Conversely, the analysis of the Council draft highlights several elements, which follow an economic -rather than social- rationale. The first of these elements is,

undoubtedly, the establishment of a voluntary due diligence scheme. Moreover, much more attention is dedicated to the economic feasibility of the measure. Indeed, the Council proposal gives more precise indications to economic operators compared to the EP draft, providing also exemption from the coverage of the regulation for companies in specific circumstances. Clearly, the absence of any compelling measure for economic operators in the Council measure is the major element in contrast with the mandatory approach.

From this analysis, some considerations are drawn in the light of the theoretical work provided in Chapter 2 and the fallacies in the supply chain described in Chapter 3. According to my argument, the legislative drafts mirror the interest that the co-legislators tend to defend on the basis of their nature and composition. The EP draft, for instance, is much stricter in cleaning up the conflict minerals supply chain, regardless of the costs that this measure would have for small companies. This approach, in my opinion, fits with the nature of the institution itself. The European Parliament, indeed, is a *pure legislative* institution, which is directly elected by EU citizens and, therefore, is much more susceptible to the opinion of civil society. Considering that the primary interest of its members is vote maximization, this institutional behavior is the most reasonable for MEPs. The Council proposal, on the contrary, lacks a real top-down approach against the financing of armed groups that profit from conflict minerals. Nonetheless, it is much more careful in terms of economic feasibility of the measure, as it responds to the lack of resources for small operators in providing mandatory due diligence through an opt-in system. Even in this case, considering that the Council can be conceived as a *legislative/executive* institution that expresses the interests of the EU national governments, this behavior is clearly justifiable. In this case, indeed, vote maximization is not needed, as negotiations are carried out mainly by bureaucrats responding to governmental “principals” that have budget maximization as main goal.

6.4. The political agreement on conflict minerals regulation: mandatory and voluntary approaches in the compromise proposal

The fifth chapter of the dissertation deals with the political agreement reached on 15 June 2016 between the European Commission, the European Parliament and the Council of the European Union. The role of the Dutch Presidency of the Council has been highlighted in this section, as the conflict minerals regulation has been prioritized in the agenda of the first semester of 2016. Moreover, a rapid political agreement has been made possible by informal negotiations within

the so-called “trilogue” between the Commission, the EP and the Council. For this reason, a section has been also devoted to the role that this unofficial institution had in the negotiations between the co-legislators. Moreover, in order to give a preliminary idea of the social and political reaction to the agreement, another brief section has also been devoted to the early comments of some relevant stakeholders regarding the 15 June political understanding.

After the descriptive section provided in Chapter 5, the main terms of the inter-institutional deal have been examined recalling the analysis of the mandatory and voluntary approaches in the co-legislators’ texts. Within this section, particular attention has been devoted to the setting up of import thresholds, which are a significant and innovative element in the new compromise proposal. Considering the new draft from the perspective of the mandatory approach, the compromise encloses many points of strength in the upstream phase, as import thresholds would compel the quasi-totality of economic operators located in this part of the supply chain. Indeed, although a small part of these operators will not be covered by the scope of the regulation, their number will be irrelevant compared to the overall upstream economic actors. Conversely, looking at the compromise proposal from a voluntary position, an opt-in system in the downstream phase is a remarkable device for an economically sustainable regulation at this stage of the supply chain. The European Commission, however, will encourage big downstream companies to disclose in any case through *ad hoc* measures establishing performance indicators. Recalling the trade-off between economic feasibility and efficacy in ensuring respect for human rights in conflict-affected areas, the debate between the two approaches positively influenced the EU legislative decision-making system in finding a balanced compromise proposal. Each of the two approaches is predominant in one of the two macro-phases in the supply chain, safeguarding the most important among their interests. Moreover, in order to create a flexible and modifiable regulation that will take into account possible emerging problems in the implementation phase, the provision of a review clause in the regulation is also a potential strong point in the compromise proposal.

