

## FACT SHEET – EU rules for disclosure of payments to governments by oil, gas and mining (extractive industry) and logging companies

On 26 June 2013 the European Parliament and Council of the European Union (EU Member States) signed into law new payment disclosure requirements for the extractive and forestry industries. These new rules require oil, gas, mining and logging companies to annually disclose the payments they make to governments on a country-by-country and project-by-project basis.

The new disclosure rules form Chapter 10 “Report on payments to governments” of the EU Accounting Directive<sup>1</sup> and Article 6 “Report on payments to governments” of the revised EU Transparency Directive.<sup>2</sup>

The Accounting Directive, which regulates the provision of financial information by all limited liability companies registered in the European Economic Area (EEA),<sup>3</sup> requires the disclosure of payments to governments by covered oil, gas, mining and logging companies.

Inclusion of the same disclosure requirements in the revised Transparency Directive applies the requirement to all relevant companies listed on EU regulated markets even if they are not registered in the EEA and are incorporated in other countries.

Transposition of the Directives into EU Member State law is permitted to take up to 24 months. The Accounting Directive must be transposed by 20 July 2015 and the Transparency Directive must be transposed by 27 November 2015. Companies’ public disclosure of payments in an annual report is anticipated to begin in 2016 and a number of Member States have committed to “quick” transposition of the legislation.<sup>4</sup>

The following provides a summary of the Directives’ key requirements. Careful assessment will be needed to ascertain that all the essential provisions have been effectively incorporated into domestic law in key Member States.

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<sup>1</sup> Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings.

[http://new.eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=oj:JOL\\_2013\\_182\\_R\\_0019\\_01&from=EN](http://new.eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=oj:JOL_2013_182_R_0019_01&from=EN)

<sup>2</sup> Directive 2013/50/EU of the European Parliament and of the Council of 22 October 2013 amending Directive 2004/109/EC of the European Parliament and of the Council on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, Directive 2003/71/EC of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading and Commission Directive 2007/14/EC laying down detailed rules for the implementation of certain provisions of Directive 2004/109/EC.

[http://new.eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=oj:JOL\\_2013\\_294\\_R\\_0013\\_01&from=EN](http://new.eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=oj:JOL_2013_294_R_0013_01&from=EN)

<sup>3</sup> European Union (EU) plus Iceland, Liechtenstein and Norway.

<sup>4</sup> The United Kingdom has committed to complete transposition of the [Accounting Directive in 2014](#). Denmark, Finland, France, Germany, Italy and Sweden have committed to complete transposition of the legislation “quickly”. See: 2013 Lough Erne G8 Leaders’ Communique (page 9, paragraph 38):

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/207771/Lough\\_Erne\\_2013\\_G8\\_Leaders\\_Communique.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/207771/Lough_Erne_2013_G8_Leaders_Communique.pdf) (18 June 2013) and *Joint Statement by Kingdom of Denmark, Republic of Finland, Republic of Iceland, Kingdom of Norway, Kingdom of Sweden, and the United States of America*: <http://www.whitehouse.gov/the-press-office/2013/09/04/joint-statement-kingdom-denmark-republic-finland-republic-iceland-kingdo> (4 September 2013)

## 1. What payment information must be disclosed?

Companies must disclose in an annual report and in respect of the relevant financial year:<sup>5</sup>

1. The **total amount of payments** made to each government.
2. The **total amount per type of payment** (see categories below) made to each government.
3. Where payments are attributed to a specific project, the **total amount per type of payment made for each project** and the **total amount of payments for each project**.
  - Payments made at **entity level** such as **corporate income taxes** should be disclosed at entity level without artificially disaggregating them and allocating them to particular projects.<sup>6</sup>
4. **Payments in kind**, reported in value and, where applicable, in volume.<sup>7</sup>
5. The **government that received** the payments.

## 2. Which categories of payments must be disclosed?

The following payment types must be disclosed:<sup>8</sup>

1. **Production entitlements**: for example, “profit oil” (oil production shared between a company and government once investment and operating costs are recovered through cost oil - the physical oil or revenue used to cover the operator's costs).
2. **Taxes** levied on the income, production or profits of companies.
  - Excluded: consumption taxes such as value added taxes, personal income taxes or sales taxes.
3. **Royalties**.
4. **Dividends**.
  - Included: dividends paid to a government in lieu of production entitlements or royalties.
  - Excluded: dividends paid to a government as a common or ordinary shareholder, provided paid under the same terms as to other shareholders.
5. Signature, discovery and production **bonuses**.
6. **Fees** including licence fees, rental fees and entry fees, and other payments for licences and/or concessions.
7. **Payments for infrastructure improvements**.

