Participants at the Ninth Plenary Meeting of the Policy Dialogue on Natural Resource-based Development held at the OECD in Paris on 31 January and 1 February 2018 agreed on a roadmap to work towards the development of a global reporting template for information disclosure by buyers, in close collaboration with the EITI.

This document was prepared by the OECD Development Centre and reflects preliminary comments received from key expert stakeholders consulted during the drafting process.

This document is submitted for discussion under session 1 of the Twelfth Plenary Meeting of the Policy Dialogue on Natural Resource-Based Development (20-21 June 2019, OECD, Paris) to inform the development of Output 1 of the Thematic Dialogue on Commodity Trading Transparency, namely the possible development of a joint EITI/OECD global reporting template for information disclosure by buyers.
Table of contents

Scope ........................................................................................................................................... 4
Introduction ................................................................................................................................... 5
1. Category 1: Identifying the commodity trading transaction ................................................... 7
   1.1. Commodity sale reference number ..................................................................................... 7
   1.2. Reference date .................................................................................................................... 7
   1.3. Identity of the seller ........................................................................................................... 8
   1.4. Identity of the buyer .......................................................................................................... 8
   1.5. Method of allocation ......................................................................................................... 9
   1.6. Information on conflicts of interest ................................................................................ 10
2. Category 2: Understanding how the price is determined ......................................................... 12
   2.1. Grade and valuation method ............................................................................................ 12
   2.2. Volume and calibration mechanism ................................................................................. 14
   2.3. Invoice amount ................................................................................................................ 15
      2.3.1. Sale price ............................................................................................................... 15
      2.3.2. Fees, charges and credits ....................................................................................... 17
      2.3.3. Contextual information ......................................................................................... 18
   2.4. Contract type .................................................................................................................. 18
   2.5. Incoterms ......................................................................................................................... 19
   2.6. Load port, terminal or depot .......................................................................................... 20
3. Category 3: Understanding where the money flows ................................................................. 21
   3.1. Key elements of the payment .......................................................................................... 21
      3.1.1. Foreign exchange rate (where applicable) ............................................................... 21
      3.1.2. Payment account ..................................................................................................... 21
      3.1.3. Payment due date .................................................................................................... 22
   3.2. Use of corporate vehicles ............................................................................................... 23
      3.2.1. Joint ventures .......................................................................................................... 24
      3.2.2. Beneficial owners .................................................................................................... 25
   3.3. Use of intermediaries ...................................................................................................... 29
References .................................................................................................................................. 31

Tables

Table 2.1. Opportunity to understate mineral values .................................................................... 13

Boxes

Box 1.1. OECD Definition of conflict of interest .......................................................................... 10
Box 2.1. Recommended price information for disclosure by the EITI ....................................... 16
Box 3.1. OECD Definition of a joint venture ............................................................................. 24
Box 3.2. FATF Definition of beneficial ownership ..................................................................... 25
Box 3.3. EITI Definition of beneficial ownership ................................................................. 26
Box 3.4. FATF Definition of politically exposed persons .................................................... 28
Box 3.5. OECD Definition of intermediaries ...................................................................... 29
Scope

1. The Thematic Dialogue on Commodity Trading Transparency was launched at the Eighth Plenary Meeting of the Policy Dialogue on Natural Resource-based Development. The Thematic Dialogue on Commodity Trading Transparency focuses on:

   - commodity trading understood as the sale of the government’s share of oil, gas and minerals or other revenue received in-kind by the government, state-owned enterprises or any other entity operating on behalf of the state, including trading-arm subsidiaries, state-owned refineries or private companies selling resources on behalf of the state, as opposed to transactions between private companies;
   - physical trade and associated financial flows, as opposed to financial market transactions (e.g. futures);
   - oil, gas, and minerals trade, as opposed to agricultural or other commodities.

2. For the purpose of the Thematic Dialogue on Commodity Trading Transparency, “buyers” are understood as any entity active in the process of buying physical commodities from any public entity or private company selling on behalf of the state.

3. In the context of this international dialogue, the term ‘oil sales’ or ‘commodity trading’ refers to the physical trading of oil, gas and minerals, and specifically the ‘first trade’, i.e. the sale by governments or state-owned enterprises of the state’s share of production.

4. For the purpose of this paper, the term “commodity trading transparency” refers to improve understanding and access to information around the physical trading of oil, gas and minerals, and specifically the purchase by buyers of the state’s share of production.
Introduction

5. Commodity trading constitutes an area of heightened risk of corruption and rent diversion, potentially resulting in revenue losses with crippling effects on government budgets. The OECD Development Centre has documented the increasing sophistication of constantly evolving patterns of corruption in commodity trading, often occurring across multiple jurisdictions and exacerbated by the misuse of corporate vehicles, such as the use of offshore companies, and types of transactions, such as commodity for product swap agreements. Key risk factors include: the lack of transparency over commodity sale transactions and the associated data, opacity over the ownership and governance structures of the actors involved, and insufficient corporate due diligence. (OECD, 2016[1])

6. Recent research by the Natural Resource Governance Institute and Public Eye also shows how corruption in commodity trading can drive and fuel illicit financial flows (IFF), whereby the proceeds of corruption are channelled to bank accounts in foreign countries, generating financial gains for corrupt public servants and other politically exposed persons (Public Eye, 2018[2]) (Sayne, Gillies and Katsouris, 2015[3]).

7. The EITI has also documented how enhanced transparency in commodity trading supports greater competition and that following best practice can result in reputational gains and improved access to capital for buyers. (EITI, 2019[4])

8. Improving transparency and accountability in commodity trading is a typical global collective challenge that requires actions by home and host governments, by commodity trading hubs, by companies, and by civil society organisations. The Thematic Dialogue on Commodity Trading Transparency is working towards the development of guidance tools that are targeted at the different actors involved in commodity trading, reflecting their different roles and responsibilities on both the demand and supply side, and articulating complementary interventions in both producing countries and trading hubs.

9. This document is intended to support the development of a joint EITI/OECD Global Reporting Template for use by buyers. The focus of this document is on conventional sales (spot sales, term sale agreements) of oil, gas and minerals. The EITI and the OECD will consider how to address unconventional sales (commodity-for-product-swap-agreements and resource-backed-finance-agreements) as the work develops.

10. The EITI Standard has encouraged disclosures by buyers since 2013. In 2018, new language more explicitly targeted at trading companies was incorporated in clause 4.2(c) for adoption at the EITI Global Conference on 18-19 June 2019. The EITI Standard sets out minimum expectations, encouraging disclosure of information by companies, limited at the volumes received and payments made for the purchase of oil, gas and minerals with some level of possible disaggregation.

11. In May 2017 the EITI Working Group on Transparency in Commodity Trading endorsed the publication of “EITI Guidance note 26 – Reporting on first trades in oil”. The guidance and the accompanying reporting template on first trades aim to promote greater accountability in the trading part of the value chain through the disclosure of data that is useful to citizens and other oversight actors.

12. More recently, the EITI International Secretariat has undertaken a targeted consultation with buying companies that have disclosed information on their payments to government for the purchase of oil, gas and minerals by request from EITI implementing
countries or on a voluntary basis, using the existing EITI reporting template. (EITI, 2019[4]) This document draws on the preliminary conclusions of that consultation process.

13. The OECD Development Centre identified the need to develop a global reporting template for buyers in 2017 and the proposal was endorsed at the Ninth Plenary Meeting of the Policy Dialogue on Natural Resource-based Development on 31 January and 1 February 2018. Since then, the OECD Development Centre has begun work to understand existing practices and tools used for information disclosure. Common ground was reached at the Eleventh Plenary Meeting in December 2018 on which elements of information are key for accountability and therefore should be subject to disclosure, beyond EITI’s minimum expectations.

