



Improving transparency in the oil, gas and mining sectors: The European Union's payments to governments legislation

1. Introduction

Natural resources can lift millions in the developing world out of poverty. But they can also motivate and enable corruption, particularly given the large and sometimes vast revenues involved, the remoteness of many operations, the secrecy surrounding many contractual arrangements and the discretionary power of public officials over national resources. This is known as the [resource curse](#).

In most developing countries progress on poverty eradication depends on the effective management of domestic resources and the revenues they generate. However, in the majority of countries considered resource-rich, governance challenges persist, including high levels of corruption and secrecy. Of the 124 countries that score below 50 in Transparency International's [2017 Corruption Perception Index](#), 73 are considered resource-rich (approximately 59%) according to the latest [Resource Governance Index](#).

To ensure that the revenues generated by the exploitation of these natural resources are used for the widest public benefit and not siphoned off through corruption or tax abuse, or mismanaged, certain conditions must exist. Civil society has long advocated for increased disclosure in key areas of corporate reporting as one important way to improve the accountability of governments and companies operating in the extractives sector. Greater corporate transparency in the extractives sector will ultimately help to combat corruption, tax abuse and mismanagement, promote citizens' trust and assist resource-rich countries' development.

The objective of companies disclosing payments to governments is to strengthen transparency and thereby fight corruption, misuse of public money and illicit financial flows from resource-rich countries. Such disclosure enhances the accountability of governments for the revenues generated by exploitation of their countries' natural resources and the accountability of companies operating in the extractives and logging industries in these countries.

2. Extractives transparency: state of play

In 2013, the European Union (EU) passed new transparency legislation requiring large oil, gas, mining and logging companies listed and registered in the EU to disclose their revenue payments to

governments around the world. The [EU Accounting Directive](#) requires reporting of EU-registered companies' payments to governments on a country-by-country and a project-by-project basis (for each country a company operates in and for each project to which payments have been attributed) as does a similar provision in the [EU Transparency Directive](#) for publicly listed companies. This includes disclosure of taxes paid, production entitlements, royalties, bonuses and other payments of EUR 100,000 and over. The legislation does not provide a reporting exemption in cases where a recipient government allegedly prohibits disclosure of payments. In certain countries where disclosure was allegedly prohibited, numerous companies have publicly reported payments with no identifiable impact on their ability to operate or their competitiveness.

Thanks to this legislation, similar laws have been adopted in non-EU countries, including Norway and Canada, while similar draft legislation is currently being considered in Switzerland and Ukraine and has been pledged by Australia's major opposition party. A mandatory reporting law in the United States awaits the Securities and Exchange Commission (SEC)'s new implementing rule.

The EU Accounting Directive has now been transposed into national law by all EU Member States. Early adoption by France and the UK means that global companies such as Shell and Total published their first reports in 2016, while the majority of European companies began reporting in 2017.

In 2018, the European Commission (EC) will review Chapter 10 of the Accounting Directive – the section setting out the requirements for “payments to governments” reporting by extractive companies. The EC is required to publish its report and recommendations to the European Parliament and Council by July 2018. As well as the need to assess whether or not existing legislation meets the stated objectives of the Directive, its review clause specifies three elements that the EC will take into account: international developments with regard to transparency of payments to governments; impacts of non-EU countries' reporting regimes; and the effects on competitiveness and on security of energy supply. The EC can recommend that the legislation is revised, with a new proposal to amend the existing text, or it can recommend that the legislation is maintained in its present form until a new review takes place. The upcoming legislative review is also an opportunity to address loopholes and other shortcomings that have become apparent since the adoption of the Directive and its implementation into national legislation in order to ensure that all data reported is complete, relevant and usable.

This position paper has been prepared by members and civil society allies of the Publish What You Pay coalition¹ in order to strengthen EU policy on promoting transparency and accountability in the extractives sector through the review of Chapter 10 of the Accounting Directive and Article 6 of the Transparency Directive. It outlines the main achievements of the existing transparency legislation for the extractives sector as well as its shortcomings and loopholes, and sets out recommendations for the EC's review.

As the EC considers companies' payments to governments reports to date, we believe that a number

¹ Publish What You Pay (PWYP) is a global membership-based coalition of civil society organisations (CSOs) in over 50 countries, united in their call for an open and accountable extractive sector, so that oil, gas and mining revenues improve the lives of women, men and youth in resource-rich countries and that extraction is carried out in a responsible manner that benefits countries and their citizens. For more information, see <http://www.publishwhatyoupay.org/about/>

of details in the Accounting Directive should be amended in order for the legislation to be more effective and deliver on its [intended objectives](#).²

Box 1: Summary of key recommendations

We recommend that the European Commission improves Chapter 10 of the Accounting Directive in the following 3 key areas:

1. Accessing data

- Require companies covered under both the Accounting Directive and the Transparency Directive to publish their reports directly to a central online repository, hosted and maintained by the European Commission, freely accessible to the public.
- Ensure the European Securities and Markets Authority (ESMA) develops and operates the European electronic access point to provide access to companies' information as per the Transparency Directive's requirements.
- Require EU Member States to set up officially appointed mechanisms as per their obligations under the Transparency Directive.
- Require companies to publish their reports both in PDF or HTML and in an open, machine-readable data format.

2. Clarifying existing data

- Clarify the definition of *substantially interconnected legal agreements* in the text of the Directive, to avoid artificial aggregation of projects.
- Specify that companies include all joint-venture payments to governments larger than €100,000, whether made directly by the company, indirectly via the operator or another entity on the reporting company's behalf, on a proportionate basis (relative to the company's ownership stake) in their reports, regardless of whether the company has a controlling or non-controlling interest.
- Clarify that when a payment in kind is made in the form of oil, gas or another mineral, companies must report both the value and the volume of such payment, and include supporting notes to explain how the value has been determined.
- Clarify that companies should avoid aggregating cash payments and payments in kind in a single figure, and avoid aggregating together in a single figure payments in kind for differently valued commodities, such as oil and gas.
- Clarify that companies are required to state the name of the national or subnational government entity or other government body receiving each of their payments, including departments, agencies or undertakings controlled by those authorities.
- Require companies to disclose the exchange rate between the reported payment currency

² According to the European Commission, the main objective of the new disclosure requirement is to provide civil society in resource-rich countries with the information needed to hold governments to account for any income made through the exploitation of natural resources, as well as to promote the adoption of the Extractive Industries Transparency Initiative (EITI) in the same countries. See [http://europa.eu/rapid/press-release MEMO-13-541_en.htm](http://europa.eu/rapid/press-release_MEMO-13-541_en.htm). The Commission has also noted the usefulness of holding companies to account: see http://ec.europa.eu/internal_market/accounting/docs/sme_accounting/review_directives/20111025-impact-assessment-part-2_en.pdf

and the currency in which the payment was made.

