OECD Development Policy Tools

Options for Operationalising Transparency in Commodity Trading Transactions



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Foreword

In 2016, the OECD Development Centre published the report on *Corruption in the Extractive Value Chain: Typology of Risks, Mitigation Measures and Incentives*, presenting the first evidence-based analysis of patterns of corruption at each segment of the value chain, taking a multi-dimensional approach in order to address both the supply and demand sides. The Corruption Typology noted that the lack of transparency around key commodity trading-related data constitutes a significant corruption risk, also in light of the scale of revenues derived from the sales of publicly-owned commodities. In that regard, the Corruption Typology set out a number of mitigation measures that host governments, home governments and buying companies can take to mitigate corruption risks in the commodity trading sector, including the requirement for companies active in commodity trading to disclose their payments to governments (OECD, 2016[1]).

Following on from the recommendations in the Corruption Typology, and in response to the call received from the 2016 London Anti-Corruption Summit and the high-level mandate received from its Governing Board on 3 October 2017, the OECD Development Centre launched the Thematic Dialogue on Commodity Trading Transparency, with the specific objective of exploring approaches to improving transparency and countering corruption in commodity trading, including paving the way for the possible development of a common global reporting standard (Governing Board of the OECD Development Centre, 2017[2]) (OECD Development Centre, 2017[3]).

This report sets out concrete actions that home and host governments, including their state-owned enterprises, as well as trading hubs, free zones, commodity exchanges and industry associations can take to increase transparency of payments to governments made for the purchase of commodities from state-owned enterprises (SOEs) or other public entities.

This report complements the work on Illicit Financial Flows (IFFs) and Oil Commodity Trading, developed under the auspices of the Anti-Corruption Task Team (ACTT), a subsidiary body of the OECD's Development Assistance Committee (DAC). The OECD-DAC's Programme of Work on Illicit Financial Flows and Oil Commodity Trading is undertaken in dialogue with oil-producing African economies, and aligns with the OECD's high priority afforded to tackling IFFs by focusing on the vulnerabilities to IFFs that arise in the oil sales process. The Programme of Work highlights what OECD members and partners can do to mitigate IFF risks in the commodity trading sector, including through official development assistance (ODA) and in their role as the home or host of the range of markets and enablers that may raise or exacerbate IFF risks.

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The report benefited from input during discussions at the Ninth Plenary Meeting of the Policy Dialogue on Natural Resource-based Development (21 January 2018), the Tenth Plenary Meeting (26 June 2018), the Eleventh Plenary Meeting (13 December 2018), the Twelfth Plenary Meeting (20 June 2019), the Thirteenth Plenary Meeting (26 November 2019), the Fourteenth Plenary Meeting (26 June 2020) and the Fifteenth Plenary Meeting (4 December 2020).

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Executive Summary

This report provides an overview of possible options for operationalising enhanced transparency and reporting requirements by companies that purchase oil, gas and minerals (hereafter: buying companies) from state-owned enterprises (SOEs) and other public entities that can be undertaken by home governments, host governments and their SOEs, trading hubs, free zones, commodity exchanges and industry associations. In particular, as a significant share of global commodity trading transactions take place in a small number of global trading hubs, those hubs should take active steps to avoid the reputational risk of harbouring corrupt transactions and suspicious deals, including by introducing requirements for companies active in commodity trading to disclose their payments to governments. The options for operationalising enhanced transparency set out in this report can act to reinforce each other and should not be seen as mutually exclusive.

At the international level, the development of a global standard on payment disclosure by buying companies could lead to the creation of a level playing field across jurisdictions. This option would allow trading hubs to compete on an equal footing while maintaining high standards of integrity and would reduce the burden on buying companies by harmonising their reporting requirements globally. Furthermore, the public disclosure of comparable and readily accessible data can enable governments, civil society organisations, and other interested stakeholders to have a fuller picture of the revenues that resource-rich countries receive for the sale of their commodities.

The 2019 EITI Standard encourages buying companies to disclose payments for the purchase of publicly-owned commodities, and notably Equinor, Glencore, Gunvor, TotalEnergies and Trafigura now disclose information in respect of their payments to governments using the EITI framework. However, on a global basis, such disclosures represent only a tiny fraction of the payments to governments for the purchase of publicly-owned commodities.

A global standard on payment disclosure should include the participation of trading hubs and jurisdictions where buying companies are registered in order to enjoy broad multi-stakeholder ownership and legitimacy, and to capture the majority of global commodity sales transactions. Disclosures should be mandatory rather than encouraged in order to increase their uptake by buying companies, and in order to ensure consistency across commodity sales transactions, reporting requirements should apply to both listed and private companies.