14. Clarifying and setting common expectations in relation to information disclosure by buyers is a necessary component of any guidance on commodity trading transparency addressed to buyers, trading hubs and producing countries. Therefore, the EITI and the OECD Development Centre have agreed to work together to develop one template and guidance for buyers. It is expected that the reporting template and guidance for buyers will provide a common reference for home countries, trading hubs, and producing countries to set out common expectations regarding information disclosures by buyers. The EITI currently has 52 implementing countries and is recognised as the global standard for the good governance of oil, gas and mineral resources. However, several significant producer countries are not implementing members of the EITI, nor are all commodity trading hubs. For example, in 2017, Trafigura made purchases of USD 2.7bn from National Oil Companies in EITI countries, and purchases of USD 30.0bn from National Oil Companies in non-EITI countries. (Trafigura, 2018[4])

15. Given the magnitude of the volumes at stake in commodity transactions, and the corresponding heightened risk of corruption and rent diversion, it is important to ensure that the sales of publicly owned commodities reflect market value, incorporate standard commercial terms, and are made at arm’s length. This document sets out the rationale for the disclosure of the key elements of information that are recommended for disclosure by buyers of publicly-owned oil, gas and minerals to build trust, improve accountability and reduce opportunities for corruption and public rent diversion, while clarifying the elements that are also recommended for disclosure by the EITI. As this paper is focused on the rationale for disclosure, questions on the mechanics and practicalities of disclosure – whom the data would be reported to, how the data would be gathered and how it would be stored – are outside the scope of this paper.
1. Category 1: Identifying the commodity trading transaction

1.1. Commodity sale reference number

16. As is customary for transactions for the sale of goods, commodity sales typically have an identifying number for ease of reference – this may be expressed as an invoice number, contract number or shipment number. It is important to note that the seller and the buyer may use different identifying numbers for the same sale. Therefore, buyers are encouraged to disclose the identifying number of the seller (where available) or another suitable identifier so that commodity sales can be matched with information provided by the seller.

17. The disclosure of the identifying number of a particular shipment/sale will enhance traceability by enabling the identification, accurate tracking, and the reconciliation with information available on the sales of the government’s share of production.

18. The wording of 4.2 of the 2019 EITI Standard (to be adopted at the EITI Global Conference in June 2019) states that buyers could disaggregate their sales disclosure by individual seller, contract or sale. EITI Multi-stakeholder groups, in consultation with buyers, are expected to: (i) consider whether disclosures should be broken down by individual sale, type of product and price; and (2) “document their discussions, rationale for disclosure/non-disclosure and any barriers to disclosure”. If sales are disaggregated by individual sale, the disclosure of a commodity sale reference number is recommended to identify the transaction at stake.

19. Participants in the EITI’s targeted consultation with buyers indicated that, in general, the disclosure of the reference number would be feasible, while noting at the same time that maybe the contract number should be provided by the country/State-owned Enterprise (SOE), not the buying company. Participants also cautioned, however, that the disclosure of the reference number (contract, p/o, invoice) may lead to inconsistencies as the SOEs invoice and the buyers’ invoice numbers do not always match. (EITI, 2019[4])

1.2. Reference date

20. The reference date is also important to identify the transaction at stake. This may refer to the date of the sale contract, which is the date at which the transaction occurred, or to the loading/shipment date, which is the date in which the commodities were loaded or shipped. In the majority of commodity transactions this will refer to the date that the commodities were shipped on a vessel. In other situations, this date may refer to commodities being loaded onto a truck, train or aeroplane, or in relation to pipeline sales of oil or gas, to a specific date of measurement.

21. Some buyers have indicated that while the disclosure of the reference date is feasible for spot sale agreements, there may be some commercial challenges with the disclosure of the reference date for term agreements. In those cases, the disclosure of the reference date may compromise the buyer’s existing contract and may reduce their ability to renew this contract in future negotiations.

22. The reference date of a particular sale is an important reference point and its disclosure can help civil society organisations to identify relevant commodity transactions.
that that are being made and to cross-reference this with the grade and the sale price to determine whether the sale is consistent with the state of the market.

23. Participants in the EITI’s targeted consultation with buyers noted that disclosure of information regarding the date of sale would be feasible. (EITI, 2019[4])

24. The wording of 4.2 of the 2019 EITI Standard (to be adopted at the EITI Global Conference on 17 June 2019) states that buyers could disaggregate their sales disclosure by individual seller, contract or sale. EITI Multi-stakeholder groups, in consultation with buyers, are expected to: (i) consider whether disclosures should be broken down by individual sale, type of product and price; and (2) “document their discussions, rationale for disclosure/non-disclosure and any barriers to disclosure”. If sales are disaggregated by individual sale, the disclosure of a reference date is recommended.

1.3. Identity of the seller

25. The seller refers to the entity that enters into an agreement to sell commodities to a buyer. This may be a government agency, an SOE, or a third party (marketer) appointed by the government to sell commodities on their behalf.

26. Ordinarily, the seller will be incorporated as a SOE, and fully owned by the state. In some cases, SOEs are listed on major stock exchanges but the government usually retains a majority stake. SOEs themselves routinely use wholly and partially owned subsidiary companies to sell commodities. Some of these subsidiaries may be incorporated in foreign jurisdictions and it may not be immediately obvious from the name, location or operations of that subsidiary that it is indeed state-owned. Consequently, the disclosure of the identity of the seller can help map which entities are involved in the sale of state-owned commodities. The disclosure of the seller could include the following information: its legal name, trading name, ownership, country registration, company’s number/identifier, legal address for service and directors’ details.

27. Participants in the EITI’s targeted consultation with buyers noted that disclosure of the identity of the seller would be feasible, however some concerns were raised about identifying sellers that are SOEs and that market commodities on behalf of the state. (EITI, 2019[4])

28. Glencore discloses both the identity of the counterparty and the counterparty’s ultimate parent group in respect of its crude oil purchases in EITI implementing countries. (Glencore, 2018[6]) Trafigura discloses the identity of the counterparty in respect of its crude oil purchases in EITI implementing countries, and this appears to refer to the specific SOE subsidiary where relevant. (Trafigura, 2018[7])

29. The wording of 4.2 of the 2019 EITI Standard (to be adopted at the EITI Global Conference on 17 June 2019) states that buyers are encouraged to disclose volumes received from the state or state-owned enterprise and payments made for the purchase of oil, gas and/or mineral resources, and that data could be disaggregated by individual seller. EITI Multi-stakeholder groups, in consultation with buyers, are expected to document their discussions, rationale for disclosure/non-disclosure and any barriers to disclosure.

1.4. Identity of the buyer

30. The buyer refers to the entity that enters into an agreement to buy commodities from the seller. The buyer may be a trading arm of a foreign SOE, an independent trader, a
trading arm of an international bank, domestic or foreign smelters and refineries, the SOE’s own trading subsidiary or refinery, or various intermediary companies. The identity of the buyer could be ascertained by its legal name, trading name, ownership, country registration, companies’ number/identifier, legal address for service and directors’ details.

31. It is important for the identity of the buyer to be fully transparent to ensure that the government is entering into an arrangement with an entity that is known, and that has the requisite financial and technical capacity to meet its obligations under the contract.

32. Participants in the EITI’s targeted consultation with buyers noted that disclosure of the identity of the buyer would be feasible. (EITI, 2019[4]) The wording of 4.2 of the 2019 EITI Standard (to be adopted at the EITI Global Conference in June 2019) refers to “companies buying oil, gas and/or mineral resources from the state”.

1.5. Method of allocation

33. Buyers enter into commodity sale agreements following an allocation process. This process could involve the buyer submitting a bid or tender in a competitive bidding process or the buyer conducting a direct negotiation with the government to purchase commodities. An effective and robust competitive bidding process can have the effect of reducing the opportunities for corruption and public rent diversion if a sufficient number of credible bidders are able to respond to the invitation to tender, have an incentive to compete for the contract, and the seller’s discretion is limited. Although it should be noted that in some specific contexts there are good strategic and economic reasons why sales are conducted using a direct negotiation method. For example, government-to-government (G2G) transactions; resources-backed financing agreements, and arrangements in which international oil companies lift and sell the government share of production, if this is already set out in an existing production sharing agreement.

34. The OECD Development Centre is developing guidance for use by SOEs on buyer selection procedures in order to reduce corruption risks in commodity trading1. EITI Requirement 4.2 encourages implementing countries, including state-owned enterprises, to disclose a description of the process for selecting the buyers, the technical and financial criteria used to make the selection, the list of selected buyers, any material deviations from the applicable legal and regulatory framework governing the selection of buyers, and the related sales agreements. The disclosure by buyers of the selection method (competitive process or direct negotiation) used for the purchase of the commodities will provide useful context on the sale and how a particular buyer was selected, which in turn, may raise red flags for further investigation. For example, a 2015 investigation into commodity trading transactions discovered that the state-owned refinery had awarded a contract to export refined petroleum products to a commodity trader without a public tender process, despite it being illegal under national law to award public contracts without a tender process. (Public Eye, 2018[6])

35. The wording of 4.2 of the 2019 EITI Standard (to be adopted at the EITI Global Conference in June 2019) states that buyers could include information on the nature of the

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1 See report by the OECD Development Centre: Key issues and emerging good practices of buyer selection procedures used by State-Owned Enterprises that will be presented at the Twelfth Plenary Meeting of the Policy Dialogue on Natural Resource-based Development on 20 June 2019.
contract (e.g. spot or term) in their disclosures – which *may* refer to the method of allocation.