- Require companies to explain their interpretation of payment categories, consistent with Article 41 (definitions) and Article 43.4 (principle of substance rather than form).

3. Increasing data and guaranteeing data quality

- Include additional categories of payments to governments on which companies have to report: payments related to the sale of oil, gas and minerals, and payments for transportation and export activities, for social expenditures and to state security forces for security services.
- Require companies to name projects that are not listed because payments during the reporting period were less than €100,000.
- Require companies to provide contextual data per project including: status (exploration, development, production), partners (if any), date of first production, production volumes and information about payments linked to infrastructure improvements.
- Require at least a limited assurance report on the disclosed data from independent accountants or auditors, together with a statement that reconciles at least the aggregate of all payments with the sum of corresponding accrued figures in the annual report.
- Require companies to disclose additional country-by-country tax-related data based on the information included in the European Parliament's final report, adopted on 4 July 2017.

Note: The above mentioned recommendations are outlined in further detail in Section 4, Making oil, gas and mining companies' reporting more effective.

3. Transparency in the extractives sector: recent developments

3.1 Impacts of EU legislation on extractives transparency

The EU legislation on disclosure of payments to governments by oil, gas, mining and logging companies is the outcome of decades of advocacy with governments by civil society and other stakeholders.

As noted above, the European Commission [pointed out](#) that the main objective of this legislation is to provide civil society in resource-rich countries with the information needed to hold governments to account for any income made through the exploitation of natural resources and to better understand whether the cost to society of extracting that natural resource is adequately compensated. The legislation also provides for greater accountability on the part of extractive companies, as the EC [has recognised](#).

The EU legislation was adopted in 2013 and Member States were required to transpose the Directive into their national legal systems by 2015. Delays in implementation resulted in the legislation being in force for only two years in most Member States at the time of writing. As a result, although company reporting is now in its third year in the UK and France, many extractive and logging companies falling under the scope of the legislation have so far reported for one year only. Therefore, the assessment of the impacts and achievements of the legislation is to some extent still only partial, with currently available data allowing only limited insight into extractive companies' payments.

However, benefits and positive results of this transparency legislation can already be identified:

- **Public understanding of extractive companies' activities and payments, and empowerment of citizens in resource-rich countries to 'follow the money'**

Improved access to information and to companies' payments data has resulted in increased resources and tools for citizens and activists around the world to monitor these disclosures and exert pressure on companies operating in their jurisdiction and on government authorities. We provide some case studies below. In addition, disclosure is not dependent upon political will in the host country, in contrast with the voluntary Extractive Industries Transparency Initiative (EITI), meaning that these reports can and do shine a light on hitherto non-transparent regimes. Disclosures are required relatively quickly following the end of a financial year, so are considerably more timely than under the EITI (reports from which are usually published at best two years after payments were made).

- **Deterrent function**

One often overlooked benefit of the legislation is the deterrent effect it has on companies and government officials against corruption and mismanagement. The fact that companies and governments know that their payments and revenues are under public scrutiny can help prevent corruption and deter both parties from engaging in questionable practices, as this would involve the risk of reputational damage for companies and political embarrassment or worse for public officials. If companies know that the public is able to scrutinise their payments, this can affect their decisions and make them rethink deals made with host governments. A [recent article](#) published by the Financial Times pointed out that transparency alone does not curb corruption or ensure that the wealth generated by natural resources is put to equitable use. However, the article argues that pressure on oil and mining companies to publish what they pay helps activists in the developing world keep a closer eye on money earned by their governments.

- **Increased information for investors**

Payment transparency has been a long-standing demand by investors, as it contributes to the good governance of extractive companies and addresses investor risks. The legislation plays a critical role in encouraging greater stability in resource-rich countries, benefitting both citizens and investors. This was pointed out by a group of leading European and North American institutional investors and fund managers in their [2013 letter](#) to the US Securities and Exchange Commission (SEC), highlighting that disclosure requirements protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation.

- **Conflict prevention**

Corruption undermines state authority and can result in decreased public confidence and trust in governing institutions, which can become [drivers of conflict](#), including terrorism. Increased transparency of payments to governments by extractive companies – by making it more difficult for corrupt government officials to misuse or misappropriate resource revenues – can play a role in mitigating future conflict, unrest and political instability in resource-rich countries.

- **Business and government reputation and improved social licence**

The main benefit of increased transparency for companies is their enhanced reputational standing internationally, nationally and subnationally. At the local level, payment transparency helps secure extractive companies' social licence to operate, whose impairment Ernst and Young has listed as the [fourth greatest risk](#) faced by mining companies and may result in conflict that disrupts production and thereby [hits company profits](#) and government revenues. Leading oil, gas and mining companies have acknowledged publicly that they favour reporting under the Accounting Directive and similar legislation for such reasons, even where such benefits may not be

immediately quantifiable. In addition, increased transparency can help increase citizens' trust in governments, such as by linking to participatory budgeting.

Article 48 ("Review") of the Accounting Directive requires the Commission to "consider the extension of the reporting requirements to additional industry sectors". Given that sectors such as telecommunications, construction and banking are also prone to corruption, financial mismanagement and aggressive tax avoidance, we support the extension of the applicability of Chapter 10 to other sectors. The EU banking sector is now covered by public country-by-country reporting requirements under the fourth Capital Requirements Directive (CRD IV).³

Box 2: What do businesses think of mandatory disclosure legislation?