## 3. Who must disclose?

- All companies that are “**active in the extractive industry or logging of primary forests**”<sup>9</sup> that are either:
  - **listed on an EU regulated stock market** (“all public-interest entities”); or
  - **large extractive and forestry companies** (“large undertakings”) that are registered in the EU/EEA (irrespective of whether private or public).<sup>10</sup>
- The EU defines a **regulated stock market** in its **Markets in Financial Instruments Directive (MIFID)**.<sup>11</sup> All

<sup>5</sup> Article 43(2). All article and recital citations refer to the Accounting Directive unless otherwise indicated.

<sup>6</sup> Recital 47.

<sup>7</sup> With supporting notes to explain how value has been determined.

<sup>8</sup> Article 41(5).

<sup>9</sup> Article 42(1).

<sup>10</sup> Article 42(1). Large undertakings are defined in Article 3(3): as those whose balance sheets indicate they exceed two of these three criteria: (a) balance sheet total €20 million; (b) net turnover €40 million; (c) average number of employees during financial year 250.

<sup>11</sup> EU Directive 2010/78/EU consolidated version (as amended and corrected):

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2004L0039:20110104:EN:PDF>

**Euronext** securities markets (Amsterdam, Brussels, Lisbon, London and Paris) are regulated markets within the meaning of this Directive,<sup>12</sup> but the **AIM** market owned and operated by the London Stock Exchange is not.<sup>13</sup>

- **Parent companies and subsidiaries:** subject to the exclusions below, a parent company is required to submit a **consolidated report** on relevant extractive and logging payments to governments by undertakings included in its consolidated financial statements if **any of its subsidiary undertakings** (defined on the basis of **control**) are active in the extractive industry or logging.<sup>14</sup>
- **Non-EU registered companies and companies with depository receipts:** The disclosure requirements will apply to any non-EU registered companies and companies with depository receipts as long as they are listed on an EU regulated stock market<sup>15</sup>. This will include Russia's Gazprom which has secondary listings in London and Frankfurt and is therefore required to disclose.
- **Exclusions:**
  - **Parent companies of small and medium-sized groups**<sup>16</sup> are not required to prepare a consolidated report unless any member of the group is **listed on an EU regulated securities market** or otherwise qualifies as a "**public-interest entity**".<sup>17</sup>
  - **Subsidiary undertakings** need not be included in a parent company's consolidated report on payments to governments under certain limited conditions: "(a) **severe long-term restrictions** substantially hinder the parent undertaking in the exercise of its rights over the assets or management" of the subsidiary; or "(b) extremely rare cases where **the information necessary** for the preparation of the consolidated report on payments to government ... **cannot be obtained without disproportionate expense or undue delay**"; or "(c) the **shares** of that undertaking are **held exclusively with a view to their subsequent resale**".<sup>18</sup>
  - The above exclusions for **subsidiary undertakings** will apply "**only if they are also used for the purposes of the consolidated financial statements**".<sup>19</sup> That is, if a parent company includes a subsidiary in its audited annual accounts, it must disclose that subsidiary's payments to governments.

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<sup>12</sup> <https://europeanequities.nyx.com/regulation/nyse-euronext-regulations>

<sup>13</sup> <http://www.londonstockexchange.com/companies-and-advisors/aim/faq/faq.htm>

<sup>14</sup> Article 44(1). According to Recital 31, "Control should be based on holding a majority of voting rights, but control may also exist where there are agreements with fellow shareholders or members. In certain circumstances control may be effectively exercised where the parent holds a minority or none of the shares in the subsidiary." Article 22 also lists various forms of control, including: majority voting rights, right to appoint or remove a majority of the administrative, management or supervisory body, right to exercise a dominant influence over an undertaking pursuant to a contract or a provision of the undertaking's constitutional documents, and power to exercise or actual exercise of dominant influence or contract.

<sup>15</sup> Article 42(1) and definition of "public-interest entities" in Article 2(1)(a)-(d). For the inclusion of depository receipts, see Transparency Directive, Recital 18 and Article 1(a)(1).

<sup>16</sup> Small and medium-sized groups are defined in Article 3(5) and 3(6) respectively.

<sup>17</sup> Article 44(2)(a) and (b). Certain credit institutions (Art. 2.1(b)), insurance companies (Art. 2.1(c)) and entities designated as public interest entities by Member States (Art. 2.1(d)) may also qualify.

<sup>18</sup> Article 44(3).

<sup>19</sup> Article 44(3).