### 1.6. Information on conflicts of interest

36. Conflicts of interest in both the public and private sector have become a major matter of public concern worldwide. An increasingly commercialised public sector that works closely with the business can give rise to the potential for new forms of conflict between the individual private interests of public officials and their public duties. When conflict-of-interest situations are not properly identified, disclosed and managed, they can endanger the integrity of organisations and result in corruption and public rent diversion.

#### Box 1.1. OECD Definition of conflict of interest

A “conflict of interest” involves a conflict between the public duty and private interests of a public official, in which the public official has private-capacity interests which could improperly influence the performance of their official duties and responsibilities. (OECD, 2003[31])

37. The requirement to disclose conflicts of interest is a broader requirement than the requirement to disclose the involvement of politically exposed persons and is intended to identify and capture any additional red flags associated with the relationship between the buyer and the seller. This may include whether any employees of the buyer are former employees of the seller (or vice versa), whether the buyer has access to any information in respect of the commodity sale that other rival companies did not, or where the buyer is providing goods or services to the seller (or government) that are unrelated to the commodity sale transaction.

38. For example, in Nigeria, a company submitting a bid in a competitive tender for the purchase of crude oil from the SOE, NNPC must provide a sworn affidavit to “confirm whether or not any of the members of relevant companies of NNPC or Bureau of Public Procurement (BPP) is former or present Director, Shareholder, or has any pecuniary interest in your company”. (NNPC, 2018[10])

39. While a conflict of interest is not necessarily evidence of corruption itself, there is increasing recognition that conflicts between the private interests and public duties of public officials, if inadequately managed, can result in corruption. It should also be recognised that as all public officials have legitimate interests which arise out of their capacity as private citizens, conflicts of interest cannot simply be avoided or prohibited, and must be identified, disclosed, and managed.

40. Any disclosure of conflicts of interest will need to take into account protections under relevant applicable privacy laws, for example, the EU General Data Protection Regulation (GDPR).

41. The requirement to disclose conflicts of interest of a particular sale will enable interested parties to scrutinise any disclosed conflicts to identify red flags and ultimately ensure that the commodity sale has been conducted with integrity and that value has not been lost.
42. The wording of 4.2 of the 2019 EITI Standard (to be adopted at the EITI Global Conference in June 2019) does not include any reference to conflicts of interest in the information that buyers are encouraged to disclose.
2. Category 2: Understanding how the price is determined

2.1. Grade and valuation method

43. Commodities (oil, gas and minerals) occur naturally in different forms and can exhibit a wide variety of different technical characteristics once mined or produced. The producer country may then choose to refine and/or process the commodities it has produced in order to achieve greater value in the sales process. Consequently, commodities are ordinarily assigned a technical grade so that potential buyers can understand the specifications of exactly what they are purchasing.

44. In respect of crude oil, the generally accepted international classification focuses on API gravity and sulphur content. The API gravity refers to the density of the crude oil where different streams of crude are often categorised as ‘light’, ‘medium’ or ‘heavy’. Crude streams with low sulphur content are referred to as ‘sweet’ and high sulphur content as ‘sour’. Crude oil streams are often underpinned by benchmark. The three most common benchmarks are West Texas Intermediate (WTI), Brent Blend, and Dubai Crude. Other major benchmarks include the OPEC Reference Basket, Tapis Crude and Isthmus.

45. In respect of natural gas, classification may depend on its British Thermal Units (BTU) value and its impurities content and may be expressed as ‘wet gas’ or ‘dry gas’.

46. In respect of minerals, the classification normally refers to the grade but depends on the specific mineral under consideration. For example, iron ore is classified according to its grade (the percentage of iron content in the ore). Several trace minerals (including copper, manganese and zinc) are classified according to their concentration – expressed in parts per million (ppm). Gemstones are usually classified according to four factors: colour, carat, cut and clarity. Coal is classified according to its metamorphic grade (lignite, sub-bituminous, bituminous and anthracite), its various technical characteristics (ash content, volatile matter) and its intended end use (thermal coal, coking coal).

47. The price of particular commodity can differ greatly depending on its grade and therefore it is important that the specific grade (and any other relevant characteristics) is disclosed in order for the details of the commodity sale to be fully understood. The OECD and the Intergovernmental Forum on Mining, Minerals, Metals and Sustainable Development (IGF) have collaborated to provide guidance to assist governments in the determination of their valuation of minerals exports, as part of a wider effort to address some of the challenges developing countries are facing in raising revenue from their mining sectors. (IISD & OECD, 2018[6]) (OECD, 2016[7]) (OECD, n.d.[13]) (IMF, OECD, WBG, UN, 2016[14])

48. Governments need to be cognisant of the risk of undervaluation of commodities for export which may be symptomatic of a corruption scheme where a commodity is undervalued to allow the purchaser to resell it at an inflated margin and where the share of the windfall can serve to pay bribes. (OECD, 2016[11]) Government revenue depends on mineral products being priced and measured accurately. The IGF and the OECD have noted that some commodities are more likely to be undervalued than others due to different stages of mineral beneficiation, the lack of publicly quoted prices for some minerals, and the grade of the commodity. Consequently, more scrutiny needs to be applied to their valuation.
49. The risk of undervaluation may be influenced by factors including: whether the commodities have been refined/processed (as unrefined products are less likely to have transparency pricing), spot sales, large variations in grade, and potential tax benefits that may be associated with undervaluation. (IISD & OECD, 2018[6])

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<th>Medium</th>
<th>High</th>
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<tr>
<td><strong>Refined base/precious metals</strong></td>
<td><strong>Physical concentrates</strong></td>
<td><strong>Non-metallic industrial minerals</strong></td>
</tr>
<tr>
<td>Gold, copper, lead, zinc, nickel, cobalt, tin, aluminium, platinum, silver</td>
<td>Copper silver, zinc silver, lead silver, zinc lead, cobalt nickel</td>
<td>Barite, fluorite, graphite, beryl</td>
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<tr>
<td><strong>Bulk commodities</strong></td>
<td><strong>Metallurgical products and specialty metals</strong></td>
<td><strong>Gemstones</strong></td>
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<td>Iron ore, coking and steam coal, manganese ore and phosphate rock</td>
<td>Blister copper, nickel matte, alumina, gold doré</td>
<td>Rough diamonds and other gems</td>
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<td><strong>Metallurgical products and specialty metals</strong></td>
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Source: Adapted from (IISD & OECD, 2018[6])

50. Governments and SOEs can put in place mechanisms to reduce opportunities for corruption associated with the undervaluation of its commodities. Available options range from monitoring companies’ own internal export valuation processes, requiring that these comply with international sampling and testing standards and demanding that companies report accordingly, through requiring the use of accredited third parties, to establishing a government mineral laboratory or a combination of the above. Each one of these policy options comes with its own challenges and risks (costs, capability, ISO accreditation, etc.).

51. The grade of a commodity can have a significant effect on the price and therefore the grade and the valuation method used to determine that grade should be disclosed. This will enable the comparison of a specific commodity sale with similar sales of the same grade and an identification of any red flags associated with the use of a particular valuation method.

52. The wording of 4.2 of the 2019 EITI Standard (to be adopted at the EITI Global Conference on 17 June 2019) states that buyers are encouraged to disclose volumes received from the state or state-owned enterprise. These disclosures of volume could include a reference to the grade of the commodity, for example when the volume refers to a specific oil field or basin.

53. Recognising that many countries produce several grades and qualities of crude oil, which attract different prices on the market, for cargo by cargo disclosures only, the EITI’s Guidance note 26 - Reporting on first trades in oil, recommends providing a list of possible grades of crude produced in the country the following on oil grade and quality, the grade for each sale, API gravity for each sale, Sulphur content (or other relevant quality indicator). :
54. During the EITI’s targeted consultation with buyers, some buyers indicated that depending on the structure of the transaction (e.g. duration) disclosure of information on the specific grade of crude oil may create some challenges as this information can be considered commercially sensitive. The EITI will undertake further consultation on this matter to understand if a time lag of 12 months (from purchase to disclosure) would help address this concern. (EITI, 2019[4]). It would be useful to better understand under what circumstances this information would be market sensitive and then discuss the appropriate time lag of publication.