In the absence of a coherent global standard, home governments, including trading hubs may choose to introduce requirements for companies to disclose information in respect of payments to governments on a unilateral basis – either through the adoption of general regulations or, in jurisdictions where commodity exchanges operate, through specific regulations applicable to companies operating on that exchange. This option would increase public disclosure of the details of commodity sales transactions, but unless aligned with a common reporting framework, such as the one provided by the *EITI Reporting Guidelines for companies buying oil, gas and minerals from governments*, may increase the reporting burden and compliance costs for companies operating in multiple jurisdictions, and would likely lead to a fragmentation of reporting and challenges with comparability of data by end-users.

Beyond reporting requirements enacted by governments, there is an opportunity for free zones, commodity exchanges and industry associations to create strong incentives for the disclosure of payments to governments. The ability of industry associations and commodities exchanges to restrict market access for non-complaint industry players provides a powerful tool for companies to comply with any applicable transparency requirements. Experience with self-regulatory approaches by industry associations and commodities exchanges shows that they work best if aligned with international standards.

Host governments and SOEs have an important role to play to clarify expectations regarding the disclosure of payments to governments from buying companies. This could be done through the adoption of a disclosure policy by host governments or the inclusion of specific disclosure obligations in commodity sales contracts. Such measures can contribute to the creation of an environment where expectations about transparency of payments are clarified at the outset and where commodity sales contracts are entered into with the understanding that payments made to governments for the purchase of oil, gas and minerals will be made public. Furthermore, these measures can also support the implementation of a global standard on payment disclosure or the operation of self-regulatory approaches, thus levelling the playing field for companies operating across different jurisdictions.

The implementation of the options set out in this report for operationalising enhanced transparency for the payments to governments for the purchase of publicly-owned commodities need to be carefully considered. A lack of implementing guidelines or a flexibility in respect of implementation can cause challenges with ensuring consistency and comparability. For example, governments may set out inconsistent reporting requirements, and companies may adopt different interpretations or approaches in respect of their reporting. A misalignment between the international standard and the implementing guidelines can have the effect of watering down the international standard and creating potential loopholes, and may increase the compliance burden if companies were subject to different reporting requirements across jurisdictions.

Early consideration should be given to the practicalities of disclosure requirements (scope, frequency, format, availability), the extent to which the data disclosed is publicly available, and the potential for new technologies (such as blockchain), to aid disclosures. The disclosure of payments to governments for the purchase of publicly-owned commodities would generate a significant amount of information that would need to be aggregated, and consequently, the creation of a common repository for disclosing, aggregating and publishing this information would be recommended in order for these disclosures to contribute meaningfully to effective accountability in commodity trading.

1 The development of a global standard on payment disclosure by buying companies

The trade of commodities and the transactions that underpin those trades take place on a global scale involving a vast network of actors from a wide array of jurisdictions – both developed and developing and both public and private. In that regard, the challenge of improving transparency and accountability in commodity trading should ideally be addressed through an internationally agreed framework on corporate payment disclosure between jurisdictions involved in those transactions, including key home jurisdictions of buying companies, trading hubs, offshore financial centres, and jurisdictions where production occurs.

In 2017, the OECD Secretary-General's High-Level Advisory Group on Anti-Corruption and Integrity recommended the development of transparency instruments to require commodity traders to disclose payments to governments and SOEs, and to accelerate the global trend towards requiring mandatory disclosure of revenue payments to governments by all oil, gas and mining companies (OECD Secretary-General's High-Level Advisory Group on Anti-Corruption and Integrity, 2017[4])

Further recognition of the need for a global standard on payment disclosure has already been made by some trading hubs and home jurisdictions of buying companies. This includes a commitment by the European Commission at the 2016 Anti-Corruption Summit to "explore the scope for a common global reporting standard" (European Commission, 2016[5]), and the United Kingdom "to establish and implement a common global reporting standard" on payments to governments for the sale of oil, gas and minerals as part of its *National Action Plan for Open Government 2019-2021* in June 2019. As part of this commitment, the United Kingdom noted that "the largest payment stream missing from mandatory disclosure is payments to governments for the sale of publicly owned oil, gas and minerals (commodity trading), an area where corruption risk is acute" (Government of the United Kingdom, 2019[6]).

