

# BIS consults on the implementation of new European disclosure rules for extractive industries.

Following the adoption of new European rules requiring disclosure of payments to governments by extractive industries and loggers of primary forests in June 2013, the UK Government Department for Business, Innovation and Skills (“BIS”) has put forward its proposals for implementing the rules in UK law. We look at what is proposed.

## Summary

The European Accountancy Directive promotes and requires greater transparency by companies in extractive industries and forestry in respect of their payments to governments globally. The Directive mandates reporting by large limited liability companies registered in the European Economic Area and public-interest entities, who must provide information annually on a country-by-country and project-by-project basis. (See our July 2013 briefing note: *Checkmate? Europe finalises disclosure rules on payments to government.*)

The UK government is keen to be among the first of the European member states to adopt implementing legislation for the Accountancy Directive, having made a commitment to promote greater transparency during its Presidency of the G8 countries (now G7) in 2013. On 28 March 2014, BIS published its proposals for *The Reports on Payments to Government Regulations 2014*.

BIS has invited comments on the draft regulations on and will conduct a consultation on its proposals until 16 May 2014. BIS intends to adopt implementing regulations during 2014 (well ahead of the 20 July 2015 deadline set by Europe) and affected undertakings should expect to report from the start of their financial year commencing on or after 1 January 2015.

## The requirements of the Accountancy Directive

In brief, the key features of the Accountancy Directive are the following:

- Large European natural resources companies must disclose their payments to governments.

- EU registered subsidiaries need not report separately if their parent reports on a consolidated basis under the relevant rules of an EU member state.
- Subsidiaries registered outside the EU are caught by the reports of an EU-registered parent.
- Materiality threshold for reporting is EUR 100,000.
- Reporting to be country-by-country and project-by-project, and broken down by type of payment (e.g. tax, royalty or licence fee).
- There are no exemptions from reporting where making a report would breach the laws of the country whose government is receiving the payment or the terms of the contract under which the payment is made.
- Limited exemptions to reporting apply: (a) if severe long-term restrictions prevent the parent from exercising its rights over an asset or subsidiary, (b) in ‘extremely rare’ cases where information cannot be obtained without disproportionate expense

or undue delay and (c) for subsidiaries held only with a view to onward disposal.

## What is proposed by the UK Government?

The proposals made by BIS in *The Reports on Payments to Government Regulations 2014* are necessarily limited to those areas in which the Accounting Directive has not already prescribed the approach.

### Time for reporting

The Accounting Directive requires annual reporting of payments to governments and requires undertakings to report for financial years commencing on or after 20 July 2015 (i.e. the transposition deadline for EU member states). Corresponding with its commitment to adopt implementing legislation early, however, BIS proposes that the first reporting period should be brought forward for UK registered undertakings and reporting will be required for financial years commencing on or after 1 January 2015. This approach is most likely to be problematic for UK subsidiaries of a parent incorporated in another EU member state or a non-EU country, who will need to report individually until such time as their parent reports payments to government on a consolidated basis under an equivalent EU regime.

The timeframe for reporting proposed by BIS is 11 months after the end of the relevant financial year. The reporting timeframe will be shortened to 6 months from the end of a financial year for companies listed on an EU market once changes to the Transparency Directive are implemented (see below: *Listed*

*Companies – Changes to the Transparency Directive*).

### Content of the Report

BIS has indicated in its consultation that it does not intend to mandate a specific reporting format but will develop industry guidance and a recommended template for reporting in on-going consultation with industry representatives. A possible reporting template – in the form of two tables: payments by country and payments by project – is provided as an annex to the consultation document and is reproduced at the end of this note.

### Place of publication

UK companies will be required to file their reports with UK Companies House within the applicable timeframe. It is anticipated that reports should be filed electronically, and Companies House will determine the rules for delivery and filing fees payable in due course. Reports will be made publicly available from the Companies House website.

### Penalties for failure to comply

BIS proposes to penalise non-compliance with the new reporting requirements under the established UK penalty regime applicable to other statutory reporting obligations. As such, failure to prepare and/or file a report will be a criminal offence for directors and failure to deliver a report will give rise to civil penalties for a company.

## Listed Companies – Changes to the Transparency Directive

Related changes to the Transparency Directive extend the new disclosure

requirements to companies in extractive industries (and forestry) whose securities are listed in EU markets, whether or not that company is incorporated in an EU member state. These companies must publish their reports on payments to governments within 6 months of the end of their financial year – that is, two months after the deadline for publishing their annual financial statements – and keep their reports publicly available for at least ten years.

The changes to the Transparency Directive do not need to be implemented by EU member states until the later deadline of 27 November 2015. In the UK, HM Treasury (and not BIS) will make proposals for the implementation of such changes in due course. Nonetheless, BIS has invited comments in the current consultation regarding concerns or benefits arising from the later implementation of the changes to the Transparency Directive.

Under the BIS proposals, while only *The Reports on Payments to Government Regulations 2014* are in force and the changes to the Transparency Directive have not been implemented, a listed company registered in the UK will have 11 months in which to report. Listed companies may also find for practical purposes that the information required to be reported is collected within their usual financial reporting cycle and that they wish, or it becomes market practice, to report earlier.

## Illustrative extractive report

This example report, taken from the BIS consultation document, is provided for illustrative purposes only. It shows one of the ways in which BIS suggest data may be presented.