55. Glencore discloses information in respect to payments for crude oil purchased from SOEs in EITI countries on an annual basis. Glencore’s 2017 report includes information in respect of the grade of crude oil for eleven out of thirteen transactions. Information on the remaining two grades is withheld due to reasons of commercial sensitivity. (Glencore, 2018[10]) Trafigura, in its annual Responsibility Report, discloses the type of product that was purchased (e.g. crude oil, or refined products) but does not specify the technical grade of those products. (Trafigura, 2018[11])

2.2. Volume and calibration mechanism

56. The volume refers to the total volume of the commodities included in the sale. There are several international and industry standards for expressing commodity volumes. Crude oil sales are ordinarily measured in barrels (bbl.), where one barrel equals approximately 159 litres but can also be reported in cubic metres (m3). Natural gas prices are ordinarily measured in million British thermal units (MMBtu) but can also be reported in thousand cubic feet (Mcf), or 1,000 cubic metres. The majority of non-ferrous mineral sales are measured in tonnes, for example – aluminium, copper, nickel, tin, zinc. Gold, silver and platinum sales are ordinarily measured in troy ounces.

57. The disclosure of the volume of a particular commodity sale will enable citizens, media and other civil society groups to cross-reference this with the grade and the sale price to determine whether the sale is consistent with the state of the market. In order to reduce complexity, volumes should be reported using the international and industry standards mentioned above (bbl., tonnes, troy ounces etc.) as most international benchmark prices are expressed in these units of measurements.

58. It is important to ensure that volumes are not over- or underreported so that any value is not lost in a commodity transaction. In order to mitigate the opportunity for this mis-reporting, volumes should be regularly calibrated. Normally calibrations are either done by a third party or witnessed by the other party’s agent. In any case, appropriate oversight mechanisms should be put in place to ensure that the calibration is accurate and that any opportunities for corruption are prevented or mitigated. In order for civil society to have confidence that the volumes sold are being accurately reported, both the volume and the calibration mechanism are recommended for disclosure.

59. The wording of 4.2 of the 2019 EITI Standard (to be adopted at the EITI Global Conference in June 2019) states that buyers are encouraged to disclose volumes received from the state or state-owned enterprise.

60. EITI multi-stakeholder groups in Albania, Chad, Ghana, Iraq and Nigeria decided that buyers should also disclose information in respect to volume to help verify what is being published by the government. Consequently, companies buying oil from these five countries have reported information on the volumes of oil received from governments/SOE through EITI reporting.
61. Participants in the EITI’s targeted consultation with buyers noted that disclosure of information on volumes would be feasible. (EITI, 2019[4]) Both Glencore (bbl.) and Trafigura (bbl. & tonnes) disclose the volumes of their purchases of crude oil in their respective transparency reports. (Trafigura, 2018[7]) (Glencore, 2018[6])

2.3. Invoice amount

62. This refers to the total amount that the buyer must pay under the terms of the contract in exchange for the commodities it has purchased from the government, an SOE or a third-party appointed to sell on behalf of the state (marketer). The invoiced amount will be expressed in a local or international currency (usually United States Dollars) and is based on the volume, the selling price, the date of sale (if the price is underpinned by a benchmark), and with the necessary adjustments made for applicable fees, charges and credits.

63. The disclosure of the invoice amount will enable interested parties to verify that the invoiced amount is correctly taking into account the volume, the selling price, the date of sale, fees, charges and credits. Furthermore, the invoiced amount will be able to be compared to the revenues received by the SOE to ensure that there is no variation and that all funds are accounted for.

64. Participants in the EITI’s targeted consultation with buyers noted that disclosure of the invoice price would be feasible. (EITI, 2019[4]) Both Glencore and Trafigura disclose the value (in USD) of their purchases of crude oil in their respective transparency reports. These disclosures are disaggregated by country for EITI implementing countries, and include the average price paid for crude oil for that year (i.e. do not disclose on an invoice-by-invoice basis). (Glencore, 2018[11]) (Trafigura, 2018[12])

65. The wording of 4.2 of the 2019 EITI Standard (to be adopted at the EITI Global Conference on 17 June 2019) states that buyers are encouraged to disclose payments made for the purchase of oil, gas and/or mineral resources. The invoice amount should coincide with the disclosure of the payments made.

2.3.1. Sale price

66. The sale price refers to the unit price set out in the contract that the buyer agreed to pay to the seller for the purchase of the commodity. The unit price will ordinarily be expressed in an industry standard classification (bbl., tonnes, troy ounces etc.) as set out above. Depending on the commodity, the selling price may refer to a benchmark price (Dated Brent, Henry Hub, London Metal Exchange etc.) and the specific date(s) in which that benchmark price should apply.

67. The disclosure of the selling price (alongside the volume) will enable the calculation of the revenues received from the sale and therefore provides information on the return that the country is getting from the sale of its natural resources. This disclosure will also indicate the magnitude of the transaction. Furthermore, the disclosure of the selling price of a particular shipment/sale will enable the comparison of the sale price with similar sales from the same field to determine whether there is any noticeable deviation that may require further investigation.

68. The sale price may be affected by the choice of contract (spot sales, term arrangement) that underlies the commodity sale transaction. For example, a buyer entering into a commercial relationship with the seller to purchase a commodity over a long time
horizon, and therefore providing a reasonable certainty of future revenue for the
government, may have this factor reflected in the sale price.

69. The wording of 4.2 of the 2019 EITI Standard (to be adopted at the EITI Global
Conference in June 2019) does not include any reference to sale price in the information
that buyers should include in their disclosures.

70. The EITI’s Guidance note 26 - Reporting on first trades in oil, which has been used
by SOEs and countries participating in the targeted efforts recommends the disclosure of
price information.

Box 2.1. Recommended price information for disclosure by the EITI

Information about the price and how it was determined by the selling NOC or government
could be reported. This could include:

Official Selling Price or reference price:
Governments or NOCs often set a blanket monthly price for various grades of crude. Some
are expressed as an absolute price, and others as a premium or discount on a given benchmark.

- Consider providing the relevant per grade of crude per barrel reference prices in
  USD and/or local currency (as applicable)

Pricing options:
Some sellers have different pricing options, e.g. “deferred” or “prompt.”

- Consider providing the pricing option used and contextualise this information in
  the ‘notes’ field at the end of the template.

Nominal price:
The nominal price is typically used to obtain a Letter of Credit, and can help provide
contextual information on the price.

- Consider providing the per barrel nominal price in USD and/or local currency (as
  applicable).

Source: (EITI, 2017[15])

71. During the EITI’s targeted consultation with buyers, some buyers indicated that
disclosure of information around price may create some challenges as this information can
be considered commercially sensitive. Specifically, those buyers identified challenges with
protecting the confidentiality and commercial sensitivity of the information in line with
general principles of competition law, exposing their commercial strategy, and generally
placing them at a competitive disadvantage in the market. Buyers suggested that the EITI
template should not request information in relation to the official selling price and pricing
options due to the commercial sensitivity of that information. (EITI, 2019[4]) For the sake
of clarity, the official selling price and pricing options are not recommended for disclosure
by the OECD Development Centre.

72. The EITI also sought feedback on whether a delay (from the purchase date to the
disclosure) would alleviate some of these commercial concerns. Generally, buyers
indicated that a 12-month time lag would be feasible for disclosures of information that are
not considered commercially sensitive. However, it was noted that some of the information requested by the EITI template could remain commercially sensitive even with a two year time lag, if the transactions are in respect of long-term sales agreements. (EITI, 2019[4])

73. At the Eleventh Plenary Meeting of the Policy Dialogue on Natural Resource-based Development on 12-13 December 2018, participants discussed the appropriate length of a time lag and a representative from a trading company noted that one year should suffice, and that less than one year could even be feasible if that data was structured so as not to disclose sensitive information.

74. It should be noted that spot sales and long-term arrangements operate differently in the marketplace and the disclosure of information in respect of these different contract types may encounter additional challenges. For example, a delay of than six months from the title transfer date may be commercial feasible for spot sales. For long-term arrangements, such as LNG contracts held with state owned or controlled entities, contracts can be decades long and contain negotiated price formulas. Consequently, from a buyer’s perspective, there may be commercial challenges in respect of the disclosure of details of these long term sales contracts after a one year or two year time lag.

2.3.2. Fees, charges and credits

75. Commodity sale transactions are complex and often include additional financial elements to the price of the unit price of the commodity. These additional financial elements are ordinarily referred to as ‘fees, charges and credits’ and may include (but are not limited to):

- Marketing fees [see section 3.3 on the role of intermediaries];
- Pricing option fees;
- Pipeline fees;
- Customs/export fees or charges;
- Agency fees, towage, pilotage and similar port charges, port duties and after taxes against the vessel(s) at the loading port;
- Late offtake/lifting/delivery charges or penalties; and
- Various other fees, charges or credits.