More recently, in June 2020, the Swiss Parliament recognised the need for a global approach to payment disclosures by buying companies during a package of wider reforms to Swiss company law. The new law delegates authority to the Federal Council to apply new transparency provisions to Swiss commodity traders buying oil, gas and minerals, in accordance with an international procedure where other key trading hubs would enact similar provisions (Parliament of Switzerland, 2020[7]).

Non-governmental organisations, such as the Natural Resource Governance Institute (NRGI) have called for governments in key commodity trading hubs including Singapore, Switzerland, the United Arab Emirates, the United Kingdom and the United States to require these buying companies to disclose the payments they make to purchase oil and gas and minerals from governments and national oil companies (NOCs) (Malden and Williams, 2019[8]) (NRGI, 2020[9]).

The development of a global standard on payment disclosure by buying companies could lead to the creation of a level playing field across jurisdictions with trading hubs able to compete on the same ground while maintaining high standards of integrity. A global standard on payment disclosure can also improve

the usability of information through consistent reporting across different jurisdictions from one year to the next on payments made by buying companies for the purchase of publicly-owned commodities.

A collective process to develop a global standard on payment disclosure could build a common understanding around key concepts and issues associated with commodity trading payments, thus fostering harmonisation of efforts and consistency in interpretation – for example, the scope of information to be disclosed, addressing concerns of commercial sensitivity and confidentiality, and setting a time lag for disclosure. The scope of the information to be disclosed should reflect the full spectrum of the corruption risks arising across jurisdictions through which transactions are routed, as identified by the OECD Development Centre, in order for the global standard to meaningfully translate into improved accountability (OECD, 2021[10]). This process would lead to the disclosure of comparable, understandable and readily accessible data that can enable governments, civil society organisations, and other interested stakeholders to have a fuller picture of the revenues that resource-rich countries receive for the sale of their commodities as well as information that may trigger corruption red flags.

In addition, the introduction of a global standard on payment disclosure would reduce the burden on buying companies by harmonising their reporting requirements across jurisdictions.

EITI Reporting Guidelines for companies buying oil, gas and minerals from governments: A basis for a globally scalable standard?

The Extractive Industries Transparency Initiative (EITI) is a global standard to promote good governance and open and accountable management in the oil, gas and mineral sectors. The EITI Standard requires the disclosure of specific information along the extractive industry value chain – from extraction, to revenue collection and spending.

In 2013, the EITI moved to require the disclosure of information about the sale of the state's share of production of oil, gas and minerals.

In response to a growing international recognition of the significance of revenues from commodity sales for the development of many resource-rich countries, this requirement was strengthened in the revision to the EITI Standard in 2016, where governments, including SOEs, were required to disclose the volumes sold and revenues received from sales of publicly-owned oil, gas and minerals. The published data must be disaggregated by individual buying company and to levels commensurate with the reporting of other payments and revenue streams.

Subsequently, the EITI established a working group to support a number of countries in voluntarily implementing the requirements of the 2016 Standard. As part of that process, 11 countries (SOEs and relevant government agencies) began to disclose information on the sales of their states' share of production.

However, as these disclosure requirements were primarily targeted toward governments and SOEs, there was a transparency gap in respect of the other side of the transaction – the buyers, as only a few EITI countries, Iraq (2013), Ghana (2018) and Nigeria (2019), published reports that included payments reported by buying companies. Furthermore, only one major buying company was in the practice of voluntarily disclosing its payments to governments in EITI countries.

The development of guidelines and a reporting template for the disclosures of payments by companies buying oil, gas and minerals from governments or SOEs was subject to extensive discussions within the EITI Working Group on Transparency in Commodity Trading, and at the OECD Thematic Dialogue on Commodity Trading Transparency.

Following these discussions, the disclosure requirement was amended in the 2019 revisions to the EITI Standard (Requirement 4.2(a)) with the aim of ensuring enhanced transparency in how the state sells its

oil, gas and minerals. Under the 2019 revisions, governments, including SOEs, are required to disclose the volumes sold and revenues received, as well as the revenues transferred to the state from the proceeds of oil, gas and minerals sold. Furthermore, the 2019 EITI Standard encourages governments to consider whether disclosures should be broken down by individual sale, type of product and price, and to disclose a description of the process for selecting the buying companies, the technical and financial criteria used to make the selection, the list of selected buying companies, any material deviations from the applicable legal and regulatory framework governing the selection of buying companies, and the related sales agreements.