6.5. Will Europe meet Africa?

With the 15 June political agreement, the core negotiations on the conflict minerals regulation came to a close. Therefore, the regulatory outcome produced by the inter-institutional debate around the issue of conflict minerals is likely to include all the main elements of the deal. Nevertheless, some technical aspects still have to be discussed among the legislative institutions,

and more trilogues are likely to occur under the Slovak Presidency of the Council. For this reason, although many details have been provided regarding the costs and benefits of the various supply chain due diligence schemes, it is difficult to predict the impact that the EU conflict minerals regulation will have in addressing the human rights abuses in conflict-affected and high-risk areas. Many technical details have to be revealed regarding import thresholds and the Commission still has to specify the measures that will be undertaken for big companies in the downstream supply chain. Moreover, additional measures may still be envisaged at the EU level in order to tackle the problem through a comprehensive approach, and many challenges have to be taken up with regard to the implementation phase.

Nonetheless, despite all these unanswered questions on the future developments and effects of this regulation, some preliminary assertions can already be made in this regard. The first is that, in spite of the various elements of criticism or support to the political agreement and the future regulatory outcome, the new regulation on conflict minerals will be a first step in breaking the links between minerals and armed conflicts. The exact direction of this step, however, will probably be evident only after some years, with the wisdom of hindsight. The second assertion concerns the “quality” of the regulation. In my opinion, this is a *perfectible* regulatory answer, and the European Union is aware of this. In saying “perfectible”, I do not want to give a derogative meaning to this word, nor do I want to provide judgements based on ethical or personal feelings. On the contrary, I mean that this regulation is perfectible in technical terms. Indeed, considering that, as highlighted in several circumstances within this dissertation, the process of cleaning up the conflict minerals supply chain should be gradual in order to avoid severe complications for small economic operators, a progressive, perfectible measure is more desirable than a radical solution. This is, in my opinion, the reason that pushed the EU regulators to provide a review clause within the measure. The third is that a significant lobbying activity will be likely to continue even after the approval of a definitive text, as occurred in the United States after the approval of section 1502 of the Dodd-Frank act. Indeed, recalling the gradual character of the cleaning-up process and the perfectibility of the regulation, this advocacy activity is not only probable, but also required in order to achieve a more effective and balanced measure in the future. As emerged in the dissertation, indeed, the various advocacy coalitions in the EU political environment had a remarkable impact in the development of the two aforementioned approaches, which, in turn, transformed a “raw” legislative proposal into an increasingly detailed draft that is now more careful and open to the various exigencies and rationales at the EU level. Therefore, whatever the effects and the impact of the regulation will

be in practice, the awareness that due diligence has to ponder numerous factors and exigencies is essential in order to give birth to effective and sustainable regulation both in Europe and abroad. Paraphrasing the work of Okun (1975, p.120) mentioned in chapter 3 of the dissertation, the new compromise proposal lays the groundwork for a system that puts more rationality into equality and more humanity into efficiency, and the coexistence of these two elements is likely to be easier after the first compliance costs for providing traceability will be met. Therefore, once – and, above all, whether- due diligence obligations will be economically sustainable for the overall EU industry, further responsible policies may be eventually enacted in order to respect the social, public interest exigency of putting human rights before trade, and people before profits.

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ABSTRACT

1. The thesis : object, scope and structure

The main trigger of a war that provoked, since the early '90s, around six million human losses (International Rescue Committee, 2007), may be on many European citizens' pockets, desks or wrists. Some of our everyday tools such as smartphones and other devices or jewels, indeed, come from tin, tungsten, tantalum and gold (3TG), also known as *conflict minerals*, which are mostly sourced in conflict-affected or high-risk areas and finance some of the deadliest conflicts of our times. The most evident example of this phenomenon is the civil war devastating the Democratic Republic of Congo (DRC), where the control over these precious natural resources fueled the bloodiest conflict since World War II (The Enough Project, n.d.). In this area and in DRC's neighboring countries, military and paramilitary groups illegally control mines and gain revenues from mineral transportation or exports, buying weapons in return. As a consequence, considering the growing importance of the 3TG on the global market, the higher the value of conflict minerals, the harsher the civil war and the subsequent human rights abuses in the region. For this reason, in order to break the bloody thread connecting mineral exploitation to widespread violence against civilians in these areas, many international actors have undertaken some due diligence initiatives in order to trace as many unlawfully extracted, transported, smuggled, exported and then smelted minerals as possible. These traceability systems have been envisaged in order to create a stricter control on the revenues of military and paramilitary groups in conflict-affected and high-risk areas. Following these international examples of due diligence, the European Union is also developing its own conflict minerals regulation. Nevertheless, considering that traceability is not an automatic warranty of stability and peace in the region, and bearing in mind that some certification systems may be even more dangerous than the *status quo*, there are many elements to take into account when developing a conflict minerals regulation. This is also the reason why there has been a polarization of the social and inter-institutional debate at the EU level in this regard. Indeed, after the European Commission (EC)'s 2014 legislative initiative, the European Parliament (EP) and the Council of the European Union (Council) gave opposing slants to the proposal, which has been radically modified by both legislative branches and gave birth to two opposing approaches on conflict minerals at the institutional level. The negotiations between the co-legislators have been long and difficult and a political deal has been reached only in June 2016, after more than two years of inter-institutional bargain.

