

## THE EU CRITICAL RAW MATERIALS ACT – VITAL LEGISLATION TO SECURE SUSTAINABLE SUPPLY CHAINS

5 JULY 2023 • ARTICLE



### BACKGROUND

On 16 March 2023, the European Commission proposed a package of actions to ensure the EU's access to a domestic, secure, diversified, affordable and sustainable supply of critical raw materials. The initiative includes:

**"Critical raw materials have a part to play in meeting the EU's net-zero and climate-related goals."**

- a proposal for a Regulation of the European Parliament and of the Council establishing a framework for ensuring a secure and sustainable supply of critical raw materials<sup>1</sup> ("Proposed CRM Regulation"); and
- a communication on a secure and sustainable supply of critical raw materials<sup>2</sup> (the "Communication").

The Proposed CRM Regulation forms part of the Green Deal Industrial Plan for the Net-Zero Age published on 1 February 2023 ("Green Deal Industrial Plan"). The plan is designed to provide a supportive environment for scaling up net-zero technologies

and products to meet the Union's 2050 target of climate-neutrality. Critical raw materials have a part to play in meeting the EU's net-zero and climate-related .

The Proposed CRM Regulation is due to be discussed and agreed with the European Parliament and the Council before it can be adopted. The Proposed CRM Regulation suggests that the regulation would enter into force after three years of being adopted.

This note presents a brief introduction to the Proposed CRM Regulation having particular regard to funding opportunities.

### THE EUROPEAN CRITICAL RAW MATERIALS REGULATION

The Proposed CRM Regulation has the following objectives:

- to strengthen the different stages of the European strategic raw materials value chain, in particular by setting benchmarks for domestic extraction, processing and recycling of strategic raw materials;
- to diversify the EU's imports of critical raw materials to reduce strategic dependencies;
- to improve EU capacity to monitor and mitigate current and future risks of disruptions to the supply of critical raw materials; and

- to ensure the free movement of critical raw materials on the single market while ensuring a high level of environmental protection, by improving their circularity and sustainability.

The Proposed CRM Regulation is based on an impact assessment that analyses the problems related to the EU's lack of secure and sustainable supply to critical raw materials, identifies possible policy options to address problem-drivers and assesses their likely impacts. The preferred option is policy option 2 (developed into the Proposed CRM Regulation), which:

- provides for a governance mechanism to set targets for strategic raw materials by setting up a dedicated EU Critical Raw Materials Board ("the Board")<sup>3</sup>, which will provide advice to the Commission in achieving the objectives of the Proposed CRM Regulation and generally assist with its implementation;
- improves the value chain in the EU by developing stronger obligations on exploration and by implementing Strategic Projects<sup>4</sup> along the value chain of strategic raw materials. These projects would benefit from streamlined permitting and a coordinated access to finance as discussed below;
- includes measures to boost circularity by setting out rules for Member States to adopt and implement measures such as increasing the collection of waste and increasing the re-use of products and components both with high critical raw materials recovery potential<sup>5</sup>; and
- includes additional measures on standards such as assessing conformity, certification schemes and environmental footprint declarations.

The preference for this option is based on support from stakeholders and Member States as it puts limited additional burden on institutions, has a relatively lower cost and boosts the development of the critical raw materials value chain which will benefit all parties along that chain.

## STRATEGIC RAW MATERIALS AND CRITICAL RAW MATERIALS

Strategic Raw Materials ("SRM") are those considered to be of strategic importance owing to their use in strategic sectors such as renewable energy, digital, space and defence technologies. They also have high forecasted demand growth combined with difficulty in scaling up production to meet that level of demand. The SRMs are listed in Section I of Annex I of the Proposed CRM Regulation and the methodology for assessing whether a raw material should be classed as a SRM is set out in Section II of Annex I. Examples include cobalt, copper, lithium (battery grade) and natural graphite (battery grade).

**"Strategic Projects will be granted the status of the highest national significance possible in each Member State and be treated accordingly in the permit granting processes, including processing permit applications for Strategic Projects rapidly."**

Any other raw material that reaches or exceeds the thresholds for both economic importance and supply risk, the methodology of which is set out in Section II of Annex II of the Proposed CRM Regulation, will be considered a Critical Raw Material (“CRM”) and is listed in Section I of Annex II. The list of CRMs should contain all SRMs as well as any other raw materials of high importance for the overall Union economy and for which there is a high risk of supply disruption. Examples include cobalt, copper, helium, lithium, magnesium, natural graphite, phosphate rock and titanium metal.