"We support and comply with the EU Transparency Directive." [AngloAmerican](#)



"BP supports the concept of transparency in revenue flows from oil and gas activities in resource-rich countries. It helps citizens of affected countries access the information they need to hold governments to account for the way they use funds received through taxes and other agreements." [BP](#)



"In 2015, we publicly supported the EU Accounting Directive and voluntarily produced our *Economic contribution and payments to governments report*, disclosing our payments to governments on a country-by-country and project-by-project basis in advance of any mandatory requirements to do so." [BHP Billiton](#)



"Rio Tinto believes our investors, stakeholders and communities deserve to understand in clear terms the amount of tax we pay in each country. We are committed to providing transparency about tax payments made to governments." [Rio Tinto](#)



"Statoil is committed to and engaged in revenue transparency for activities in the extractives sector, and has found this practice conducive to establish trust between stakeholder groups." [Statoil](#)



"Part of our commitment to creating shared prosperity is to ensure that there is transparent disclosure of payments to governments in the countries in which we operate." [Tullow](#)



"Revenue transparency provides citizens with important information to hold their government representatives accountable and to advance good governance. Shell is committed to transparency as it builds trust [...]. By fulfilling the mandatory disclosures in line with the new UK legislative requirements we demonstrate that extraction of natural resources can lead to the opportunity of government revenue, economic growth and social development." [Shell](#)

³ Directive 2013/36/EU of the European Parliament and of the Council, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013L0036>



“In 2014, we made a policy decision to disclose payments to governments at a project level, as laid out in the European Union Accounting Directive, an initiative that aims to improve corporate accounting practices and transparency. We believe that this type of disclosure is beneficial to investors, civil society, and local communities, and reflects evolving international expectations.” [Kosmos](#)

3.2 International developments

Since the EU Directives came into force in 2013, a number of similar laws have been adopted. Norway adopted [its version](#) of the EU Directives in 2013. Canada adopted the [Extractive Sector Transparency Measures Act \(ESTMA\)](#) in 2014, based largely on the EU laws and leading to publication of [hundreds of company reports on payments to governments](#). In the USA, the Cardin-Lugar provision (Section 1504) of the 2010 Dodd-Frank Act remains law despite a repeal of the Securities and Exchange Commission (SEC) implementing rule by the Trump administration in early 2017. The SEC is still mandated to bring a rule into force. In its [2016 rule](#)⁴ the SEC made clear that it considered other reporting requirements, including the EU Directives, equivalent to its own provisions. In Australia, the main opposition party, Labor, committed in November 2017 to adopt a mandatory disclosure law if elected at the next General Election, expected to take place in 2018.⁵ The proposals are based on existing EU requirements.⁶

These mandatory disclosure requirements complement the Extractive Industries Transparency Initiative (EITI), a global programme to promote open and accountable management of natural resources. Companies operating in EITI member countries disclose the payments they make to governments for the extraction of oil, gas and minerals, and, in turn, the governments disclose the revenues they receive. Recently, the EITI strengthened its reporting standards by reaffirming [that project-level reporting](#), in addition to country-level reporting, is required by 2020 at the latest, with the definition of project consistent with international norms.

However, the EITI is currently limited to [51 countries](#), data is often incomplete and out of date and there is always a risk that for political reasons a country will stop implementing the initiative.

The EU Directives ensure that all EU-listed and large unlisted companies disclose the payments they make to governments worldwide, and complement the EITI by providing transparency with regard to operations of extractives industries in countries such as Angola, China, Equatorial Guinea, Qatar and Russia that are not part of the EITI and are unlikely to be in the near future.

The existing benefits of the EU legislation are supported by clear evidence, despite the challenges in precisely quantifying them. Our research illustrates how the extractive industry’s payment transparency has had a positive impact across resource-rich countries in empowering local citizens and activists and in providing a better understanding of companies’ activities and payments. Here we provide examples of the first demonstrable results of increased transparency through mandatory reporting in the extractives sector:

⁴ <https://www.sec.gov/rules/other/2016/34-78169.pdf>

⁵ <https://www.devex.com/news/plans-to-legislate-transparency-of-australia-s-international-mining-operations-91434>

⁶ <https://www.theguardian.com/australia-news/2017/oct/31/labor-plans-to-force-australian-mining-companies-to-disclose-taxes-paid-overseas>

3.3 Case studies

Publish What You Pay's International Secretariat has established the flagship [Data Extractors programme](#), which trains PWYP members and allies from around the world – from countries where extractive companies are subject to mandatory disclosure laws, and from countries where those companies have operations. Over the course of a year the PWYP Data Extractors work with each other to use the data through peer learning, twinning, mentoring, workshops and case studies that will strengthen civil society oversight of the natural resources sector. A number of the case studies below were produced by Data Extractors. As a part of its work on the Data Extractors' programme, OpenOil has produced a '[use-case matrix](#)', detailing numerous possible ways of using extractives data (some of which are mentioned in the following sections).

Civil society in Uganda uses data from EU disclosures to query government

Uganda's oil fields are the third largest oil reserves in sub-Saharan Africa. However, Uganda was ranked 163 out of 188 countries assessed in the UNDP's [2016 Human Development Index](#). If managed well, the expected oil revenues could transform the economy and dramatically improve living conditions for Uganda's 37 million citizens, 13 million of whom live on less than 1.90 USD per day. Despite the lack of meaningful information regarding Uganda's developing oil sector, [Ugandan civil society](#) was able to benefit from company disclosures under the EU Accounting Directive. The government of Uganda issued production licenses to Tullow and Total, which in 2016 published their payments to governments reports under EU law. By comparing this information with data disclosed in the Bank of Uganda Annual Reports, civil society representatives found USD 14 million not included in government reports. Unless these funds were part of a prior transfer into the country's general budget before the Petroleum Fund was fully operational, these USD 14 million in payments could reasonably be deemed to be missing. This information has been used in direct dialogue with government officials as civil society representatives query discrepancies and demand financial accountability using real data, rather than hypothetical figures. For the first time ever, newly available project-level disclosures have provided local civil society groups with the information necessary to conduct investigations and demand government accountability.