The various institutional positions on the EU conflict minerals regulation represent the main issue analyzed by this dissertation. The thesis, indeed, has the main aim of examining *why the co-*

legislators took two different positions on the conflict minerals regulation, and more precisely which factors conditioned the undertaking, at the institutional level, of two diverging due diligence schemes. Moreover, taking also into consideration the political deal reached in June 2016, this dissertation aims at investigating on *which elements of the compromise proposal made the convergence between the EP and Council's approaches possible.* In order to answer all these questions, a text analysis of the various co-legislators' drafts will be performed. Anyway, before carrying out the core examination, a long and structured theoretical and analytical path shall be covered. Not surprisingly, this path starts from theory: after the introduction, chapter two is dedicated to the outline of the state of the art, the theoretical approach and the methodology used in the dissertation. Subsequently, chapter three gives important clarifications on the issue of conflict minerals, with a description of the DRC case and a specific section dedicated to the conflict minerals' supply chain. Then the theoretical and descriptive parts of the thesis give way to the European case. Indeed, after a background subsection that describes some international examples of conflict minerals due diligence and labels the chronological events characterizing the development of the EU regulation in this matter, the analysis of the co-legislators' drafts is operated. Within this analysis, a mandatory and a voluntary approach to the EU conflict minerals regulation is distinguished in the stakeholders' positions as well as in the co-legislators' texts. The examination performed in chapter four is followed by some considerations that take also into account the theoretical work operated in chapter two and the description of the issue provided in chapter three. After the analysis of the co-legislators' drafts, chapter five is dedicated to the compromise proposal. Even in this case, the analysis of the political agreement is fundamental in order to understand how the two opposing approaches have been reconciled. However, the text-analysis method performed in chapter four has been replaced by the analysis of the "main terms of the deal", which are the meeting points that made possible the political understanding. Finally, chapter six summarizes the main findings of the dissertation, providing also some conclusive considerations. In order to better understand the subject and the organization of the thesis, the following sections in this abstract will describe, more in depth, the content of the dissertation on a chapter-by-chapter basis.

2. State of the art, theoretical approach, methodology

As already mentioned, chapter two deals with theory. More specifically, this section examines some of the most important theories of regulation to give theoretical strength to the analysis of the following chapters of the dissertation. This analysis refers particularly to chapter four, which copes with the inter-institutional debate between the co-legislators through the analysis of their legislative drafts. Moreover, this part of the thesis explains the inter-institutional negotiations at the EU level

from a theoretical point of view. In other words, in the second chapter, I make use of some fundamental theories in the field of regulation to explain why a European regulatory initiative on conflict minerals is undertaken, stressing also the reasons why EU institutions involved in the legislative negotiations take certain positions on specific matters. Even if the analytical section is concentrated on regulatory actions rather than regulatory initiatives, a specific section explaining *why* the European Union regulates on this matter is fundamental, as the development of a conflict minerals regulation at the EU level is not obvious, nor needed in purely economic terms. Therefore, I introduce many theories explaining why regulation occurs, highlighting a fundamental distinction between public and private interest theories of regulation (Den Hertog, 2010; Baldwin, Cave and Lodge, 2012). The cleavage between the two schools of thought, as imaginable, is determined by the interest(s) triggering regulatory initiatives. Furthermore, in the first part of the second chapter, I discuss the purpose(s) determining regulation according to these two different theoretical approaches. Within this first important discrepancy, a second cleavage emerges between economic and social regulation. This distinction is also essential, as it explains why regulation occurs even when regulation seems irrational on economic terms. As broadly discussed by Baldwin, Cave and Lodge (2012), Prosser (2006) and Ogus (2005), market failures, alone, are not sufficient to explain the vast majority of regulatory initiatives, and other causes such as human rights protection (Brownsword, 2004), social solidarity (Prosser, 2006; Durkheim, 1893; Duguit, 1970) and other paternalistic or ethical principles (Ogus, 2005) shall be considered.