In addition to the disclosure requirements for SOEs and relevant government agencies, the revised 2019 EITI Standard also includes provisions to *encourage* disclosures by companies buying oil, gas and minerals from governments or SOEs. Requirement 4.2(c) of the 2019 EITI Standard provides that:

> Companies buying oil, gas and/or mineral resources from the state, including state-owned enterprises (or third parties appointed by the state to sell on their behalf), 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. This could include payments (in cash or in kind) related to swap agreements and resource-backed loans. The published data could be disaggregated by individual seller, contract or sale. The disclosures could for each sale include information on the nature of the contract (e.g. spot or term) and load port (EITI, 2019[11]).

During the development of Requirement 4.2(c) there was recognition that company-level reporting can support the existing transparency efforts by the state or SOE, and additional disclosures by companies buying oil, gas and minerals can complement information on receipts published at the country level. Company reporting can also contextualise the information being disclosed by the state and SOE through the EITI process, which can assist interested stakeholders to better understand that nature of the disclosures.

In September 2020, the EITI published specific guidance for buying companies to encourage increased disclosures under Requirement 4.2(c) (EITI, 2020[12]). The *Reporting Guidelines for companies buying oil, gas and minerals from governments* (EITI Guidelines) have been be developed by the EITI Working Group on Transparency in Commodity Trading, and informed by the discussions at the OECD Thematic Dialogue on Commodity Trading Transparency.

The EITI Guidelines are for use by companies buying oil, gas and minerals from governments to guide their disclosures on payments to governments in their own company reports. They aim to ensure the consistent disclosure of payments for purchases of the state's share of production and other in-kind revenues from EITI countries where the selling entity is a government agency or SOE or a third party appointed to sell on their behalf (i.e. where EITI Requirement 4.2 is applicable).

The EITI Guidelines also recommend that disclosures cover purchases from SOEs in EITI and *non-EITI countries* where the state or SOE has explicitly or publicly stated its support for buyers disclosing information on their sales or has reflected this in its general terms and conditions for the sale of commodities or where disclosures of volumes and values of sales are already being made to the public with the cooperation of the seller.

The EITI Guidelines set out a number of steps that buying companies can take to give effect to Requirement 4.2(c). These steps include: mapping selling entities and transactions, considering the data set to be disclosed, providing data assurances, communicating disclosures to selling entities, and presenting and publishing data. The EITI Guidelines also set out provisions for the disclosure of non-conventional commodity trading transactions, such as pre-payment deals, resource-backed loans and swap agreements. Annexed to the EITI Guidelines are three different reporting templates[1] that buying

companies can use for their disclosures (EITI, 2020[12]). As of May 2021, no buying company has made disclosures under the most detailed reporting template.

The EITI Guidelines represent an important first step toward closing the transparency gap surrounding payments to governments for the purchase of oil, gas and minerals. They were developed through a rigorous multi-stakeholder process with significant buy-in from buying companies and from countries implementing the EITI Standard. The EITI Guidelines provide a useful basis for the possible future development of a global reporting standard, which would require getting the buy-in from trading hubs and home jurisdictions of buying companies, and which would be global in its reach and applicability.

The EITI is raising awareness of the EITI Guidelines to encourage their uptake and use by companies that purchase commodities from governments and SOEs, including through outreach to financial institutions involved in commodity trade finance. As of June 2021, three commodity trading companies and two international oil companies (Equinor, Glencore, Gunvor, Trafigura and TotalEnergies) have released payment to government reports based on the EITI Guidelines, and some of these companies have also reported aggregated information on payments made to governments in non-EITI countries. For example, Glencore has published disaggregated payments data for non-EITI countries where legislation allows for such disclosures, as is the case in South Sudan. The EITI International Secretariat is currently in discussions with other trading companies and IOCs to encourage further uptake of the EITI Guidelines.

In contrast to the disclosure requirements for SOEs and relevant government agencies in Requirement 4.2(a), the EITI Guidelines are not explicitly binding on buying companies as Requirement 4.2(c) only *encourages* these companies to disclose information in relation to commodities purchased from governments and SOEs. There are expectations from governments and civil society organisations that buying companies operating in EITI countries will give effect to the disclosures contemplated by Requirement 4.2(c), especially where such companies have made public statements in support of the EITI and where companies sit on the EITI Board. In fact, the EITI Board has clarified that companies supporting the EITI are expected to "*ensure comprehensive disclosure of taxes and payments made to all EITI implementing countries*" (EITI Board, 2018[13]). However, there is no guarantee that companies will disclose the requested information for commodity transactions if not explicitly required to do so. To increase the likelihood of these disclosures, EITI countries should adopt a general disclosure policy and include specific disclosure obligations in their commodity sales contracts – see *Section 4: Setting out expectations on payment disclosure by buying companies: Options for host governments and SOEs*.