Shell's in-kind payments to the Nigerian government

In [analysing](#) Royal Dutch Shell's [report on its 2015 Nigerian payments](#) as a part of the Data Extractors programme, Publish What You Pay (PWYP) UK noted an anomaly in data relating to the valuation of some production entitlements paid in kind to the Nigerian government. When calculated from Shell's volume and value data, the average price per barrel of oil equivalent (BOE) for in-kind production entitlements payments for one reported project (SPDC East) was at USD 20.89/BOE, far lower than the average price for other reported projects (USD 51.59/BOE). PWYP UK wrote to Shell company headquarters to ask about this. The company responded by stating that its valuation of in-kind payments for the project in question combined oil with gas, and provided a figure for its valuation of the oil. However, it declined to disaggregate the oil from the gas, or to provide respective volumes, or to price its in-kind gas payments, for this or for any other project. This made it impossible to check whether Shell's gas payments for this and other projects were appropriately valued in terms of price per barrel of oil equivalent.

Civil society's engagement with the company has helped demonstrate to Shell that its payments are under scrutiny. Shell demonstrated its awareness of this when it informed PWYP UK in April 2017 that it would publish its payment disclosures for 2016 in June 2017, later than the previous year, because it needed time to integrate the systems of recently acquired BG Group with its own. PWYP-UK has also worked with PWYP-Nigeria to question the Nigerian

government about payments in Shell's report.

Renegotiation of Areva's uranium contracts in Niger

In April 2017, Publish What You Pay France, Oxfam France, ONE and Sherpa published a [report](#) (in French) analysing disclosures under France's implementation of the Accounting Directive by six French extractive companies: Areva, EDF, Engie, Eramet, Maurel & Prom and Total. The report includes in-depth analysis of the payments reported by Areva in Niger.

In 2014, Niger and Areva announced that they had signed a strategic partnership agreement which renewed their uranium exploitation contracts. The new contract included a new royalty fee, which, based on the profitability of Niger's mines, was expected to boost Areva's contribution to Niger, a country included in the [top five poorest countries](#) in the world. However, since the agreement came into effect, rather than bolstering Niger's revenues as had been suggested, Areva's payments to Niger have decreased. Through analysis of the data in Areva's report on payments to governments published in 2016, it emerged that while the amount of uranium Areva extracts from Niger has stayed relatively the same, Areva's royalty fee payments have decreased considerably. This was partly due to the decrease in the value of uranium (which is determined by the price at which Areva buys uranium from mines), which went from more than EUR 110 to less than EUR 79 per kilo for Niger. Civil society's analysis indicates that uranium exported by Areva's operated joint venture subsidiary Somair from Niger to France's nuclear power industry may be undervalued by up to €11,500 per tonne compared with other Nigerien uranium exports. Oxfam France and PWYP Niger believe this is largely why Areva did not pay any profit tax in Niger in 2015. Areva has refuted this conclusion, stating that the agreed price "reflects uranium market conditions", but has not provided a consistent explanation for the undervaluation of the uranium exports. Local civil society including PWYP Niger has used this information to raise media and government awareness about the outcome of the contract renegotiations.

Discrepancies between oil price figures reported by Statoil and Azerbaijan

OpenOil [analysed](#) Statoil's 2014 payments to governments report and compared it to the 2014 EITI report by Azerbaijan, which revealed significant discrepancies between the reported figures for the price of oil that year. According to the Azeri EITI report, in 2014 oil was sold by the national oil company SOCAR at prices between USD 69 and USD 113 per barrel. The average price (weighted by quantity) was USD 99 per barrel. For the same year, Statoil reported on two producing projects in Azerbaijan: the Azeri, Chirag and Gunashli (ACG) complex, the country's largest oil project, contributing three-fourths of national oil production; and the Shah Deniz gas and condensate field. Statoil reported a price of USD 103.4 per barrel for the first and a much lower price for the second, USD 52.9 per barrel, which makes a weighted average of USD 97.5 per barrel.

This shows that in 2014, the Azeri government sold its oil at an average price USD 1.5 per barrel higher (at USD 99) than the market value as reported by Statoil (at USD 97.5). This raises questions that may be directed to Statoil for further clarification. This demonstrates that civil society has insufficient detail to evaluate these transactions, for instance with regard to the timing difference between production and sales, or the risks involved in the oil trade. Access to oil sales contracts could shed light on how much of the price risk is borne by the oil trader and how much by SOCAR. This case also demonstrates the critical importance of including payments to governments for the sale of oil, gas and minerals as an additional payment category within the legislation.

Indonesian and Filipino civil society tracks extractives payment data on online platforms
PWYP Indonesia [analysed](#) 2015 payments to Indonesian government entities reported under the Accounting and Transparency Directives by UK-registered and/or listed companies Shell, BP, BHP Billiton, Premier Oil, Total Oil and Jardine Matheson, as well as disclosures under Norwegian law by Statoil. These seven companies' payments in Indonesia in 2015 totalled more than USD 2.38 billion. PWYP Indonesia created, as a public resource for citizens, an [interactive online map](#) of the companies, their operational sites and the payment data disaggregated by payment type, and incorporated the data into their Android "[Open Mining](#)" mobile application for wider accessibility. PWYP Indonesia plans to update the information annually to allow citizens to have better access to and understanding of the data.

Similarly, Bantay Kita (PWYP Philippines) created a [data portal](#) to better present relevant extractives data. This was [presented](#) to numerous civil society organisations and local communities across the country, alongside a data user template, which was translated into local languages. This enabled Bantay Kita to make data more relevant to local needs.

Community consultation in Zimbabwe

PWYP Zimbabwe used payment data disclosed by Anglo American⁷ for its Unki platinum mine to empower citizens. Workshops were held with 20 representatives of the Marange and Shurugwi communities to develop their skills in assessing local mining tax revenue alongside local government budget and financial statements, and to support their calls for better funding for local economic and social development from the proceeds of mineral extraction. PWYP Zimbabwe also started sharing company payment and government revenue data with community organisations in diamond-producing but impoverished eastern Zimbabwe. This has helped make data a tool that communities can use in organising their grassroots advocacy, and has enhanced PWYP Zimbabwe's participation in national budget consultations and dialogue with senior government officials. Given that Zimbabwe is not a part of the EITI and its domestic transparency measures reveal little, mandatory disclosure reports form a hugely important source of data for Zimbabwean civil society.