Besides the above-mentioned discrepancies, another distinction is made between regulatory initiatives and political actions linked to regulation. Considering that the main focus of the dissertation concerns the inter-institutional debate between the EU legislative branches in the field of conflict minerals, this aspect is also very important. Therefore, in the light of the initiative/action cleavage, I also introduce Public Choice and Rational Choice Institutionalism. Within the outline of the state of the art, they are conceived as theories of political action linked to regulation (Den Hertog, 2010), which may explain, from a private/institutional interest point of view, the EU inter-institutional behavior in the specific case of the European conflict minerals regulation. All these theories presented are fundamental to support the theoretical arguments regarding the core issue of this dissertation, supporting the analysis provided in the analytical chapters of the thesis.

In the theoretical approach, I discuss my specific point of view in the light of the theories enumerated in the outline of the state of the art. In my argument, the distinction between regulatory initiative and political action is very important in the case of the EU conflict minerals regulation. In the first phase, indeed, the European regulator behaves as a benevolent social authority that decides

to set up a due diligence system in order to pursue the public interest, increasing social solidarity and respect for human rights abroad. Anyway, when the inter-institutional discussion takes place, several “private” interests at the social and institutional level emerge. According to my argument, it is not by chance that the co-legislators opt for two different ideas of a conflict minerals regulation. In particular, according to the principal-agent model introduced in the framework of Public Choice and Rational Choice Institutionalism, the European Parliament and the Council’s positions are determined by their specific composition and their interests. Considering the EP as a pure legislative having civil society (voters) as its direct principals, the Parliamentary assembly of the European Union seeks at maximizing votes. Conversely, since the Council of the European Union may be conceived as a legislative/executive having national governments as direct principals, it prefer maximizing budget rather than votes (Mitchell and Simmons, 1994). As a consequence, in the light of the above, the European Parliament is incentivized to adopt a mandatory approach in its proposal, while the Council is more oriented towards a voluntary approach.

A third section has been eventually dedicated to methodology. In order to understand the position of the various institutions involved in the decision-making process of the EU conflict minerals regulation, I carry out a text analysis of the various legislative drafts. I decided to choose this analytical method because I think this is the best methodological device for understanding the approach of the European Parliament and the Council on conflict minerals taking also into account the European Commission’s initial position. Within this methodological framework, I tried to be as more neutral as possible, inferring the main positions of the various institutions directly from the text, without unnecessary interpretations. Even if the subsequent chapters are less theoretical and more descriptive/analytical, some important theories and assumptions mentioned in this section are recalled and used many times during the entire dissertation.

3. Framing the issue

While the second section of this thesis is dedicated to theory, chapter three is focused on the context. More precisely, this section individuates and describes the vicious circle connecting armed conflicts with trade in minerals, taking the specific case of the Democratic Republic of Congo. In this country, widespread violence linked to natural resources is frequent and ruthless, as a complex domestic conflict among warlords and their armies gave birth to an endless humanitarian disaster that involves also DRC’s neighboring countries. After a description of the historical, socio-economic and cultural roots of the vicious circle described above, the context of the civil war started in late 1990s –and *de facto* ongoing- is introduced. The contribution of many United Nations (UN) and non-governmental organizations (NGOs) reports is fundamental in order to