76. It is important that all fees, charges and credits are disclosed in order for them to be analysed and that in order for the details of the commodity sale in its entirety to be fully understood.

77. The payment of fees can represent a corruption risk, particularly if paid through a third party, such as an intermediary. These fees can be used to make payments, convey the offer or promise to bribe or influence the decision-making process. For example, an intermediary can charge the buyer using false invoices for sham services and then forward the funds to the relevant official. The buyer may seek to disguise such payments on its books or records them as loans, consultancy fees, or payments for legal services.

78. The wording of 4.2 of the 2019 EITI Standard (to be adopted at the EITI Global Conference on 17 June 2019) does not include any reference to fees, charges and credits in the information that buyers should include in their disclosures.
79. The EITI’s Guidance note 26 - Reporting on first trades in oil, which has been used by SOEs and countries participating in the targeted efforts recommends the disclosure of fees, charges and credits. The Guidance notes that buyers pay certain fees or charges, or receive certain deductions or credits. The list will vary by country. Fees, charges and/or credits could be disaggregated from the sale price, so not to undermine analytical accuracy. (EITI, 2017[15])

80. During the EITI’s targeted consultation with buyers, some buyers indicated that disclosure of fees, charges and credits may create some challenges, if not consistently disclosed as this information may be recorded differently by buyers and sellers. (EITI, 2019[4])

2.3.3. Contextual information

81. In the majority of situations, all relevant terms relating to the transaction – especially those terms that affect price – are contained in the agreement for the sale and purchase of commodities between the buyer and seller. However, in the context of some commodity sale transactions, there may be additional agreements between the buyer and the seller (government, SOE or third-party appointed by the State to sell on its behalf) that may affect price determination, and these additional agreements may not be expressly referenced in the commodity sale agreement.

82. These additional agreements may relate to the provision of goods or services that the buyer is supplying, or will supply to the government. A recent example of this concerns a commodity sale transaction in Ghana for the sale of crude oil from the SOE, Ghana National Petroleum Corporation (GNPC) to Litasco SA, a trading subsidiary of Lukoil. GNPC entered into agreements to sell crude oil from two different fields to different foreign buyers at different times. Civil society organisations observed that crude oil from one field was being sold to Litasco SA at a discount whereas crude oil from the other field was sold to buyers at a premium, and the reason for this pricing difference could not be ascertained from the terms of the commodity sales transaction. Following discussion with the government and SOE, it emerged that Litasco SA, who was purchasing crude oil at a discount at certain period of the year, had entered into additional agreements with the government to provide fuel for power generation, cash guarantees and the provision of a loan. These additional agreements, alongside difference of quality and the specific contractual provisions on the fixed differential subject to periodic review also helped explain the difference in sale price.

83. Consequently, it is important that information regarding any additional agreements between the buyer and seller are disclosed in order to understand their implications on price determination in its entirety.

84. The wording of 4.2 of the 2019 EITI Standard (to be adopted at the EITI Global Conference in June 2019) does not include any reference to contextual agreements that may affect the sale price in the information that buyers should include in their disclosures.

2.4. Contract type

85. Commodity transactions take place under different contractual arrangements. This paper focuses on spot sales and term arrangements (short, medium and long-term). Spot sales and term sales involve straightforward sales of commodities from the buyer to the seller with spot sales occurring in real-time and term arrangements taking place over a longer period.
86. Each of these contractual arrangements can have a different impact on the sale price. For example, a buyer entering into a commercial relationship with the seller to purchase a commodity over a long time horizon, and therefore providing a reasonable certainty of future revenue for the government, may have this factor reflected in the sale price.

87. The EITI’s Guidance note 26 - Reporting on first trades in oil, which has been used by SOEs and countries participating in the targeted efforts, recommends the disclosure of Contract type. The Guidance notes that some countries use multiple types of sale contracts. The most common types are ‘spot’ or ‘term’ contracts, but there may be country-specific distinctions within these categories, or additional types. The Guidance recommends providing a list of sale contracts for the country, and for cargo-by-cargo reporting, consider providing the contract type for each sale. (EITI, 2017[15])

88. The wording of 4.2 of the 2019 EITI Standard (to be adopted at the EITI Global Conference in June 2019) states that buyers could include information on the nature of the contract (e.g. spot or term) in their disclosures, and could include payments (in cash or in kind) related to swap agreements and resource-backed loans. Participants in the EITI’s targeted consultation with buyers noted that disclosure of the contract type would be feasible. (EITI, 2019[4])

2.5. Incoterms

89. Incoterms are pre-defined commercial terms published by the International Chamber of Commerce (ICC) that are commonly used in both international and domestic trade contracts. Incoterms inform sales contracts defining respective obligations, costs, and risks involved in the delivery of goods from the seller to the buyer. These terms are updated by the ICC regularly – the current version is Incoterms 2010. The most common Incoterms trade standard used for commodity sales by SOEs is Free-On-Board (FOB). The inclusion of Incoterms in a contract allows for the allocation of costs, risks and the transfer of title between the seller and the buyer. These can include loading, export clearance, fees, insurance, unloading and transportation cost from the arrival port to destination.

90. The use of specific Incoterms may have an impact on the sale price in a commodity transaction depending on which party assumes which costs and which risks. Costs can include loading, customs, shipping costs, as well as insurance responsibilities. Risks include the possibility that an event may occur which could cause loss of or damage to the commodities while they are in transit. As the allocation of these costs and risks affects the sale price, the disclosure of the Incoterms used for a particular sale is recommended in order to fully understand the sale price and determine whether it is representative of the market value for that particular sale.

91. The EITI’s Guidance note 26 - Reporting on first trades in oil, which has been used by SOEs and countries participating in the targeted efforts, recommends the disclosure of Incoterms. The Guidance recommends considering the disclosure of specific Incoterms governing the trade, and considering providing name and country of parcel port to allow buyers management systems match cargos to their country of origin (where applicable). (EITI, 2017[15])

92. During the EITI’s targeted consultation with buyers, different views were raised on the feasibility of disclosing this information by some buyers. (EITI, 2019[4]) The wording of 4.2 of the 2019 EITI Standard (to be adopted at the EITI Global Conference in June
2019) does not include any reference to Incoterms in the information that buyers should include in their disclosures.

2.6. Load port, terminal or depot

93. This refers to the port, terminal or depot in which the commodities were loaded or shipped for sale. In the case of a port, this will refer to the location where the commodities are loaded onto a vessel. The terminal of depot will refer to the location where the commodities are loaded by truck, train, aeroplane or pipeline. It should be noted that in countries that are landlocked or that have insufficient infrastructure, sales may take place from a port, terminal or depot in another country.

94. The port, terminal or depot identifies the location where the sale takes place and where various checks are ordinarily carried out – including, export clearance, goods inspection, tax assessments etc. In some jurisdictions, these ports are located in special economic zones, such as a free port or a free trade zone that are subject to different laws than other ports in that country. (Akinci, G and Crittle, 2008[11]) The use of a port, terminal or depot located in a special economic zone can have an impact on the sale price in a commodity transaction as certain fees and charges may or may not apply. Consequently, the disclosure of the port, terminal or depot of a particular sale is important in order to fully understand the sale price and this element will help to determine whether a particular sale is representative of the market price.

95. The EITI’s Guidance note 26 - Reporting on first trades in oil, which has been used by SOEs and countries participating in the targeted efforts, recommends the disclosure of the load port, terminal or depot. The Guidance recommends considering providing the name and country of the load port, terminal or depot. (EITI, 2017[15])

96. The wording of 4.2 of the 2019 EITI Standard (to be adopted at the EITI Global Conference on 17 June 2019) states that buyers could include information on the load port in their disclosures.

97. In terms of the load port, terminal or depot, during the EITI’s targeted consultation with buyers, different views were raised on the feasibility of disclosing this information. Buyers noted that this data point would not necessarily indicate whether the commodity was produced in the country where the load port, terminal or depot was located. (EITI, 2019[4])

98. Glencore discloses the identity of the load port for several of its commodity transactions, although in some cases the names of the port are listed as ‘not available’. The identity of one load port was withheld due to commercial sensitivity. (Glencore, 2018[11])

99. Furthermore, Glencore discloses both the country where the load port was located and the country where the oil was produced. In the majority of cases these are the same country but there are isolated examples – such as Glencore’s purchase of oil from the Doba field in Chad that was loaded in a port in Cameroon – that may require this additional explanation in order to be fully understood.
3. Category 3: Understanding where the money flows

3.1. Key elements of the payment

3.1.1. Foreign exchange rate (where applicable)

100. This refers to the rate at which one currency is exchanged for another as determined by the foreign exchange market. The foreign exchange rate is relevant here as the majority of commodity trade transactions are made using United States Dollars (USD), rather than in the local currency to the producer country.