Engaging with media and civil society stakeholders in Nigeria

The Natural Resource Governance Institute (NRGI) analysed payments to Nigerian government entities disclosed by seven oil and gas companies operating in the country: Chevron Canada Limited; CNOOC Limited (Nexen); ENI; Royal Dutch Shell; Statoil; Seplat and Total SA. [NRGI's briefing](#) analyses USD 14.6 billion in payments in Nigeria on a company level, government-entity level, project level and payment-type level. It highlights potential avenues of enquiry in which stakeholders can use this information to demonstrate to companies and government entities that they will be held accountable for the revenues generated from the country's extractives industries.

On a project level, NRGI's briefing uses a cross-checking approach to analyse disclosures for the Bonga Field project (OML 118) by Shell (as the operator of the joint venture that controls the project) and Total SA as a 12.5% equity share partner, identifying potential discrepancies in the estimated economic contribution of the project. Similarly, in analysing the payment-type distribution of Nigeria's resource revenue streams, this briefing highlights the dominance of production entitlements, accounting for 54% of the total disclosed payments, and explores

⁷ Anglo American: <https://extractives.companieshouse.gov.uk/company/03564138> and <http://www.angloamerican.com/~media/Files/A/Anglo-American-PLC-V2/documents/tax-report-2015/aa-2015-tec-report-21-04-16-final.pdf>

potential unit pricing issues present in the payments of these physical transfers of oil and gas.

This briefing was used to reach out to companies and raised potential issues with their reporting on their payments in Nigeria. NRGI is now using this briefing to engage with media and civil society stakeholders in-country to demonstrate how this data can be used to hold companies and government entities accountable and inform public debate on the management of the country's natural resources. A further conclusion of this briefing was that payments to governments for the sale of oil, gas and minerals should be included as an additional payment category within mandatory payments to governments legislation.

3.4 Increased transparency does not harm competitiveness

Mandatory disclosure reports contain no commercially sensitive information that could harm a company's competitiveness. Competitors cannot "reverse-engineer" the information made available in these reports to reproduce a company's return on investment.⁸ Neither payment transparency nor confidentiality of payments is a decisive factor in determining an extractive company's success in bargaining and winning bids with host governments. Negotiations for each deal between companies and host states include a range of complex factors including geology, quality of the resource, technical and financial capacity and experience of the company, above-ground political risks, and economic characteristics of the project.

Moreover, in July 2016, Transparency International EU published a [report](#)⁹ assessing the impact that public country-by-country reporting would have on the competitiveness of firms across all sectors. The report, which analyses the performance of 28 multinationals over a three-year period using publicly available information and sector performance at the global and regional level shows that the claim that corporate competitiveness could be harmed by greater public disclosure of financial data is not backed up by evidence. What the research found is that there is no definitive correlation between public reporting and standard measures of competitiveness. For instance, 86% of the European companies assessed in the report that already publicly report on a country-by-country basis – either voluntarily or due to legislative drivers (such as for extractive companies and for banks) – improved or maintained their revenue performance.

4. Making oil, gas and mining companies' reporting more effective

The Accounting and Transparency Directives' payments to governments reporting requirements are ground-breaking, in the EU and worldwide. As argued in the previous section, the first reports published by extractive companies in 2016 and 2017 have provided information that was in the vast majority of cases not accessible before and which has proven to be extremely useful for monitoring and accountability purposes. However, the first rounds of reporting by EU-registered and EU-listed companies indicate that there are significant gaps and ambiguities in the legislation and that improvement is needed in several areas in order to have more meaningful transparency over oil, gas

⁸ See comment submitted to the US Securities and Exchange Commission by Robert F. Conrad (July 17, 2015). Available at: <https://www.sec.gov/comments/df-title-xv/resource-extraction-issuers/resourceextractionissuers-81.pdf>

⁹ Transparency International EU, 'Do Corporate Claims on Public Disclosure Stack Up?', July 2016.

and mining companies' payments. [A review](#) of UK companies' disclosures was undertaken by a group of UK academics in 2017, noting a number of these gaps and recommending potential remedies.¹⁰

Thanks to the upcoming first legislative review of the Accounting Directive, the European Commission has an opportunity to make selective adjustments to the details of the legislation to ensure it is more effective and better achieves the intended objectives.

Three key areas that must be improved for EU legislation on extractives transparency to be better fit for purpose

1. Accessing data

Where are we now?	What needs to change?
<p><u>Accessibility and comparability of reports</u></p> <p>The Accounting Directive (AD) requires companies to publish their report on payments to governments on an annual basis in a form and manner “<i>as laid down by the laws of each Member State</i>” (Art 45(1)). The AD does not require that the reports are published in a central repository or freely available. The information is not required to be published in any particular format, and is seldom machine-readable open data. In certain Member States, users must pay a fee to a business registry to access the reports. There is a central EU portal connecting Member States’ business registers,¹¹ but not all Member States are currently connected, and the portal is unsearchable by report type.</p> <p>In their first round of reporting, many extractive companies reporting in EU Member States apart from the UK have published their reports only in PDF format on their own websites. The lack of a central repository -- either EU-wide or in each Member State – for all the payment reports, whether published by EU-registered companies under the AD or by EU-listed companies under the Transparency Directive (TD), has been a challenge with regard to locating the reports. The collection of relevant data has thus proven to be complex and time-consuming for citizens. The UK</p>	<p>Meaningful payments to governments transparency can only be achieved through accessible and comparable data. Therefore, measures to improve users’ ability to find, analyse and compare reports must be included. This can be achieved by:</p> <ul style="list-style-type: none"> ● requiring publication of payments to governments reports directly to a central online repository, hosted and maintained by the European Commission, and freely accessible to the public, which will cover both registered company reports under the Accounting Directive and listed company reports under the Transparency Directive, in addition to national reporting requirements; ● ensuring ESMA swiftly develops and operates the EEAP to provide access to companies’ information as per the Transparency Directive’s requirements; ● requiring EU Member States to set up OAMs as per their obligations under the Transparency Directive in accordance with the ESMA’s guide;

¹⁰ Eleni Chatzivgeri, Lysie Chew, Louise Crawford, Martyn Gordon and Jim Haslam, ‘*Reports on Payments to Governments: A Report on Early Developments and Experiences*’, report for Publish What You Pay International Secretariat and Publish What You Pay UK, June 2017.