<b>Government Reports</b>									
<b>Indonesia Governments</b>	<b>Production Entitlement</b>	<b>Tax</b>	<b>Royalties</b>	<b>Dividends</b>	<b>Sign, Disc, Prodn Bonuses</b>	<b>License Fees etc</b>	<b>Infrastructure Improvements</b>	<b>Total</b>	<b>Notes</b>
Indonesia – National	0	270,000,000	0	0	0	0	0	<b>270,000,000</b>	
Indonesia – Regional - Kalimantan	0	0	8,000,000	0	0	20,000,000	0	<b>28,000,000</b>	
Indonesia – Regional - Papua	0	0	10,000,000	0	10,000,000	2,000,000	0	<b>22,000,000</b>	
Indonesia – Regional - Sumatra	0	0	12,000,000	0	2,000,000	2,000,000	0	<b>16,000,000</b>	
Indonesia – Local – Banjarmasin City	0	0	0	0	0	0	20,000,000	<b>20,000,000</b>	
Indonesia – Local – Jayapura City	0	0	0	0	0	0	30,000,000	<b>30,000,000</b>	
Indonesia – Local - Medan	0	0	0	0	0	0	14,000,000	<b>14,000,000</b>	
Indonesia – Government Controlled Undertaking	1,600,000,000	0	0	0	0	0	0	<b>1,600,000,000</b>	
	<b>1,600,000,000</b>	<b>270,000,000</b>	<b>30,000,000</b>	<b>0</b>	<b>12,000,000</b>	<b>24,000,000</b>	<b>64,000,000</b>	<b>2,000,000,000</b>	Production entitlement volume of 16 million barrels valued at US\$100 per barrel
<b>USA Governments</b>	<b>Production Entitlement</b>	<b>Tax</b>	<b>Royalties</b>	<b>Dividends</b>	<b>Sign, Disc, Prodn Bonuses</b>	<b>License Fees etc</b>	<b>Infrastructure Improvements</b>	<b>Total</b>	<b>Notes</b>
USA National	0	520,000,000	20,000,000	0	10,000,000	0	0	<b>550,000,000</b>	
USA – Regional – Alaska State	0	80,000,000	30,000,000	0	0	250,000	0	<b>110,250,000</b>	
USA – Regional – Texas State	0	60,000,000	0	0	0	100,000	0	<b>60,100,000</b>	
USA - Regional – Wyoming State	0	100,000,000	40,000,000	0	11,500,000	400,000	0	<b>151,900,000</b>	
USA – Local – Anchorage Municipality	0	750,000	0	0	0	0	0	<b>750,000</b>	
USA – Local – Cheyenne Municipality	0	1,000,000	0	0	0	0	500,000	<b>1,500,000</b>	
USA – Local – Houston Municipality	0	500,000	0	0	0	0	125,000,000	<b>125,500,000</b>	
	<b>0</b>	<b>762,250,000</b>	<b>90,000,000</b>	<b>0</b>	<b>21,500,000</b>	<b>750,000</b>	<b>125,500,000</b>	<b>1,000,000,000</b>	
	<b>1,600,000,000</b>	<b>1,032,250,000</b>	<b>120,000,000</b>	<b>0</b>	<b>33,500,000</b>	<b>24,750,000</b>	<b>189,500,000</b>	<b>3,000,000,000</b>	

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Project Reports									
	Production Entitlement	Tax	Royalties	Dividends	Sign, Disc, Prodn Bonuses	License Fees etc	Infrastructure Improvements	Total	Notes
<b>Indonesia Projects</b>									
Papua Project (Indonesia)	500,000,000	80,000,000	10,000,000	0	10,000,000	2,000,000	30,000,000	<b>632,000,000</b>	Production entitlement volume of 5 million barrels valued at US\$100 per barrel
Kalimantan Project (Indonesia)	400,000,000	70,000,000	8,000,000	0	0	20,000,000	20,000,000	<b>518,000,000</b>	Production entitlement volume of 4 million barrels valued at US\$100 per barrel
Sumatra Project (Indonesia)	700,000,000	120,000,000	12,000,000	0	2,000,000	2,000,000	14,000,000	<b>850,000,000</b>	Production entitlement volume of 7 million barrels valued at US\$100 per barrel
	<b>1,600,000,000</b>	<b>270,000,000</b>	<b>30,000,000</b>	<b>0</b>	<b>12,000,000</b>	<b>24,000,000</b>	<b>64,000,000</b>	<b>2,000,000,000</b>	
<b>USA Projects</b>									
Texas Project (USA)	0	60,500,000	20,000,000	0	10,000,000	100,000	125,000,000	<b>215,600,000</b>	
Alaska Project (USA)	0	80,750,000	30,000,000	0	0	250,000	0	<b>111,000,000</b>	
Wyoming Project (USA)	0	101,000,000	40,000,000	0	11,500,000	400,000	500,000	<b>153,400,000</b>	
Entity Level Payment (USA)	0	520,000,000	0	0	0	0	0	<b>520,000,000</b>	
	<b>0</b>	<b>762,250,000</b>	<b>90,000,000</b>	<b>0</b>	<b>21,500,000</b>	<b>750,000</b>	<b>125,500,000</b>	<b>1,000,000,000</b>	
<b>Total</b>	<b>1,600,000,000</b>	<b>1,032,250,000</b>	<b>120,000,000</b>	<b>0</b>	<b>33,500,000</b>	<b>24,750,000</b>	<b>189,500,000</b>	<b>3,000,000,000</b>	

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## Public Policy Unit at Clifford Chance

Clifford Chance's Public Policy Unit is well-placed to assist those wishing to respond to this BIS consultation, and other government consultations. We regularly advise clients in relation to legislative and regulatory matters at both the UK and the EU level.

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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