The Commission shall review and, if necessary, update the list of strategic and critical raw materials every four years after the date of entry into force of the Proposed CRM Regulation and every four years thereafter.

## PERMIT PROCESS AND STRATEGIC PROJECT STATUS<sup>6</sup>

Member States shall designate one national competent authority which shall be responsible for facilitating and coordinating the permit granting process for critical raw material projects and will act as the sole point of contact for the project promoter in the permit granting process.

Any promoter of a SRM project will be able to apply for recognition of their project as a “Strategic Project” to the Commission, which will adopt its decision within 60 days<sup>7</sup>. Projects will largely be selected based on their contribution to the security of supply of SRM and their technical feasibility, sustainability and social standards.

Strategic Projects will be granted the status of the highest national significance possible in each Member State and be treated accordingly in the permit granting processes, including processing permit applications for Strategic Projects rapidly. The Proposed CRM Regulation prescribes a timeline for the permit granting process for Strategic Projects of 12–24 months.

For projects in third countries, the Commission would share the application with said third country and withhold approval as a Strategic Project until receiving explicit approval from the relevant authority there.

## THE CALL FOR GREATER ACCESS TO FINANCE

Recognising the difficulty that critical raw materials projects often face with access to finance, the Proposed CRM Regulation provides that the Commission will work with InvestEU implementing partners to seek ways to scale up support of investment in line with the common objectives set out in Regulation (EU) 2021/523<sup>8</sup> and in the Proposed CRM Regulation. The Proposed CRM Regulation does not specifically state that the InvestEU Fund will be used to finance Strategic Projects – but it is presumed that, as a Union-source of financing, this would be considered as an option provided the criteria is met and subject to the availability of other sources of financing, as further discussed in paragraph 6.2. It is also noted that the InvestEU Advisory Hub, which is a platform connecting project promoters and intermediaries with advisory partners to help projects reach financing stage, can assist with developing a pipeline of ‘viable’ Strategic Projects.

The Proposed CRM Regulation recognises the need for coordination between the Commission, Member States and promotional banks and the creation of synergies between existing funding programmes at Union and national level to realise funding for Strategic Projects. There will also need to be collaboration between these parties and the critical raw materials industry as a whole, including key private sector stakeholders.

The Proposed CRM Regulation also discusses the volatility of prices of SRMs and limited means of hedging as a consequence, causing issues for project promoters in securing financing for their Strategic Projects and downstream consumers in the value chain looking for stable and predictable pricing for their key inputs. Without yet a clear outline of how this will be achieved, the proposal considers a future system in which interested parties can indicate their selling or buying bids, and that such parties can be brought into contact if their bids are compatible. This could potentially be similar to the InvestEU Advisory Hub but in relation to private financing only.

The Proposed CRM Regulation also recognises that private investment will be essential. Where private investment alone is not sufficient, the effective roll-out of critical raw material projects may require public support, for example in the form of guarantees, loans or equity and quasi-equity investments. This public support may also constitute state aid and the Proposed CRM Regulation notes that the recently updated state aid guidelines allow for the possibility of granting aid along the critical raw materials value chain. The provision of state aid funding would however be subject to compliance with state aid rules.

**"The Proposed CRM Regulation recognises the need for coordination between the Commission, Member States and promotional banks and the creation of synergies between existing funding programmes at Union and national level to realise funding for Strategic Projects."**

The Commission has also noted in the Communication the possibility of an EU Export Credit Facility that would support critical raw materials supply chains abroad. This is not explicitly identified in the Proposed CRM Regulation as a source of public funding, but the development of an EU Export Credit Strategy also forms part of the Commission's Green Deal Industrial Plan. We would therefore expect a framework for export credit funding in the context of critical raw materials projects to be developed.

## COORDINATION OF FINANCING

The Proposed CRM Regulation proposes setting up a dedicated sub-group of the Board that brings together experts from the Member States and the Commission as well as relevant public financial institutions. This sub-group would deal with specific questions and tasks in the context of a Strategic Project, discuss the individual financing needs of a Strategic Project (including any existing financing) and provide project promoters with a suggestion on how to best access financing possibilities.