In order to increase the uptake of the EITI Standard and its implementing EITI Guidelines, support from major trading hubs is essential. The Netherlands and the United Kingdom (EITI implementing countries) and the United States (an EITI supporting country) can play an important role in promoting the use of the EITI Standard as an agreed framework for disclosures of payment to governments. However, other important trading hubs, including China; Hong Kong, China; the Russian Federation; Singapore; the United Arab Emirates (Dubai) are not members of the EITI.

Furthermore, although the EITI counts 55 resource-rich countries among its members, many important producing countries, including Algeria, Angola, Bolivia, Brazil, China, Egypt, Equatorial Guinea, India, Russia, South Africa and Zimbabwe are not members of the EITI. This discrepancy between EITI and non-EITI resource-rich countries and the corresponding effect on payment disclosures can be significant. For example, an NRGI study showed that in the year 2016, buying companies purchased oil and gas from governments to the value of USD 1.5 trillion. However, only 10% of these sales took place in countries that implement the EITI Standard. The remaining 90%of sales took place outside the jurisdiction of the EITI (Malden and Williams, 2019[8]). Despite these shortcomings, there is no global initiative that includes all resource-rich countries and at present, the EITI provides the widest coverage and access at an international level. Its membership is also increasing – for example in 2020, Angola committed to join the EITI.

Consequently, the development of a global standard on payment disclosure that builds on the EITI Guidelines but also includes the participation of trading hubs and jurisdictions where buying companies are registered would cover a significantly greater number of global commodity trading transactions. A global standard building on the EITI Guidelines could also assist buying companies in their discussions on disclosures with SOEs in non-EITI countries as the standard would provide companies with the legal certainty to make disclosures and to promote transparency in these important non-EITI jurisdictions (OECD Development Centre, 2019[14]).

Precedents for requiring the disclosure of payments to governments: Exploration and production activities extractive sector

During the last decade, Canada, the European Union,[2] Norway, Switzerland and the United States have adopted legislation to require the disclosure of payments to governments for the rights to explore and produce oil, gas and minerals. These examples set a useful precedent about the introduction of transparency requirements for payments to governments by extractive companies, and the way they were designed and implemented offers lessons for possible future development of a global reporting standard for the disclosure of payments made for the purchase of publicly-owned commodities.

Since the introduction of these reporting requirements, publicly-listed and large private companies in the petroleum and mining sectors have disclosed project-level payments made to governments of USD 1.16 trillion as of July 2021 (NRGI, 2015[15]).

Canada

Canada adopted the Extractive Sector Transparency Measures Act (ESTMA) in 2014, based largely on the EU Accounting and Transparency Directives and this legislation has led to the publication of hundreds of company reports on payments to governments. The ESTMA and the EU Accounting and Transparency Directives are functionally equivalent and both the EU and the Canadian Government have stated that reports compiled to meet requirements in one jurisdiction are fully substitutable with the other jurisdiction. The extractive industry welcomed this equivalence because it will avoid double reporting for companies operating in Canada and the EU (Government of Canada, 2018[16]).

However, there are some differences between the EU and Canadian reporting standards. ESTMA applies broadly to all entities listed on a Canadian stock exchange, whereas the EU Transparency Directive is more restrictive as it only covers entities listed on a regulated market. The deadline to provide the report is shorter in the case of the Canadian legislation (150 days) than in the case of the Transparency Directive (six months) or the Accounting Directive (12 months). Furthermore, ESTMA stipulates that reports shall remain publicly available for no less than five years, whereas in the EU, this period is at least ten years for companies complying with the EU Accounting and Transparency Directives (European Commission, 2018[17]).

European Union: Accounting and Transparency Directives

In 2013, the European Union (EU) adopted the Accounting and Transparency Directives requiring large oil, gas, mining and logging companies listed and registered in the EU to disclose their revenue payments to governments around the world for the rights to explore and produce oil, gas and minerals.[3] The scope of the Accounting and Transparency Directives does not include payments for the sale of oil, gas and minerals as a payment category on which companies should report.

The objective of these new requirements was to improve the transparency of payments made to governments by the extractive and logging industries. The European Commission noted that such

disclosures could 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. Consequently, civil society will be in a better position to question whether the contracts entered into between the government and extractive companies had delivered adequate value to society and government (European Commission, 2013[18]). The European Commission also noted that the legislation provides for greater accountability on the part of extractive companies and can serve as a tool for enhancing transparency and building trust (European Commission, 2011[19]).