¹¹ https://e-justice.europa.eu/content_business_registers_in_member_states-106-en.do

has [a centralised repository](#) for disclosures by UK-registered companies, but not for the first two years of reporting by UK-listed companies. Efforts are being made by civil society [to centralise reports and increase their accessibility](#) and [to train communities](#) to access and use the data, but more needs to be done to make the information proactively available.

Article 21a of the Transparency Directive (TD) requires the European Securities and Markets Authority (ESMA) to develop and operate a European electronic access point (EEAP) to provide access to all regulated information filed by companies under the TD and to be accessible through ESMA's website. The EEAP web portal was due to be established by 1 January 2018 but has been postponed. Article 21a also requires Member States to ensure there is access to their national storage mechanism/officially appointed mechanism (OAM) of listed company regulated information via the EEAP once established. Under the Commission's regulatory technical standards (RTS) on access to regulated information (May 2016),¹² once established, this system will enable users to access regulated information by legal entity identifier (LEI) and type of regulated information from listed companies across the EU/EEA in a central location.

Not having access to all the information in machine-readable open data format has posed additional challenges to citizens with regard to data analysis and comparability purposes. For example, to compare the figures in comma-separated values (CSV) format within Anglo American's payments to governments reports with those in Gazprom's report which is available only in PDF format, citizens would need to use complex tools such as 'scraping tools' for extracting data from PDFs, or a lengthy manual copying process, to put the data into a consistent format. The level of effort and/or expertise required is unrealistic for many potential data users.

- **requiring companies to publish their reports both in PDF or HTML and in an [open, machine-readable data format](#).**¹³

¹² <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32016R1437&from=EN>

¹³ Open Knowledge Foundation, Defining Open Data, <https://blog.okfn.org/2013/10/03/defining--data/>

2. Clarifying existing data

Where are we now?	What needs to change?
<p><u>Definition of project</u></p> <p>The Accounting Directive requires companies to publish their payments to governments for each country of operation, as well as for each specific project, which is defined as <i>“the operational activities that are governed by a single contract, licence, lease, concession or similar legal agreements”</i>. However, the Directive points out that if one or more of these agreements are <i>“substantially interconnected”</i>, they may be considered as a single project (Art. 41(4)).</p> <p>From the first reports published by extractive companies, it has become evident that several of them have broadly aggregated data for multiple oil and gas fields or mines, and have reported these as a single project. Some companies have used broad geographical names (e.g. Gulf of Mexico,¹⁴ Western Australia¹⁵ or Sarawak¹⁶) to designate such projects, <i>de facto</i> aggregating several of them.</p>	<p>The Directive is not sufficiently clear when it comes to the current definition of “substantially interconnected”. Over-aggregation of projects reduces the detail of company reports, prevents users from fully understanding the data and may result in specific payments of interest to citizens and civil society being obscured from view. To ensure an appropriate degree of transparency, genuinely disaggregated project-level reporting must be required and provided. This can be achieved by:</p> <ul style="list-style-type: none"> • clarifying the definition of “substantially interconnected” agreements in the text of the Directive, in particular by specifying that the possibility to aggregate agreements for reporting purposes applies only to those that meet the following three criteria: <ol style="list-style-type: none"> a) the agreements must both be operationally and geographically integrated; b) they must have substantially similar terms; and c) they must be signed with the same government.
<p><u>Joint venture payments</u></p> <p>The Accounting Directive does not specify whether and under what circumstances</p>	<p>It is important to citizens that JV payments to governments are reported as clearly and comprehensively as possible. Where JV participants appoint an operator to conduct the</p>

¹⁴ BHP Billiton, Economic contribution and payments to governments: Report 2016, http://www.bhp.com/~media/bhp/documents/investors/annual-reports/2016/bhpbillitoneconomiccontributionandpaymentstogovernments2016.pdf?utm_source=Website&utm_medium=Organic&utm_term=EconomicDownloadNews&utm_campaign=AR2016 p. 16

¹⁵ Ibid. p. 16

¹⁶ Shell, Report on Payments to Governments, 2015, http://www.shell.com/sustainability/transparency/revenues-for-governments/_jcr_content/par/textimage_569728713.stream/1460962925009/43a62e840a312580b7a030a0b6719d720a03afb774d5edf22bc8f30914609748/shell-report-payments-to-governments-2015-18042016.pdf p. 16

<p>extractive companies have to disclose joint venture (JV) payments in their reports.</p> <p>As a result, several companies state in their reports on payments that they have omitted payments by non-subsidiary JVs; payments by JVs over which they have joint control; payments by entities that are accounted for using the equity method; or payments where they are not the operator or do not make payments on behalf of the operation. We understand that some Member State governments have approached the European Commission for clarity on this issue.</p> <p>An example of this is the Cerrejón mine in Colombia, which is described as “one of the largest open-pit coal-export mining operations in the world”¹⁷ and is co-owned by BHP Billiton, Glencore and Anglo American.¹⁸ All of these companies are covered by the Directives, but since none is a majority shareholder, neither BHP, Glencore nor Anglo American appear to consider themselves obliged to consistently disclose their payments made for this mine, or payments made on their behalf by the operator.¹⁹ This is clearly in contravention of the spirit of the law.</p> <p>Several companies reporting under France’s and the UK’s implementation of the Directive and Norway’s similar legislation have more helpfully disclosed their proportionate share of at least some JV payments.²⁰</p>	<p>JV’s operations on their behalf, they do not cease to have an underlying liability for their proportionate share of the JV’s payments to governments or to be responsible for reporting this proportionate share. Given the frequency of JVs in resource extraction, and because JV production entitlements are often the largest payment to a government, non-reporting of JV payments is likely to leave large sums of money undisclosed. Avoiding this can be achieved by:</p> <ul style="list-style-type: none"> ● specifying that companies must include JV payments, whether made directly by the company or indirectly via the operator or another entity on the reporting company’s behalf, on a proportionate basis in their reports on payments to governments, regardless of whether the company has a controlling or non-controlling interest.
<p><u>Reporting on payments in kind</u></p> <p>The Accounting Directive requires companies to report both their payments in cash and payments in kind in the form of oil, gas or another mineral. The Directive requires them to disclose the value of in-kind payments and “where applicable” the volume (Art. 43.3).</p>	<p>In order for citizens to judge whether an in-kind payment is appropriately valued, disaggregated volume as well as value data for each in-kind payment in oil, gas or other minerals is necessary. Without this information, citizens and civil society will not be able to properly hold their governments (and the companies) to account. In-</p>