101. Due to the often significant value of a given commodity sale transaction, even a slight adjustment to the foreign exchange rate can have consequential effect on the amount that is paid by the buyer to the seller. Foreign exchange rates could be used as a means to divert public revenue for private gain, especially where the exchange rate mechanism is not clear, or where the date (from which the currency conversion is calculated) is not set or is vague. In 2015, an investigation into commodity trading transaction identified a contract between the state-owned oil refinery and an independent commodity trader where payments to the oil refinery were made using a “mutually agreed upon exchange rate”, rather than fixing a reference rate explicitly detailed in the contract, and therefore exposing this transaction to possible risks of corruption and public rent diversion. (Guéniat et al, 2015[12]) Consequently, for currencies, other than United States Dollars, it will be important to understand the foreign exchange rate in order to be able to analyse revenues received. The foreign exchange rate conversion process should be clearly described in contract so there is no opportunity for confusion or manipulation.

102. The EITI’s Guidance note 26 - Reporting on first trades in oil, which has been used by SOEs and countries participating in the targeted efforts, recommends the disclosure of the foreign exchange rate. The Guidance recommends for aggregate reporting, consider providing the average foreign exchange rate applied, and for cargo-by-cargo reporting, consider providing the foreign exchange rate used to convert the sale amount, and the date to which it corresponds. (EITI, 2017[15])

103. The wording of 4.2 of the 2019 EITI Standard (to be adopted at the EITI Global Conference in June 2019) does not include any reference to the foreign exchange rate used in the information that buyers are encouraged to disclose.

104. Participants in the EITI’s targeted consultation with buyers noted that buyers often purchase crude in USD. No challenges were identified by buyers in respect of the disclosure of the foreign exchange rate. (EITI, 2019[4])

3.1.2. Payment account

105. The payment account refers to the details of the bank account in which the payment is to be received. The details of the payment account should include: the name of the account, the name of the bank where the account is located, and the physical location of that relevant branch of the bank.

106. Depending on the requirements of the government, and the terms of the contract, payment for the commodities may be made directly to the SOE or to another government account – for example the ministry of finance or central bank. It is important to know the identity of the specific government entity that receives each payment (SOE, treasury etc.).
Where payments are made by the buyer directly to the SOE, those payments will need to be reconciled with subsequent remittances made by the SOE to the treasury (minus any authorised operational expenditure) to ensure that these amounts match and that public funds are not being diverted. In Nigeria, payments for crude oil sold by the Nigerian National Petroleum Corporation (NNPC) are now paid by buyers directly into the Federation Account controlled by the Central Bank of Nigeria. NNPC does not have the ability to withdraw funds from this account but are able to view the payments that are received in order to know when to release the crude oil cargos to the buyer. In these situations, where the payments are made by the buyer directly to the treasury/central bank, transparency of the details of the bank account where payments are made can ensure that these payments are being made in accordance with the governments requirements which can reduce the opportunities for corruption or public rent diversion.

107. During the EITI’s targeted consultation with buyers, it was noted that the payment account into which the transfer is being made may not always be feasible for buyers to disclose. (EITI, 2019[4])

108. The EITI’s Guidance note 26 - Reporting on first trades in oil, which has been used by SOEs and countries participating in the targeted efforts, recommends the disclosure of the payment account as tracing financial flows around oil sales is an objective of the EITI. The Guidance recommends providing the legal entity and the account that received the funds. (EITI, 2017[15])

109. The wording of 4.2 of the 2019 EITI Standard (to be adopted at the EITI Global Conference in June 2019) does not include any reference to the payment account in the information that buyers are encouraged to disclose.

3.1.3. Payment due date

110. The payment due date refers to the date in which the buyer is obligated to make payment to the seller under the terms of the commodity sale contract. This date may be the same as the date of shipment or may be at an earlier or later date as agreed by the parties.

111. Corruption risks can include: contractual provisions with unusual long-term repayment periods, and payments in open credit with no financial guarantee leading to unbalanced terms where the seller would assume substantial risks of default. If these risks are identified, further scrutiny may need to be applied to this particular commodity sale transaction. (OECD, 2016[1])

112. However, it should be noted that there are several legitimate reasons why a buyer may be offered a delayed payment date. It is the practice of some SOEs to offer days in credit – often up to 30 days. In other cases, given that a delayed payment date represent a benefit for the buyer, this benefit may be reflected in the selling price for the commodity sale. Consequently, the payment date should be disclosed by the buyer, and any unusual delay in payment should be explained clearly in this disclosure.

113. During Ghana’s Commodity Trading Pilot Programme, it was noted that there was often a few days difference when reconciling information on the date of payment. This inconsistency may relate to confusion over the date that payment was due, rather than received. (GHEITI, 2018[17]) Given that buyers are unlikely to be in a position to provide information on the date payment was received, it is recommended that buyers provide information on the payment due date.

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114. The wording of 4.2 of the 2019 EITI Standard (to be adopted at the EITI Global Conference in June 2019) does not include any reference to the payment due date in the information that buyers are encouraged to disclose.

3.2. Use of corporate vehicles

115. Corporate vehicles refer to entities that conduct a wide variety of commercial and entrepreneurial activities. These can include: companies, trusts, foundations, partnerships, joint ventures, and other types of legal persons and arrangements. In many cases, these vehicles have an essential and legitimate role to play in the global economy. However, they can be misused for illicit purposes, including money laundering, bribery and corruption, insider dealings, tax fraud, terrorist financing, and other illegal activities. (FATF, 2014[13]) Corporate vehicles sit within a corporate group structure that ordinarily functions as a single economic entity through a common source of control. These structures themselves are complex and their composite entities may be incorporated in several different jurisdictions, often with the same or similar directors. Generally, each subsidiary or associated entity will have a separate legal personality but these entities are often considered together (as a corporate group) for various business, legal and tax purposes.

116. The Financial Action Task Force (FATF) has established standards on transparency, so as to deter and prevent the misuse of corporate vehicles in order to combat money laundering and terrorist financing, as well as the financing of proliferation of weapons of mass destruction. Recommendations 24 and 25 of the 2012 FATF Recommendations require countries to ensure that adequate, accurate and timely information on the beneficial ownership and control of corporate vehicles is available and can be obtained or accessed by the competent authorities in a timely fashion. The purpose of the FATF standards on transparency and beneficial ownership is to prevent the misuse of corporate vehicles for money laundering or terrorist financing. However, it is recognised that these FATF standards support the efforts to prevent and detect other designated categories of offences, including corruption and tax offences. (FATF, 2014[13])

117. Corporate vehicles can be used to introduce opacity into the ownership structure of an entity to facilitate corruption schemes. They can provide “legal distance” between the beneficial owner and his/her assets by introducing complexity and obscure true ownership. In a tiered corporate vehicle structure, layers of legal entities and/or arrangements can be inserted between the individual beneficial owner and the assets of the primary corporate vehicle. The use of tiered entities can afford a beneficial owner the ability to own and control assets across multiple jurisdictional boundaries whilst being able to maintain plausible deniability of ownership of these assets as no single investigating agency will have visibility over the entire corporate vehicle structure. (Halter et al., 2011[14])

118. Excessive complexity in a corporate vehicle structure can be regarded as a “red flag” indicator of risk. Therefore, the disclosure of the corporate vehicles involved in the transaction can help identify and prevent the misuse of these vehicles to facilitate corruption and public rent diversion. This disclosure requirement complements the requirements to disclose the beneficial ownership of the buyer and any involvement of politically exposed persons (see paragraphs 119-123), and provides a further level of transparency in this regard.

119. The wording of 4.2 of the 2019 EITI Standard (to be adopted at the EITI Global Conference in June 2019) does not include any reference to the use of corporate vehicles in the information that buyers are encouraged to disclose.
3.2.1. Joint ventures

120. A company may enter into a commodity sales transaction as the sole buyer, or it may decide to form a joint venture with another entity to dilute its commercial risk, to comply with the local content requirements of that particular jurisdiction, or to increase its chances of being awarded a sales contract.