#### 4. For which activities must payments be disclosed?

Disclosure is required for payments arising from any activity related to **minerals, oil, natural gas deposits or other materials** involving:

- **Exploration**
- **Prospection**
- **Discovery**
- **Development**
- **Extraction**<sup>20</sup>

And payments arising from the **logging of primary forests**.<sup>21</sup>

#### 5. Payments to which government entities?

Payments must be disclosed if they are made to “governments in the countries in which [the companies] operate”,<sup>22</sup> specifically:

- Any **national, regional or local authority** of any country.<sup>23</sup>
- Any **department, agency or undertaking controlled** by a government authority; this would include **state-owned companies**.<sup>24</sup>

#### 6. How is a project defined?

- “Project” is defined as “**the operational activities that are governed by a single contract, license, lease, concession or similar legal agreements and form the basis for payment liabilities with a government**”.<sup>25</sup>
- “**Multiple such agreements**” provided they are “**substantially interconnected**” will also be considered a single project.<sup>26</sup>
  - “**Substantially interconnected**” legal agreements mean “a set of operationally and geographically integrated contracts, licenses, leases or concessions or related agreements with substantially similar terms that are signed with the government” and “give rise to payment liabilities”.<sup>27</sup>
  - Such multiple agreements “can be governed by a single contract, joint venture, production sharing agreement, or other overarching legal agreement”.<sup>28</sup>

#### 7. What is the threshold of payments to be disclosed?

- Any payment, whether made as a **single payment** or **series of related payments**, must be disclosed if it is at least **100,000 Euro within a financial year**.<sup>29</sup>

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<sup>20</sup> Article 41(1).

<sup>21</sup> Article 41(2).

<sup>22</sup> Recital 44.

<sup>23</sup> Article 41(3).

<sup>24</sup> Article 41(3). On “control” see footnote 13 above.

<sup>25</sup> Article 41(4).

<sup>26</sup> Article 41(4).

<sup>27</sup> Recital 45.

<sup>28</sup> Recital 45.

<sup>29</sup> Article 43(1) and Recital 46.

- Where companies make **periodic payments or instalments** (e.g. rental fees), this will constitute a series of related payments, and the **aggregate amount** of the related periodic payments or instalments at either project or country level will determine whether disclosure is required.<sup>30</sup>
- Payments and activities **“may not be artificially split or aggregated”** to avoid disclosure.<sup>31</sup>
- For Member States that do not use the Euro, the 100,000 Euro threshold is to be **converted into national currency** at the exchange rate published in the *Official Journal of the European Union* at the date of entry into force of the Accounting Directive, rounded to the nearest hundred.<sup>32</sup>

#### 8. When will the information be disclosed?

- The Accounting and Transparency Directives **enter into force** on the twentieth day following their publication in the *Official Journal of the European Union*.<sup>33</sup>
- Member States are required to **transpose the disclosure requirements into their domestic law by 20 July 2015** (Accounting Directive)<sup>34</sup> and **within a period of 24 months from the date of its entry into force** (Transparency Directive, and therefore by 27 November 2015).<sup>35</sup>
- Companies will be required to comply with the new rules in each Member State according to when each country completes transposition. Companies’ public disclosure of payments in an annual report is anticipated to begin 2016 and a number of Member States have committed to “quick” transposition of the legislation (see footnote 4, page 1).
- For the Transparency Directive, **the report shall be made public at the latest six months after the end of each financial year and shall remain publicly available for at least 10 years.**<sup>36</sup>

#### 9. How will the information be disclosed to the public?

- Companies will publish the information **annually in a report.**<sup>37</sup>
- In a form and manner as **laid down by the laws of each Member State.**<sup>38</sup>

#### 10. Are any exemptions granted on grounds of alleged prohibitions in foreign law, confidentiality or commercial sensitivity?

- The new EU disclosure requirements **do not** provide for any exemptions in cases of alleged **disclosure prohibitions in foreign law** or on **confidentiality or commercial sensitivity grounds.**
- The Transparency Directive evokes the principle of “universality” with regard to reporting on payments to governments and states that **no exemptions, for instance for issuers active in certain countries, should be made which have a distortive impact and allow issuers to exploit lax transparency requirements.**<sup>39</sup>

<sup>30</sup> Recital 46.

<sup>31</sup> Article 43(4).

<sup>32</sup> Article 43(5).

<sup>33</sup> The Accounting Directive 2013/34/EU was published in the *Official Journal of the European Union* on 29 June 2013:

<http://new.eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L:2013:182:TOC>.

The Transparency Directive 2013/50/EU was published in the *Official Journal of the European Union* on 6 November 2013:

<http://new.eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L:2013:294:TOC>.

<sup>34</sup> Article 53(1).

<sup>35</sup> Transparency Directive, Article 4.

<sup>36</sup> Transparency Directive, Article 6.

<sup>37</sup> Article 42(1).

<sup>38</sup> Article 45(1).