understand the connection between conflicts and exploitation of natural resources. Therefore, in this part of the chapter, some paragraphs are focused on individuating the basic elements of a mechanism that kills many human lives in order to produce and export large quantities of raw materials at the most competitive prices in the world market. Without developing this type of awareness, the issue of conflict minerals cannot be easily understood and, consequently, addressed. This is the reason why an important section is dedicated to the conflict minerals supply chain. More specifically, the second part of chapter three provides a simplified scheme representing the path through which some materials extracted, transported and exported through violence, rape, torture and other forms of abuses may be processed, manufactured and marketed as smartphones, computers, tablets or even jewels. Within this section, the conflict minerals supply chain is divided into two macro-phases. The first, called *upstream phase*, goes from the source/extraction to the melting of the product (included), while the second, known as *downstream phase*, regards the processes of manufacturing, assembling and then marketing as component of the various final products. This specific partition is crucial, as it highlights a fundamental divergence in the fallacies characterizing the supply chain. According to the macro-phases examined, indeed, different problems emerge, such as smuggling, corruption and unlawful presence of armed groups in mines (in the upstream phase) or lack of awareness about the issue, complexity of the supply chain or lack of leverage from “virtuous” companies on smelters and refiners (in the downstream phase). All these fallacies respond to contrasting needs (either for strictness or for flexibility) and require different due diligence schemes in order to be solved properly. Moreover, throughout this discussion, a particular focus is dedicated to smelters and refiners, as they have the most sensitive position in the supply chain: these economic operators have a fundamental role, as they transform minerals into metals, determining a point of no return in the path that brings conflict minerals to Europe. From that moment on, indeed, it is impossible to trace the origin of a raw material, therefore due diligence in this phase is vital for achieving some results. Moreover, smelters and refiners are very few in the market, therefore they have a stronger bargaining power in the entire logistics network compared to other economic operators.

From this description, a common conclusion emerges: the overall phenomenon is very complex and diversified, thus there is not a completely safe way to clean up the 3TG supply chain in conflict-affected or high-risk areas. Each certification initiative, indeed, may address many problems linked to conflict minerals accurately, creating, at the same time, many setbacks in some respects. In addition, due diligence is not very effective *per se*, and accompanying measures are desirable in order to support traceability initiatives and intervene at the local level, thus addressing problems

linked to the context of corruption and bribery that characterizes the DRC and its neighboring countries. Legal safeguards that tackle synergistically all the issues discussed in this chapter, accompanied by local efforts towards transparency and accountability in the mining sector, are crucial in putting an end to the deadly system of production and trade in conflict minerals. If an approach in this direction is not applied, the possibility that some daily life objects will be produced in totally conflict free areas in the near future is neither practicable, nor trustworthy.

4. Conflict minerals and the European Case

After the theoretical and framework sections, chapter four operationalizes the work previously written examining the European provision on conflict minerals. Two background subsections precede this analysis. Before the core, analytical section, indeed, I first describe other important examples of due diligence implemented by different social and political actors, such as international, non-governmental and civil society organizations but also firms and national authorities. This discussion is very important in order to contextualize the European conflict minerals regulation in a broader background of similar initiatives, highlighting also the various inputs that the EU law received from already existing good practices on this issue. In particular, section 1502 of the U.S. Dodd-Frank Act and the OECD due diligence guidance are treated with greater consideration, as the European conflict minerals regulation is particularly inspired by the systems set up in the aforesaid provisions. Moreover, the OECD guidelines are mentioned in many occasions in the text of the European regulation, as this guidance represents an international model in the field of conflict minerals due diligence.

The second background subsection regards the chronological events that characterized the development of the EU regulation, from the legislative initiative to the final compromise. Within this part, the co-legislators' actions and their orientation towards different models of due diligence are not the only focus of the discussion. Indeed, some paragraphs are also devoted to the activity of various stakeholders participating to the political debate on this matter. Although the central part of the dissertation is dedicated to the EU institutional positions with regard to the conflict minerals regulation, the role of non-governmental, civil society and business organizations is not underestimated. Indeed, not only did these important advocacy groups raise awareness at the social and institutional level on the various problems linked to due diligence, but they also influenced – directly or indirectly- the legislative decision-making on this issue. In particular, these organizations had a fundamental role in delineating two main approaches on conflict minerals due diligence. This is why, within this second preliminary subsection, I introduce the *mandatory* and *voluntary*

approaches at the stakeholders' level. Both positions in this regard have been mirrored, at the institutional level, by the two distinct drafts elaborated by the EU legislative branches.