The sub-group would consider at least the following financing options:

- additional private sources of financing;
- support through resources from the European Investment Bank Group or other international financial institutions, including the European Bank for Reconstruction and Development;
- existing Member State instruments and programmes, including from national promotional banks and institutions; and
- relevant Union funding and financing programmes (such as InvestEU mentioned above).

## SUPPORT AT NATIONAL LEVEL

In addition to Commission activity, Member States shall undertake activities to accelerate private investments in Strategic Projects and such activities may include providing and coordinating support to Strategic Projects facing difficulties in accessing finance.

Such support may be administrative rather than financial, including by providing assistance to project companies to ensure compliance with applicable administrative and reporting obligations and assistance to project promoters to further increase the public acceptance of the project.

## STRATEGIC PARTNERSHIPS AND THIRD COUNTRIES

The Commission proposed the development of Strategic Partnerships as part of its 2020 Action Plan on Critical Raw Materials, an intention that would continue under the Proposed CRM Regulation. To qualify, such project must result in value being added to the EU as a whole as well as the third country in which the project is located, particularly when it is a developing country.

Strategic Partnerships are commitments between the EU and a third (non-EU) country to increase the cooperation related to the raw materials value chain. The non-binding instrument identifies the mutual interests between the EU and that third country and what actions will be taken between them to further those interests. The 2020 Action Plan identified resource-rich countries like Canada, Australia, those in Africa and Ukraine and the EU and UK have both since entered into a Strategic Partnerships with Canada.

The EU has already taken steps to develop such partnerships since the publication of the Proposed CRM Regulation. On 14 June 2023 the Commission adopted a regulation permitting and setting out the scope of negotiations with the US in relation to a Critical Minerals Agreement (“CMA”). If approved by the Council, it would cover negotiations on (i) facilitating trade on materials required to make electric vehicle batteries; and (ii) cooperating to make the CRM sector more “sustainable”, including by (a) focussing on environmental protection, implementing international technical standards and taking an approach in line with the circular economy; (b) promoting labour rights in the CRM sector; and (c) developing common standards for strengthening sustainable and equitable supply chains. Combining the EU and US’s resources and experience is a positive step for achieving the objectives set out above, however – given that these objectives are wide and will be difficult to implement and achieve in actuality – we will be interested in the development of the “how” behind them as the negotiations unfold.

The EU would, on conclusion of the CMA, obtain a status equivalent to a free trade agreement partner in the US which would allow it to compete on a level playing field with other third country competitors on the US market when exporting materials necessary for electric vehicle battery production. As well as scaling up as a trading partner, the CMA feeds into the EU’s objectives of scaling up domestic carbon neutral technologies as part of the Net Zero Industry Act – another framework forming part of the Green Deal Industry Plan.

In addition, the EU signed a memorandum of understanding with Argentina in June, under which the parties commit to developing a roadmap within 6 months for achieving the objectives of the collaboration. Similar to the EU-US partnership, these focus on cooperation to achieve ESG criteria, aligning with international standards, minimising the environmental and climate impact of mining projects as well as sustainable raw material value chain integration. One of the ways this could be achieved is by jointly developing projects and facilitating trade and investment between the two countries. Such collaboration will also facilitate training and skill-sharing along the value chain necessary to bring labour at each level in line with international labour standards.

## OPPORTUNITIES

Should the Proposed CRM Regulation enter into force as currently drafted, mining companies will be able to apply to the Commission for the recognition of their EU and third country-based projects as Strategic Projects. If granted status, these should benefit from support in accessing finance and, in relation to EU-based projects, benefit from prioritisation throughout the permit granting processes in each relevant Member State and compliance with applicable administrative and reporting obligations. It should be noted that Strategic Projects would be expected to have cross-border benefits beyond the Member State in which the project is taking place and including into downstream sectors.

There is no sufficient clarity at this stage how the permit-granting process will be implemented at national level (particularly what “highest national significance” means in each Member State) and the extent to which this will vary between Member States, albeit there is comfort from the prescribed timelines for granting permits for Strategic Projects.