<sup>39</sup> Transparency Directive, Recital 8

### 11. Will any other reporting regimes be considered equivalent to the EU rules?

- The **EU Commission** will draw up, **in consultation with the Parliament and Council, criteria** to assess which if any reporting regimes applied by countries outside the EU/EEA (“third country reporting requirements”) may be considered **equivalent** to the EU requirements.<sup>40</sup>
  - The Commission is required in its work on equivalence criteria to **“carry out appropriate consultations ... including at expert level”** and will be “assisted” by a committee.<sup>41</sup>
- The **equivalence criteria** must include target companies, target recipients of payments (governments), payments reported and their attribution and breakdown, triggers for reporting on a consolidated basis, reporting medium, and frequency and anti-evasion measures.<sup>42</sup>
- The Commission will be empowered to identify **“those third-country reporting requirements”** that it judges meet the equivalence criteria previously agreed with the Parliament and Council.<sup>43</sup>
- Companies required to disclose payments under the EU rules that disclose under third country reporting requirements which the EU Commission has assessed to be equivalent to the EU regime will be permitted to **disclose in the EU/EEA** using the **report compiled under those non-EU requirements**.<sup>44</sup>

### 12. What penalties do companies face for failing to meet the requirements?

- Member States are required to **“provide for penalties applicable to infringements”** of their national provisions and **“shall take all the measures necessary to ensure that they are implemented”**.<sup>45</sup>
- Penalties are required to be **“effective, proportionate and dissuasive”**.<sup>46</sup>

### 13. How do the rules address attempts to evade disclosure?

- Member States are required to ensure that **“members of the responsible bodies”** of each reporting company **“have responsibility for ensuring that, to the best of their knowledge and ability”**, the report on payments to governments is **“drawn up and published in accordance with”** the Accounting Directive.<sup>47</sup>
- Disclosure **“shall reflect the substance, rather than the form, of the payment or activity concerned”**.<sup>48</sup>
- Reporting companies **“cannot avoid disclosure ... by re-characterising an activity”**.<sup>49</sup>
- Payments and activities cannot be **“artificially split or aggregated”** to avoid disclosure.<sup>50</sup>

### 14. What is contained in the review clause?

- The reporting regime will be reviewed and a report by the Commission to the Parliament and Council must be submitted within **three years** after the deadline for transposition into Member State law – that is **by 21 July 2018**.<sup>51</sup>

<sup>40</sup> Articles 46 and 47.

<sup>41</sup> Recital 50 and Article 50.

<sup>42</sup> Article 46(3).

<sup>43</sup> Article 47.

<sup>44</sup> Article 46(1).

<sup>45</sup> Article 51.

<sup>46</sup> Article 51.

<sup>47</sup> Article 45(2).

<sup>48</sup> Article 43(4) and Recital 49.

<sup>49</sup> Recital 49.

<sup>50</sup> Article 43(4) and Recital 49.

<sup>51</sup> Article 48 and Recital 52. The Transparency Directive will also be reviewed within three years after the final date for the transposition of the Directive (Transparency Directive, Article 5).

- The review will “**consider the effectiveness of the regime**” including “**compliance** with the reporting obligations and the modalities” of **project-level reporting**.<sup>52</sup>
- It will take into account “**international developments**” including “the impacts of other international regimes” and effects on **competitiveness and energy security**.<sup>53</sup>
- The review will consider **extending reporting requirements to additional industry sectors** and **whether the report should be audited**.<sup>54</sup>
- The review will “**take into account the experience of preparers and users of the payments information**”.<sup>55</sup>
- It will consider “whether it would be appropriate to include **additional information**, such as effective tax rates, average number of employees, use of subcontractors and any pecuniary sanctions administered by country.”<sup>56</sup>
- The Commission’s report will also “analyse the feasibility of the introduction of an obligation for all EU issuers to carry out due diligence when sourcing minerals to ensure that supply chains have no connection to **conflict parties** and respect the **EITI and OECD recommendations on responsible supply chain management**”.<sup>57</sup>

<b>More information:</b>
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- The “Accounting” *Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings* was published in the *Official Journal of the European Union* on 29 June 2013:  
[http://new.eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=oj:JOL\\_2013\\_182\\_R\\_0019\\_01&from=EN](http://new.eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=oj:JOL_2013_182_R_0019_01&from=EN)
- The “Transparency” *Directive 2013/50/EU of the European Parliament and of the Council of 22 October 2013 amending Directive 2004/109/EC of the European Parliament and of the Council on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, Directive 2003/71/EC of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading and Commission Directive 2007/14/EC laying down detailed rules for the implementation of certain provisions of Directive 2004/109/EC* was published in the *Official Journal of the European Union* on 6 November 2013:  
[http://new.eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=oj:JOL\\_2013\\_294\\_R\\_0013\\_01&from=EN](http://new.eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=oj:JOL_2013_294_R_0013_01&from=EN)
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<sup>52</sup> Article 48 and Recital 52.

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<sup>55</sup> Recital 52.

<sup>56</sup> Article 48 and Recital 52.

<sup>57</sup> Article 48.