¹⁷ <http://www.cerrejon.com/site/english/our-company/who-we-are.aspx>

¹⁸ <http://www.cerrejon.com/site/english/our-company/shareholders.aspx>

¹⁹ For financial year 2016, Anglo American discloses payments for Cerrejón but inconsistently; Glencore mentions Cerrejón in a footnote; BHP Billiton does not mention it although it includes payments related to equity-accounted investments in Colombia which relate to Cerrejón.

²⁰ Examples include Rio Tinto, Statoil, Total and Tullow.

<p>Project-specific volume and value data enables citizens to calculate the unit price of in-kind payments by dividing value by volume, and by doing this to judge whether payments are appropriately valued.</p> <p>Overvalued payments in kind, i.e. those valued in excess of current market prices, may indicate that a government has received a poorer deal than initially apparent (i.e. the true market value of the in-kind payment is less than the company claims it was); conversely, undervalued payments in kind may indicate that government officials have benefited improperly from a payment whose value has not been fully disclosed (i.e. the true market value of the in-kind payment is more than the company states it was).</p> <p>However, a significant number of companies' payment-in-kind disclosures lack the necessary volume data, or they confusingly combine cash and in-kind payments in a single figure, or they combine payments for differently valued commodities (such as oil and gas) or fail to clarify which specific payments have been made in kind.</p>	<p>kind payments should be disclosed per payment, per raw material, by value and by volume. This can be achieved by:</p> <ul style="list-style-type: none"> ● clarifying that when a payment in kind is made in the form of oil, gas or another mineral, companies must report both the value and the volume of each such payment; ● clarifying that companies must not aggregate together in a single figure cash payments with payments in kind, or aggregate together in a single figure payments in kind for different commodities, such as oil and gas; ● clarifying that broad general statements such as that a company values in-kind payments at "contractual", "market", "average", "fixed" or "benchmark" prices are insufficient without disaggregated payment-specific value and volume data.
<p><u>Identification of recipient government entities</u></p> <p>The Accounting Directive points out that for the purpose of Chapter 10, "government" is defined as <i>"any national, regional or local authority of a Member State or of a third country [including] a department, agency or undertaking controlled by that authority"</i> (Art. 41 (3)). This means that extractive companies falling under the scope of the Directive are required to specify the governmental entity receiving each payment and not just name the country or only identify the generic level of government.</p> <p>However, many companies' payments to governments reports for 2015 and/or 2016 fail to name government entities they pay or do so inconsistently.²¹ Some reports identify only the</p>	<p>For citizens to hold their government effectively to account for the payments they receive from extractive companies, they need to know which specific governmental entity received them and not just the generic level of government. Avoiding inconsistency between companies' reports and lack of information on recipient government entities can be achieved by:</p> <ul style="list-style-type: none"> ● clarifying that, beside naming the countries to which payments have been made, companies are required to also state the name of the national or subnational government entity or other government body receiving each of their payments, including departments,

²¹ Examples include Acacia, Aggregate Industries, Anglo American, Antofagasta, Avocet, BHP Billiton, Bisichi, Cadogan, Centamin, Centrica, Cheliabinsk, Gazprom, Genel, Glencore, Great Eastern Energy, KazMunaiGas, Lonmin, Lukoil, Ophir, Petra, Polymetal, Prairie Mining, Public Power Corp., Severstal, Societatea Natl/Romgaz and Total.

<p>country name (sometimes adding the words “the Government of [country name]”).</p> <p>Further examples include companies, such as LafargeHolcim, which only provide a generic indication of the level of government as “national” or “regional/local”,²² or Lukoil, which only state that payments have gone to unnamed “state authorities”.²³</p>	<p>agencies or undertakings controlled by those authorities.</p>
<p><u>Currency conversion</u></p> <p>The Accounting Directive requires extractive companies to disclose their payments above EUR 100,000. In the case of Member States that have not adopted the Euro, the Directive provides an indication on how to convert the Euro threshold into national currency (Art. 43 (5)).</p> <p>When companies publish their payments in dollars or in local currencies, it may be necessary that they convert the amounts into Euros in order for them to be compared within the same statement or with the statements of other companies. However, most companies²⁴ do not specify the exchange rates used to convert their payments from other currencies nor the sources they used for reference, which makes it difficult to cross-check them.</p>	<p>To improve citizens’ understanding of extractive payments it is important to ensure that details regarding the currency conversion used are included in disclosures. This can be achieved by:</p> <ul style="list-style-type: none"> ● requiring that companies declare the amounts paid in both their original currencies and in Euros, indicating precisely the rate and the reference system used for currency conversions.
<p><u>Interpretation of payment categories</u></p> <p>Civil society’s analysis of reports to date of payments to governments indicates that several companies use different interpretations of categories of payments that may result in the allocation of similar payments to different categories. For instance, Total informed PWYP France that they use a United States definition of “royalty”, resulting in their reporting as taxes</p>	<p>The discrepancies between the different interpretations of payment categories have made it difficult for civil society and users to determine whether certain companies have paid their share of royalties and other payments. Improving citizens’ understanding of extractive companies’ payments can be achieved by:</p>

²² LafargeHolcim, Report on Payments to Governments, 2016, http://www.lafargeholcim.com/sites/lafargeholcim.com/files/atoms/files/05052017_payments-to-government-report-2016.pdf , p. 5.