Subsequently I come to the outright analysis of the European institutions' legislative proposal. This part of the thesis examines the different versions of the regulation, stressing the numerous divergences among the institutional positions on a recital-by-recital and article-by-article basis. From the above-mentioned analysis emerges that the European Parliament proposes a stricter regulation, which imposes due diligence to all economic operators in the 3TG sector, regardless their size and their position in the supply chain. On the contrary, the Council proposes an opt-in system that establishes due diligence for companies operating in the 3TG industry on a discretionary base. Reminding all the fallacies linked to the setting up of a conflict minerals due diligence system treated in chapter 3, I also try to explain how the various drafts respond to the challenges caused by the existing 3TG logistics network in conflict-affected and high-risk areas. In the case of the EP draft, for instance, the proposal provides more effective legal expedients to fight the system of bribery and corruption in DRC and its neighboring countries compared to the Council's draft, creating also better communication and avoiding cooperation problems between smelters/refiners and downstream operators. Nevertheless, the EP provision disregards the situation of small importers in the 3TG, which would be economically endangered by the imposition of a mandatory system and would risk exiting the market. On the other hand, the Council's draft is much more careful to the economic feasibility of the measure, as it takes into account the exigencies of small economic operators in the market, which are not the main responsible for the current system. Nevertheless, with respect to the overall political efficacy of the measure, the Council's proposal is weaker than the EP draft.

Moreover, from the identification of the divergences among the various drafts, I emphasize the parallelism between the EP proposal and the mandatory approach, on the one hand, and the Council provision and the voluntary approach, on the other. I examine this discrepancy in light of the theoretical section provided in chapter two. More precisely, I claim that differences in composition and nature between the co-legislators correspond to diverging legislative approaches to the issue of conflict minerals. In particular, by opting for a compulsory version of the regulation, the EP acts as a spokesperson for those major civil society groups that asked for a mandatory due diligence system. Conversely, the Council is much more careful towards small and medium-sized enterprises and tends to maximize budget rather than votes, avoiding the excessive costs of a top-down approach and stressing the importance of economic sustainability in this matter.

Finally, chapter four highlights another important aspect of the inter-institutional debate between the European Parliament and the Council, which considers, even in this case, the theoretical discussion performed in chapter two. Recalling the social/economic cleavage within the theories of regulation, indeed, some scholars argue that there is no hierarchy between these two types of regulatory initiatives, and that sometimes regulators have to take a position between economic and social rationales in developing and/or implementing regulations (Baldwin, Cave and Lodge, 2012; Prosser, 2006; Okun, 1974). In my opinion, the stakeholders' positions as well as the co-legislators' drafts in the case of the EU conflict minerals regulation are an example of the latter contingency. Indeed, the regulatory initiative in this matter and its subsequent inter-institutional debate give birth to a trade-off between political efficacy in ensuring respect for human rights (social rationale) and economic feasibility of the EU due diligence scheme for small economic operators (economic rationale). Considering the above, and reminding the social and institutional divergences emerged in chapter four of the dissertation, I finally claim that if a compromise has to be reached between co-legislators' position and a final draft has to be jointly agreed, the EU regulator(s) shall take into account the two rationales, producing a balanced legislative outcome in the aforementioned trade-off.

5. The compromise proposal

Chapter five is focused on the last compromise proposal on the EU conflict minerals regulation, elaborated by the Dutch Presidency of the Council and then informally approved by the delegations of the other EU legislative institutions in June 2016. After endless negotiations, the new political deal overcame the *impasse* that conditioned the inter-institutional debate and laid the bases for a final legislative outcome. In this regard, the fifth chapter investigates on the causes that brought to this political understanding, explaining the main elements of the new inter-institutional deal in the light of what discussed in the previous chapters and considering with particular attention the mandatory/voluntary cleavage within the societal and inter-institutional debate.