In terms of operability, the Accounting Directive requires the reporting of payments to governments on a country-by-country and a project-by-project basis by limited liability companies registered in the European Economic Area (EEA). In order to level the playing field between different companies, the same disclosure requirement was incorporated into the Transparency Directive, which applies to companies publicly listed on EU regulated markets even if they are not registered in the EEA and are incorporated in other countries (European Commission, 2013[18]). The EU Accounting and Transparency Directives also set out a size thresholds to determine which companies are subject to the reporting requirements. Companies that exceed two of the three following criteria are required to report their payments to governments: (1) balance sheet total assets exceed EUR 20 million; (2) net turnover of EUR 40 million; or (3) average number of 250 employees for the year.

The European Commission commissioned a review of the effectiveness of the Accounting and Transparency Directives in 2018 and found that the reporting requirements had been effective in increasing the transparency of payments made by companies to governments for the exploitation of natural resources. The Directives resulted in the generation and publication of data that was not available previously and that data enabled civil society to compare data on payments to governments across several sources and therefore make it better equipped to hold governments to account (European Commission, 2018[17]).

The European Commission conducted its own review of the Accounting and Transparency Directives in 2021. The European Commission noted that reporting under the Directives is still relatively recent and that a longer observation period would be necessary to more thoroughly assess certain aspects of its effectiveness. However, the European Commission did find that the policy overall undeniably makes the extractives sector more transparent. The Commission noted that while it is still too early to notice significant changes in government accountability (especially in the case of less democratic or open governments) or in resource governance in resource-rich countries, the disclosures made by companies under the Directives have enabled civil society organisations to question governments and companies and to hold them to account (European Commission, 2021[20]).

Several civil society organisations themselves have also noted the improvements to transparency and accountability brought about by disclosures made by companies under the EU Accounting and Transparency Directives (European Commission, 2021[20]). For example, Transparency International EU has noted how public understanding of extractive companies' activities and payments has increased as citizens in resource-rich countries have greater access to the information needed to hold governments and companies to account for public revenues derived from natural resource extraction (Transparency International EU, 2018[21]).

The NRGI has noted how the introduction of the Directives has brought unprecedented levels of relevant and timely project-level payment data into the public domain in Nigeria, and that this data, especially when combined with data from other sources (including companies' annual reports, EITI reports and government statistics), can lead to better-informed public debate on the management of the country's natural resources (Malden, 2017[22]). In another example, the NRGI demonstrated how the disclosure of payments to governments' data under the EU Directives had enabled accountability actors in Indonesia to verify the size and recipients of oil and gas project signature bonuses, to estimate and verify the revenue that local and regional government entities should receive from an oil and gas project in their region, and to verify

the government's share of production under a new gross split production-sharing contract (PSC) model (Malden and Muhammadi, 2019[23]).

Furthermore, as the enabling legislation is set out by the jurisdictions where extractive companies are listed and registered, rather than where the exploration and production takes place, disclosures are not dependent upon the political will, capacity and financial resources of governments in the host country. Consequently, reports generated under the EU Accounting and Transparency Directives can shine light on non-transparent regimes who may or may not be members of voluntary transparency initiatives, such as the EITI (Publish What You Pay, 2017[24]).

The frequency of reporting under the EU Accounting and Transparency Directives has also be highlighted as a positive step toward greater transparency. Disclosures are required relatively quickly following the end of a financial year so the data is considerably more timely than information released in the EITI reports, as those reports are usually published at least two years after payments were made (Publish What You Pay, 2017[24]).

Reporting under the EU Accounting and Transparency Directives has generated a significant amount of data since its inception. Data from 2018 shows that over 100 publicly traded and large companies, including BHP Billiton, BP, Gazprom, Glencore, Rio Tinto, Rosneft and Shell have reported their payments to governments for the right to explore and produce oil, gas and minerals under the requirements of the EU Accounting and Transparency Directives (Poretti, 2018[25]).

However, this reporting has identified a number of challenges with the implementation of the EU Accounting and Transparency Directives. The Directives require companies to report on payments to governments on an annual basis in a form and manner "as laid down by the laws of each Member State", and therefore there is flexibility on reporting across different EU jurisdictions. This flexibility has caused discrepancies in the manner that information is reported under the Directives.