²³ Lukoil, Report on Payments to Governments, 2015, <http://www.lukoil.com/InvestorAndShareholderCenter/ReportsAndPresentations/reportonpaymentstogovernments> , p. 7 (e.g. various state authorities of the Republic of Kazakhstan).

²⁴ Among which Areva. See Areva, Reports on Payments to Governments, 2016, http://www.new.areva.com/finance/liblocal/docs/2016/Rapport_paiements_gouvernements_2015_VUK.pdf

<p>many payments that in other countries would be identified as royalties.</p>	<ul style="list-style-type: none"> ● requiring that companies explain their interpretation of payment categories, consistent with Article 41 (definitions) and Article 43.4 (principle of substance rather than form).
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3. Increasing data availability and guaranteeing its quality

Where are we now?	What needs to change?
<p><u>Payments for the sale of oil, gas and minerals, and other payment categories</u></p> <p>The Accounting Directive does not include payments for the sale of oil, gas and minerals as a payment category on which companies should report. For countries such as Iraq, Libya and Nigeria, oil sales have in past years generated over half of total government revenues. From 2011 to 2013, oil sales by the governments of Africa’s top 10 producers totalled USD 254 billion, an amount equivalent to 56% of those countries’ total public revenues. However, these transactions are highly opaque and prone to corruption. Since 2013, the EITI has included trading payments among its requirements. EITI countries, including state-owned companies, are now required to disclose the volumes of commodities sold and the revenues received, broken down by buyer.</p> <p>Additional payment categories that are not addressed by the Accounting Directive are those that arise from transportation and export activities and payments for social expenditures – which are also required in EITI reporting. A recent Amnesty International report noted Shell’s payments to a military unit of the Nigerian government. This demonstrates the need for companies’ payments to governments reports to also include payments to state security forces for security services.</p>	<p>Given its voluntary nature, the EITI is not going to bring transparency to citizens of a large number of countries in the near future. In order to ensure a more harmonised approach, regulation in countries where trading companies are headquartered or listed is necessary.</p> <p>The EU should therefore align the Accounting Directive with the new EITI standard on commodity trading transparency. This can be achieved by:</p> <ul style="list-style-type: none"> ● including a requirement for companies to report on payments made to governments that arise from trading activities; ● requiring that companies disclose, as a minimum, the following information: <ol style="list-style-type: none"> a) the seller (government entity) b) the date of the sale c) volumes received d) value of the payment e) price information and how it was determined ● considering a requirement for companies to disclose their payments to governments for transportation and export activities; payments for social expenditures; and payments to state security forces for security services.

<p><u>Projects for which no reportable payments were made</u></p> <p>The Accounting Directive does not currently require companies to include in their reports projects for which no single payment or series of related payments reached the €100,000 reporting threshold within a financial year.</p> <p>The lack of a legal requirement and the current inconsistency of practice among companies mean that some of them fail to mention one or more projects in their reports. Report users therefore lack complete certainty about whether any projects have been omitted due to oversight – which does occur – or because no above-threshold payments were made.</p>	<p>Citizens have a right to know the identity of every project a company operates in their country, whether or not the company has made an above-threshold payment for that project. Naming all projects will also assist users in comparing a company’s data from one year to the next. This can be achieved by:</p> <ul style="list-style-type: none"> ● requiring companies to name every project in each country regardless of whether an above-threshold payment or series of related payments has been made in the reporting period.
<p><u>Contextual information per project</u></p> <p>The Accounting Directive does not require companies to disclose background information on their extractive projects. However, raw data only allows for a limited understanding of the payments and leaves important questions unanswered.</p>	<p>Information regarding the history and evolution of the presence of companies in the countries concerned, the existing partnerships, details regarding the payment categories used and the projects themselves are necessary for a better understanding of the payment disclosures. Providing citizens and users with better understanding of the context in which extractive projects are carried out can be achieved by:</p> <ul style="list-style-type: none"> ● requiring that companies publish the following information for each project: <ol style="list-style-type: none"> a) project status (exploration, development, exploitation) b) partners (if any) c) start date d) production volumes e) contextual information about payments linked to infrastructure.
<p><u>Auditing and reconciliation of data</u></p> <p>The Accounting Directive does not require the data published in extractive companies’ payments to governments reports to be audited. Further, there is also no requirement</p>	<p>Civil society considers that a full audit of payments to governments reports would be optimal, but at the very least there should be limited assurance. A degree of reconciliation</p>

<p>for the reports to be reconciled to company accounting information in annual reports.</p>	<p>with the annual reports should also be required. This can be achieved by:</p> <ul style="list-style-type: none"> ● requiring at least a limited assurance report on the disclosed data from independent accountants or auditors, together with a statement that reconciles at least the aggregate of all payments with the sum of corresponding accrued figures in the annual report.
<p><u>Additional country-by-country tax-related data</u></p> <p>The Directive does not require extractive companies to publish tax-related information on a country-by-country basis (as the Capital Requirement Directive IV does for the banking sector). This information is crucial, as it would increase corporate and government transparency and accountability by enabling citizens worldwide to check whether companies' tax payments are aligned with their real economic activities. It will also contribute to ensuring that taxes are paid where they are due and that taxes help to provide revenue for critical public services.</p>	<p>In order to achieve a more transparent and accountable extractives sector, full tax transparency is needed. We therefore welcome the EU's efforts to adopt legislation on public country-by-country reporting (CBCR) for all sectors, which will provide citizens with additional data with regard to extractive companies' activities, structures and tax payments in all countries of operation (including their turnover, number of employees, assets, profit or loss before tax, a distinction between taxes paid and accrued, and a list of subsidiaries).</p> <p>We strongly support the European Parliament's final report on public CBCR adopted on 4 July 2017 and urge EU Member States as well as the European Commission to swiftly adopt this amendment to the Accounting Directive during the upcoming negotiation process. Reporting items that need to be upheld in this process and included in the final legislation are:</p> <ul style="list-style-type: none"> ● turnover; ● number of employees on a full-time equivalent basis; ● value of assets; ● profit or loss before tax; ● a distinction between taxes paid and accrued; ● a list of subsidiaries.