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<thead>
<tr>
<th>Box 3.1. OECD Definition of a joint venture</th>
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<td>A joint venture is a contractual agreement between two or more parties for the purpose of executing a business undertaking in which the parties agree to share in the profits and losses of the enterprise as well as the capital formation and contribution of operating inputs or costs. It is similar to a partnership […], but typically differs in that there is generally no intention of a continuing relationship beyond the original purpose. A joint venture may not involve the creation of a new legal entity. Whether a quasi-corporation is identified for the joint venture depends on the arrangements of the parties and legal requirements. The joint venture is a quasi-corporation if it meets the requirements for an institutional unit, particularly by having its own records. Otherwise, if each of the operations is effectively undertaken by the partners individually, then the joint venture is not an institutional unit and the operations would be seen as being undertaken by the individual partners to the joint venture. Because of the ambiguous status of joint ventures, there is a risk that they could be omitted or double-counted, so particular attention needs to be paid to them. (OECD, 2008[15])</td>
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121. Joint ventures are a flexible form of corporate identity that can be used to facilitate corruption schemes in several different ways. For example, where buyers gain market access by entering into joint ventures with PEPs, the buyer is likely to be awarded preferential contractual terms for the purchase of commodities due its association with the PEP. Profits are then distributed to both the buyer and the PEP through the structure of the joint venture, which also acts to obscure the identities of the beneficial owners and the involvement of the PEPs.

122. In other scenarios, buyers may enter into joint ventures with the SOEs and their subsidiaries that are mandated to sell publicly-owned commodities. These joint ventures can create conflicting incentives for the SOE who finds itself on both sides of the transactions, and these blurring of roles may open the door to corruption and public rent diversion.

123. Joint ventures may also be used as a corporate vehicle to insert distance between the buyer and an entity that is engaged in paying bribes.

124. For example, in the TSKJ Case, a joint venture was established in 1991 by four companies (one American and 3 Portuguese) to bid for contracts in a Nigerian gas project. Senior executives of the constituent companies of the TSKJ joint venture decided to bribe Nigerian officials in order to win contracts, and subsequently appointed two consultants to facilitate the bribery of high-level Nigerian officials. In an effort to evade U.S. foreign bribery laws, the American company deliberately avoided direct ownership in the joint venture. Instead, it took an indirect ownership interest in the joint venture through a partially-owned U.K. company. (OECD, 2009[16])

125. Consequently, it is important that the existence of any joint ventures between the buyer (and/or related entities) and the seller are disclosed in order for the potential impact
of the joint venture on the commodity sale transaction to be analysed and understood. This will ensure that there is no structure sitting behind the commodity sale transaction that could give rise to corruption or public rent diversion.

3.2.2. Beneficial owners

126. The beneficial owner(s) of the buyer refers to the natural person(s) who directly or indirectly ultimately own or control the buyer. This is distinct from the ‘legal owners’ who are the persons or companies listed as direct owners in a company’s corporate registration, tax returns, licences or contracts. Beneficial owners can exercise significant control or influence over the legal owners and can ultimately be the beneficiary of any profits received by the legal owners.

127. The existing global norm on ensuring availability of beneficial ownership information for corporate vehicles is contained in the FATF Recommendations 2012 – Recommendations 24 and 25 and Immediate Outcome 5. The FATF Standard is applied in 198 jurisdictions and recognised as the leading standard for anti-money laundering and countering terrorist financing (AML and CFT). The FATF’s definition of beneficial ownership has been adopted by the OECD-hosted Global Forum on Transparency and Exchange of Information for Tax Purposes in 2016, and represents the most widely established international standard for ensuring the availability of beneficial ownership information.² (OECD & IADB, 2019[17])

Box 3.2. FATF Definition of beneficial ownership (FATF, 2012[18])

Beneficial owner refers to the natural person(s) who ultimately* owns or controls a customer** and/or the natural person on whose behalf a transaction is being conducted. It also includes those persons who exercise ultimate effective control over a legal person or arrangement.

* Reference to “ultimately owns or controls” and “ultimate effective control” refer to situations in which ownership/control is exercised through a chain of ownership or by means of control other than direct control.

** This definition should also apply to beneficial owner or a beneficiary under a life or other investment linked insurance policy.

128. The EITI is seeking to make beneficial ownership transparency a norm in the extractive sector. EITI implementing countries face a deadline of 1 January 2020 to introduce public beneficial ownership for companies bidding for licences or holding a licence to explore or exploit oil, gas or minerals.

² The second round of peer reviews, which started mid-2016, is being carried out by the Global Forum under strengthened terms of reference, which include the requirement of the availability of, and access to, information on the beneficial ownership of all relevant entities and arrangements and all bank accounts. The definition of beneficial ownership in the FATF standard is used, although in applying and interpreting the FATF materials, care is taken to not go beyond what is appropriate for the purposes of ensuring effective exchange of information for tax purposes. (2016 Terms of Reference to Monitor and Review Progress Towards Transparency and Exchange of Information on Request for Tax Purposes)
Box 3.3. EITI Definition of beneficial ownership (EITI, 2016[19])

EITI Standard 2016, clause 2.5

i. A beneficial owner in respect of a company means the natural person(s) who directly or indirectly ultimately owns or controls the corporate entity.

ii. The multi-stakeholder group should agree an appropriate definition of the term beneficial owner. The definition should be aligned with (i) above and take international norms and relevant national laws into account, and should include ownership threshold(s). The definition should also specify reporting obligations for politically exposed persons.

iii. Publicly listed companies, including wholly-owned subsidiaries, are required to disclose the name of the stock exchange and include a link to the stock exchange filings where they are listed.

iv. In the case of joint ventures, each entity within the venture should disclose its beneficial owner(s), unless it is publicly listed or is a wholly-owned subsidiary of a publicly listed company. Each entity is responsible for the accuracy of the information provided.

129. The EITI approach above risks divergence from the FATF Standard. The key difference with the EITI approach is that it allows for flexibility in each jurisdiction. The multi-stakeholder group is tasked with determining an appropriate definition of the term beneficial owner and it should conform with international norms. It is particularly important that companies are not confronted with diverging definitions across jurisdictions and in different pieces of legislation (anti-money laundering, corporate and tax laws). Part of what motivated this EITI requirement were scenarios in which improper conduct related to beneficial ownership was linked to corruption and IFFs. (Westenberg, 2018[20])

130. Another emerging norm of beneficial ownership transparency is the EU Fifth Anti-Money Laundering Directive, which entered into force in July 2018 and requires EU member states to incorporate beneficial ownership transparency into domestic legislation by January 2020. Companies registered in those member states will be required to disclose beneficial ownership information on national registers that will be interconnected to enable the exchange of information among countries, as well as the implementation of verification mechanisms regarding beneficial ownership information. (EU, 2018[21])

131. In the extractives sector, there is evidence that hidden ownership information is a risk factor for corruption. The NRGI reviewed 100 oil, gas and mining corruption cases from 49 countries, and found that over half of these cases involved companies with hidden beneficial owners. (Sayne, Gillies and Watkins, 2017[22]) The ONE Campaign has undertaken analysis on the complex and opaque ownership structure that often sits behind extractive companies and estimates that developing countries lose USD 1 trillion each year as a result of corrupt or illegal cross-border deals, many of which involve companies with unclear ownership. (OGP, 2016[23])

132. Beneficial ownership is often disguised using a complex web of corporate vehicles (see section 3.2) to isolate the beneficial owner from the legal (declared) owner. Adding numerous layers of ownership between an asset and the beneficial owner in different jurisdictions, and using different types of legal structures, can prevent or make detection
more difficult. (FATF & Egmont Group, 2018[24]) Beneficial ownership information can be obscured through the use of: (FATF, 2014[13])

- shell companies\(^3\) (which can be established with various forms of ownership structure) especially in cases where there is foreign ownership which is spread across jurisdictions;
- complex ownership and control structures involving many layers of shares registered in the name of other legal persons;
- bearer shares and bearer share warrants;
- unrestricted use of legal persons as directors;
- formal nominee shareholders and directors where the identity of the nominator, or even the existence of a nominee contract, is undisclosed;
- informal nominee shareholders and directors, such as close associates and family;
- trusts and other legal arrangements which enable a separation of legal ownership and beneficial ownership of assets; and
- use of intermediaries in forming legal persons, including professional intermediaries.