First, the rules of publication of the reports are not harmonised across different EU jurisdictions. Several national legislations indicate that the reports should be submitted to a national registry where accounting and financial information about companies can be consulted. For example, the United Kingdom has a centralised repository established by the Companies House for disclosures by all companies registered in the United Kingdom. Implementing legislation in France and Italy requires that the reports should be published on the company website. In other jurisdictions, such as Cyprus and Belgium, relevant legislation requires that the reports must be enclosed in the companies' annual report (European Commission, 2018[17]). In Denmark, companies are given the option of publishing their payments to governments' reports in a management review, an annual report or on their website. In Sweden, there are different requirements for companies that are listed (and that are regulated by the Swedish Financial Supervisory Authority) and those that are private (Swiss Institute for Comparative Law, 2017[26]).

Further inconsistencies can be found in the verification of the data disclosed. Audits or assurance is not mandatory in the reporting requirements and their national transpositions. Some multinational companies, though, already make use of the services of independent auditors or provide additional assurance on a voluntary basis (European Commission, 2018[17]).

Due to the lack of implementation guidelines, extractive companies have adopted different interpretation of the scope of the reporting requirements. For example, companies have adopted different approaches regarding the reporting of the payments of joint ventures – some report only payments when they are the controlling party while others report the payments even if they are not the controlling party. Some companies report payments to governments in full, proportionally or do not report such payments at all (European Commission, 2018[17]). In another example, the requirements to report at project level are complicated by the reference to "substantially interconnected agreements" as the basis for defining a project, as companies have adopted different interpretations of what this means. Consequently, reporting on each project varies across companies, making it difficult to have a complete and consistent overview of

projects involving several companies. These discrepancies and a lack of contextual information have resulted in a lack of comparability across reports (European Commission, 2021[20]).

The European Commission has noted that there is limited monitoring and oversight of the different national authorities on the compliance with the reporting requirements. Therefore, issues with the reporting requirements have been identified mostly through the efforts of civil society organisations and academics (European Commission, 2018[17]).

Norway

Norway adopted new transparency rules in December 2013 on country-by-country reporting (*cf. Prop. 1 LS (2013-2014) Chap. 20*) to require extractive industries to publish data in their annual reports, indicating the flows of income, costs, taxes paid, and sign-on fees per country in which they operate.

The Norwegian legislation is largely aligned with the EU Accounting and Transparency Directives. For example, the scope of entities that must report under the Norwegian legislation is determined in accordance with the criteria set out in the Accounting and Transparency Directives in respect of the companies that are subject to reporting requirements. In Norway, companies are required to report if their annual sales revenue are more than NOK 320 million, balance sheet total is more than NOK 160 million, if the average number of employees during the financial year more than 250 or if the company is an issuer with Norway as its home state pursuant to the Securities Trading Act (Ministry of Finance (Norway), 2013[27]).

Switzerland

In June 2020, Switzerland enacted a law requiring Swiss extractive companies to disclose the payments they make to governments for the right to explore for and extract oil, gas and minerals (Parliament of Switzerland, 2020[7]).

The new provisions in Articles 964a et seq. of the Swiss Code of Obligations are modelled on the EU Accounting and Transparency Directives. The new provisions are applicable to companies which are required by law to have their annual financial statements audited, which in practice refers to listed and large companies. Companies are required to disclose in a written report payments of at least CHF 100 000 per financial year made by the company to government bodies. In terms of publication, the report must be published y by the company in an electronic format (GHR Rechtsanwälte AG, 2020[28]).

Although the scope of the new provisions in the Swiss Code of Obligations is restricted to payments made to governments for the right to explore for and extract commodities, the amendments also empower the Federal Council to apply these new transparency provisions to companies that purchase publicly-owned commodities, as part of a coordinated international process (Parliament of Switzerland, 2020[7]).

United States: Dodd-Frank Act

In 2010, the United States Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. Section 1504 directs the Securities and Exchange Commission (SEC) to issue rules that would require oil, gas, and mining companies listed on US stock exchanges to report the payments they make to governments for the commercial development of oil, gas or minerals. The legislation provides that reports should be filed in an interactive data format and should include the type and amount of payments per project and per country.

The SEC drafted rules in 2012 and 2016 but these were never implemented due to challenges from industry associations, a disapproval by a joint resolution of Congress, and the scrutiny of a federal court. On 16 December 2020, the SEC finally issued rules on the disclosure of resource extraction payments.

These rules do have some similarities to the requirements in the EU Accounting and Transparency Directives requirements, but there are significant differences. The US requirements allow companies to aggregate payments for multiple projects in their reporting, whereas the EU requirements require that payments to governments are reported on a country-by-country and a project-by-project basis (Securities and Exchange Commission, 2020[29]).

In terms of the frequency of reporting, the EU Accounting and Transparency Directives require that reports are made available after 6 months (Transparency Directives) or 12 months (Accounting Directive), whereas the US requirements stipulate a filing deadline of 270 days after fiscal year end.