The chapter begins with a background section regarding the compromise proposal and the subsequent political deal among the legislative institutions. In particular, the role and the peculiarities of the "trilogue" are treated in depth. The latter consists in an unofficial meeting between the delegations of European Parliament, the Council and the Commission, which has the function of accelerating the negotiations among the legislative institutions (European Parliament, 2014; Farrell and Héritier, 2003). If, on the one hand, this is the most significant point of strength of the "trilogue", on the other hand, this bargaining method also has some significant fallacies, such as the lack of transparency and accountability (Perez, 2016; Dolan, 2015). Within the preliminary

section supplied in chapter five, all these contradictory specificities are presented. Moreover, contextualizing the role of the “trilogue” in the negotiations for the conflict minerals regulation, I particularly stress the leading function of the Dutch Presidency of the Council, which had a fundamental role in formulating the new compromise proposal and initiating the informal talks among the EU legislative institutions on this matter. Another preliminary section is also devoted to the first reactions of the main institutional and social actors involved in the debate over the EU conflict minerals regulation.

After the background sections, the analytical part regarding the main elements of the proposal begins. Within the new terms of the deal, a preeminent role is given to an innovative legal expedient: the new agreement establishes thresholds on 3TG imports in the upstream phase above which certification becomes compulsory. According to my argument, this is probably the key factor that reconciles the two approaches, laying the foundations for a jointly accepted legislative outcome. The decision to distinguish the various due diligence schemes on the basis of high import thresholds in the upstream phase, indeed, gives birth to a mixed system that takes into account the points of strength of the two approaches on the issue and combines them in a unique legal device. Considering this issue from a mandatory point of view, import thresholds establish due diligence obligations for almost all economic operators in the upstream phase and include smelters and refiners. As explained in chapter three, this is the macro-phase in which military and paramilitary groups use to gain revenues coming from extraction, transportation and/or exportation. For this reason, compulsory certification at that specific stage of the supply chain is crucial. Even if thresholds do not cover all economic operators in the upstream phase, the exempted companies are so few that their number is almost irrelevant in terms of political efficacy. On the other hand, that is not true in terms of economic sustainability, as the enterprises discharged from mandatory due diligence are the smallest and the most vulnerable. Therefore, from a voluntary perspective, this provision is much more feasible compared to a 100% mandatory system, as it takes into account the specific situation of the weakest economic operators in the conflict minerals supply chain.

Another important element in the new compromise is the asymmetric due diligence setting between the upstream and downstream phases. Indeed, with regard to the first, there is a predominance in the compulsory element, as the quasi-totality of economic operators would be compelled to apply due diligence. On the contrary, with regard to the second, there are no mandatory obligations on economic operators, even if the Commission ensured propelling measures in order to incentivize big enterprises to provide mandatory certification. In this case, the voluntary approach clearly prevails over the mandatory position.

Considering the examination operated in chapter five, as things stand at the moment, I argue that the new proposal takes into account both economic and social rationales, placing itself in a balanced position on the trade-off between political efficacy and economic sustainability. Anyway, it is still too early to draw exhaustive conclusions on this issue. Only in some months, after the end of the negotiations among the various legislative institutions that will continue under the Slovak Presidency, there might be a complete and certain awareness on the precise balance that the new compromise will provide to the final regulation.

6. Conclusions

In the conclusive chapter of the dissertation, some main findings coming from the topic treated are upheld and deepened. Moreover, few final, personal considerations regarding possible future developments and consequences of the EU conflict minerals regulation are taken in the light of all the work performed. In this regard, the first assertion concerns the value of such provision: regardless the various opinions and approaches on the issue, an EU conflict minerals regulation would represent a first step in breaking the links between mineral exploitation and human rights abuses. This aspect shall not be underestimated, as a provision in this regard at the European level still does not exist. The second consideration, which is linked and consequential to the first, regards the “quality” of the regulation. In the light of the various problems highlighted and the analysis of the diverging approaches, I argue that the new regulatory outcome is unlikely to address the problem completely. Considering the overall analysis performed throughout the dissertation, indeed, I finally claim that, whatever the due diligence scheme devised will be, the implementation phase will require time and continuous work at the stakeholders’ and institutional level to produce some significant results. Depending on the outcomes that the regulation will bring, the European institutions should constantly adjust, through balanced legislative devices, the equilibrium in the trade-off between economic feasibility and political efficacy, and the stakeholders should persistently raise awareness about the future consequences of the regulation. If such work is carried out in the next and far future, the European Union could remain competitive in a key economic sector, attesting, at the same time, that it can be a major international actor in the field of human rights protection and a civil model to follow in the realm of conflict prevention and resolution.