133. Consequently, it is important to fully understand the identity of the buyer’s beneficial owners to reduce opportunities for corruption and public rent diversion. The disclosure of the beneficial ownership of the buyer is a key transparency element that is required to meet the increasing complexity of patterns of corruption, which often rely on multi-layered structures across various jurisdictions and involve corporate vehicles to channel or disguise corrupt payments and distance the corrupt agent from the crime. Increased transparency of buyer beneficial ownership information in commodity sales transactions can create greater accountability and public trust by ensuring that value is not lost in the transactions.

134. The difficulty in obtaining reliable and comprehensive beneficial ownership information was noted in the EITI’s pilot into beneficial ownership – which was focused on disclosures by governments in the extractive sector generally. Despite significant interest from stakeholders, information about the identity of the beneficial owners of extractive companies and level of ownership was difficult to obtain, especially when company ownership was structured across multiple jurisdictions. The EITI’s Evaluation Report of the beneficial ownership pilot notes that appropriate thresholds need to be determined that can take into account a companies’ corporate structure, but can also capture any individual’s full aggregated interest, as well as situations where ownership and/or control may be exerted through less conventional means. Some countries participating in the EITI’s pilot programme also identified concerns around security in respect of disclosing details such as residential addresses, if this information was to be disclosed publicly. (EITI, 2015[30])

135. Challenges with obtaining beneficial ownership information were identified in Ghana’s Commodity Trading Pilot Programme, where all buyers participating in the pilot provided the name of the entity that acted as the buyer but none provided beneficial

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\(^3\) Shell companies are considered to be companies that are incorporated and that have no significant operations or related assets.
ownership information on that buyer entity. (GHEITI, 2018[17]) Going forward, GNPC will now require the disclosure of beneficial ownership information from buyers at the pre-qualification and contracting stages.

136. During the EITI’s targeted consultation with buyers, some potential challenges were raised by buyers on the feasibility of disclosing beneficial ownership information. These concerns related to the level of implementation at the EITI country level, including, a lack of legal framework, clear definitions, and awareness among industry players. (EITI, 2019[4])

Politically exposed persons

137. A politically exposed person (PEP) refers to a natural person who has been entrusted with prominent public functions. This may include senior members of the government or other such senior officials in the administration, judiciary, police, military or state-owned enterprises.

<table>
<thead>
<tr>
<th>Box 3.4. FATF Definition of politically exposed persons</th>
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<tbody>
<tr>
<td>Foreign PEPs are individuals who are or have been entrusted with prominent public functions by a foreign country, for example Heads of State or of government, senior politicians, senior government, judicial or military officials, senior executives of state owned corporations, important political party officials.</td>
</tr>
<tr>
<td>Domestic PEPs are individuals who are or have been entrusted domestically with prominent public functions, for example Heads of State or of government, senior politicians, senior government, judicial or military officials, senior executives of state owned corporations, important political party officials.</td>
</tr>
<tr>
<td>Persons who are or have been entrusted with a prominent function by an international organisation refers to members of senior management, i.e. directors, deputy directors and members of the board or equivalent functions.</td>
</tr>
<tr>
<td>The definition of PEPs is not intended to cover middle ranking or more junior individuals in the foregoing categories. (FATF, 2012[25])</td>
</tr>
</tbody>
</table>

138. The EITI Standard states that “the definition [of a beneficial owner] should specify reporting obligations for politically exposed persons” (Requirement 2.5.f.ii). (EITI, 2016[24]) There is no definition of PEPs in the EITI Standard but EITI guidance makes reference to definitions of PEPs contained in the FATF Recommendations, 4th EU Money Laundering Directive, and United Nations Convention Against Corruption. (EITI, 2016[32])

139. Due to their power and influence, PEPs are often in positions that can be abused for the purpose of corruption, public rent diversion or other illicit activities. PEPs often use corporate vehicles to obscure their identity, in order to distance themselves from transactions, and to access the financial system undetected. (FATF, 2013[26]) It is important to note that the PEP status itself does not necessarily mean an individual is corrupt or that they have been involved in any corrupt practice – but it does raise a red flag that should require further scrutiny. For example, the FATF requires reporting institutions to treat every transaction with a foreign PEP as high risk. While all holders of public positions may have corrupt opportunities to a certain degree, those having substantial authority over or access to procurement awards and control over regulatory approvals can pose a greater risk than
others. Their actual vulnerability to corruption will vary, depending on the extent to which they exercise hierarchal control. (FATF, 2012[18])

140. The requirement to disclose the involvement of politically exposed persons is linked to the general requirement to disclose the beneficial ownership of the buyer but goes further by requiring the buyer to clearly identify any PEP involved in the transaction. PEPs may be involved in a commodity sale transactions through the use of complex corporate and legal structures, including intermediaries, briefcase or shell companies, or by entering into joint ventures with the buyer. The risk of PEP involvement may be heightened in situations where contracts are awarded to local companies – either awarded outright or in a partnership between a local and an international buyer.

141. In the countries that were assessed during the EITI’s pilot into beneficial ownership, it was found that there were often legal requirements for PEPs to disclose assets, but that such disclosures are not always publicly available. The report notes that countries could be encouraged to ask companies to disclose the names of Board members, as these disclosures could help shed light on cases where proxies are used to conceal a PEP. (EITI, 2015[30])

3.3. Use of intermediaries

142. Buyers may choose to engage the services of an intermediary to help facilitate a commodity sale transaction. An intermediary may be a legal or a natural person. An intermediary may help facilitate the transaction between the buyer (trader) and the seller (government) or may themselves act as the buyer in the transaction before quickly off-selling the commodity to the trader.

Box 3.5. OECD Definition of intermediaries (OECD, 2009[16])

A person who is put in contact with or in between two or more trading parties. In the business context, an intermediary usually is understood to be a conduit for goods or services offered by a supplier to a consumer. Hence, the intermediary can act as a conduit for legitimate economic activities, illegitimate bribery payments, or a combination of both.

143. The use of an intermediary in a commodity sales transaction is not necessarily evidence of corruption or other improper purpose. There could be legitimate reasons for buyers who engage the services of an intermediary. When exploring potential openings abroad, buyers often find themselves in unfamiliar environments with a wide variety of cultural, legal, financial and accounting complexities and obligations and may wish to benefit from local knowledge. In some jurisdictions, the use of intermediaries may be mandatory as those jurisdictions may require the employment of a local agent for any business transaction in the local market. (OECD, 2009[16]).

144. However, the involvement of intermediaries in corrupt transactions worldwide has been largely documented. At least 71% of all 427 bribery cases reported by the signatory countries of the OECD Anti-Bribery Convention in the period from 1999 to 2014 involved the use of an intermediary. (OECD, 2014[26]) Analysis undertaken by Stanford Law School

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4 As there is no generally accepted definition of an intermediary in the context of foreign bribery, this definition was formulated for the purposes of the Final Report of the OECD Working Group on Bribery in International Business Transactions on “Typologies on the Role of Intermediaries in International Business Transactions”.

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of 240 United States Foreign Corrupt Practices Act (FCPA) cases from 1977 to 2017 found that more than 90% of these cases also involved an intermediary. (Moretti, 2018[29]) In commodity sale transactions, a common example of this concerns a corruption scheme where the buyer pays the intermediary a fee for his services, and then the intermediary pays that fee (or part of it) to the public official who is responsible for selecting the buyer of a specific sale of commodities. In this example, the intermediary acts as a ‘shield’ between the buyer and the corrupt payment (bribe) to the public official. However, the use of an intermediary in this context may not necessarily protect the buyer from criminal liability. The OECD Anti-Bribery Convention expressly covers the situation where foreign bribery is committed “directly or through intermediaries” and consequently any buyer relying on the use of intermediaries to make corrupt payments would be committing a criminal offence in jurisdictions that apply the OECD Anti-Bribery Convention. (OECD, 1997[30])

145. Intermediaries may contribute to the creation of complex and opaque structures of corporate vehicles rendering the identification of beneficial owners more difficult. This may occur in particular when the trading company offers little value added and acts as a mere intermediary between the public entity or its marketing agent and a second-tier purchaser. The OECD Development Centre’s Corruption Typology reports the case of suspicious transactions where a small trading company with no credentials in the trading business was offered very generous contractual terms to trade refined products, despite the fact that it would provide no logistical or other reasonable service, and resell the products with a significant profit margin to third parties on the international market. (OECD, 2016[1])

146. Consequently, the disclosure of any involvement of intermediaries acting on behalf of the buyer can act to reduce opportunities for corruption and public rent diversion that could result in public revenue losses. This disclosure is a key transparency element that is required to meet the increasing complexity of patterns of corruption, which often rely on multi-layered structures, individuals and entities that may be designed to disguise corrupt payments and distance the corrupt agent from the crime.
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