There is also ambiguity around the extent of financing available for such projects; while national, union-wide and public funding is available, including state aid, the availability of this funding is subject to stringent tests. The Proposed CRM Regulation makes clear that public support should only be used to address market failure or where there is sub-optimal investment, and not “crowd-out” private financing or distort competition. The application of public support must be proportionate and add value to the Union. There is an expectation therefore that private funding should first be assessed as an option which, in the face of volatility of pricing of critical raw materials, may be difficult. The interaction of public and private funding and whether this will result in a specific critical raw materials fund is not yet clear but may be of interest to parties considering obtaining project finance for future mining projects and wishing to explore a hybrid form.

While it is clear that we only have a framework at this stage, with lots of detail yet to crystallise, the recognition of the importance of mining within the EU’s sustainable transition, and the offer of additional support to mining sector parties as part of that, will be welcome.

## FOOTNOTES

# WATSON FARLEY & WILLIAMS

[1] <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52023PC0160>

[2] <file:///wfwlofi1/users/bucl3/Downloads/7ce37e41-1d9a-4f96-a24b-4f89207700bf.pdf>

[3] The Board shall be composed of Member States and the Commission. It shall be chaired by the Commission (Article 35).

[4] Projects contributing to build strategic raw materials capacities across all value chain stages, both within and outside of the EU, can apply for the status of “Strategic Project”. These projects will contribute to the security of supply of strategic raw materials in the EU.

[5] Directive 2006/21/EC of the European Parliament and of the Council of 15 March 2006 on the management of waste from extractive industries and amending Directive 2004/35/EC. As an overview, the Directive provides for measures and guidance to prevent or reduce as far as possible, the adverse effects on the environment resulting from the management of waste from extractive industries.

[6] Chapter 3, Section 2, Article 8 (One stop shop) of the Proposed CRM Regulation.

[7] The permit application procedure is set out in Article 6 of the Proposed CRM Regulation.

[8] Regulation (EU) 2021/523 of the European Parliament and of the Council of 24 March 2021 establishing the InvestEU Programme and amending Regulation (EU) 2015/1017. The InvestEU Programme was designed to contribute to building a sustainable finance system in the EU with a focus on sustainable investment through the InvestEU Fund.

## KEY CONTACTS



**SOLANGE LEANDRO**  
PARTNER • LONDON

T: +44 20 7814 8244

[sleandro@wfw.com](mailto:sleandro@wfw.com)



**LAUREN BUCHAN**  
ASSOCIATE • LONDON

T: +44 20 7814 8429

[LaurenBuchan@wfw.com](mailto:LaurenBuchan@wfw.com)



**JAN MELLMANN**  
PARTNER • LONDON

T: +44 20 7814 8060

[jmellmann@wfw.com](mailto:jmellmann@wfw.com)

### DISCLAIMER

Watson Farley & Williams is a sector specialist international law firm with a focus on the energy, infrastructure and transport sectors. With offices in Athens, Bangkok, Dubai, Dusseldorf, Frankfurt, Hamburg, Hanoi, Hong Kong, London, Madrid, Milan, Munich, New York, Paris, Rome, Seoul, Singapore, Sydney and Tokyo our 700+ lawyers work as integrated teams to provide practical, commercially focussed advice to our clients around the world.

All references to ‘Watson Farley & Williams’, ‘WFW’ and ‘the firm’ in this document mean Watson Farley & Williams LLP and/or its affiliated entities. Any reference to a ‘partner’ means a member of Watson Farley & Williams LLP, or a member, partner, employee or consultant with equivalent standing and qualification in WFW Affiliated Entities. A list of members of Watson Farley & Williams LLP and their professional qualifications is open to inspection on request.

# WATSON FARLEY & WILLIAMS

Watson Farley & Williams LLP is a limited liability partnership registered in England and Wales with registered number OC312252. It is authorised and regulated by the Solicitors Regulation Authority and its members are solicitors or registered foreign lawyers.

The information provided in this publication (the “Information”) is for general and illustrative purposes only and it is not intended to provide advice whether that advice is financial, legal, accounting, tax or any other type of advice, and should not be relied upon in that regard. While every reasonable effort is made to ensure that the Information provided is accurate at the time of publication, no representation or warranty, express or implied, is made as to the accuracy, timeliness, completeness, validity or currency of the Information and WFW assume no responsibility to you or any third party for the consequences of any errors or omissions. To the maximum extent permitted by law, WFW shall not be liable for indirect or consequential loss or damage, including without limitation any loss or damage whatsoever arising from any use of this publication or the Information.

This publication constitutes attorney advertising.