In terms of the scope of the companies that are required to report, the US requirements apply to listed extractive companies only, whereas the EU requirements apply to large unlisted companies, as well as listed companies (European Commission, 2013[18]).

Furthermore, the US rules provide a number of exemptions for their reporting requirements. For example, smaller and emerging growth companies are granted certain exemptions from compliance, and newly public companies are granted a grace period until after their first full fiscal year as a public company. Additional exemptions include where disclosure is prohibited either by foreign law or by a pre-existing contract (Securities and Exchange Commission, 2020[29]).

Although the focus of the US requirements is in respect of the disclosure of payments to governments for the rights to explore and produce oil, gas and minerals, the SEC did acknowledge in its 2020 rules the significance of payments made by buying/trading companies or similar companies to purchase natural resources. In that regard, the SEC rules also includes a requirement to disclose payments for the purchase of in-kind commodities in certain circumstances (Securities and Exchange Commission, 2020[29]).[4]

Lessons learned from the disclosure of payments to governments from the upstream exploration and production sector

The implementation of legislation requiring the disclosure of payments to governments for the rights to explore and produce oil, gas and minerals in Canada, the European Union, Norway, Switzerland and the United States can offer a number of lessons for the possible development of a global standard on payment disclosure for the purchase of publicly-owned commodities.

Firstly, consideration will need to be given to the scope of the coverage of a global standard. For example, the EU Accounting and Transparency Directives apply to companies publicly listed on EU regulated markets but also to limited liability companies registered in the EEA (European Commission, 2013[18]). Whereas in the United States, Section 1504 of the Dodd-Frank Act extends to oil, gas, and mining companies listed on US stock exchanges only. Private companies therefore would be exempt from these reporting requirements (Securities and Exchange Commission, 2020[29]). In the commodity trading sector, many of the major companies are held privately and are not listed on stock exchanges. Therefore, in order to capture a significant share of commodity trading transactions, a global standard on payment disclosure for the purchase of publicly-owned commodities should extend to both listed and non-listed companies in line with the approach taken in the EU Accounting and Transparency Directives.

Consideration should also be given to ensuring that a global standard on payment disclosure is interpreted consistently across different implementing jurisdictions. The experience of EU countries in implementing the EU Accounting and Transparency Directives shows that inconsistent applications can occur, and this can have an impact on the comparability and usability of the information that is disclosed. For example, due to a lack of implementation guidelines, extractive companies have adopted different interpretations of some of the key elements of the reporting requirements (e.g. definition of a joint venture), and as the publication of the reports are not harmonised across the EU, different jurisdictions have adopted different approaches to reporting (e.g. submission to a national registry, publication on the company website, annexed to a company's annual report) (European Commission, 2018[17]).

Lastly, given the existence of legislation in Canada, the EU, Norway, Switzerland, the United Kingdom and the United States for the disclosure of payments to governments for the *rights to explore and produce* oil, gas and minerals, there may be scope to extend these legislative instruments to cover the payments to governments for the *purchase* of publicly-owned oil, gas and minerals. This option has already been recognised by the Swiss Parliament, as its recent law requiring Swiss companies to disclose payments to governments for the right to explore and produce oil, gas and minerals also delegates authority to the Federal Council to apply these new transparency provisions to companies that purchase publicly-owned oil, gas and minerals as part of a co-ordinated international process (Parliament of Switzerland, 2020[7]).

2 Adoption of regulations by home governments requiring payment disclosure by buying companies

In the absence of a global standard, home governments, including trading hubs may choose to introduce regulations requiring buying companies to disclose information in respect of payments to governments. This approach could be undertaken on a unilateral basis or could involve two or more hubs introducing regulatory requirements in a co-ordinated manner.

Such actions by home governments and/or trading hubs to require buying companies to disclose their payments for the purchase of oil, gas and minerals from governments and SOEs globally would provide enhanced transparency around the details of these transactions. These disclosures could increase public understanding around the volumes and values of the transactions and their associated revenue streams, particularly in countries where SOEs have not provided such information to citizens in their home jurisdiction. For buying companies subject to corruption investigations related to commodity trading, the provision of payment disclosures could act to rebuild public trust in their business dealings (Malden and Williams, 2019[8]).

Home governments that wish to introduce requirements for buying companies to disclose information in respect of payments to governments may consider different options for implementation. For example, through the adoption of legislative instruments (laws, regulations, decrees etc.) applicable to all buying companies in their jurisdiction. Alternatively, in jurisdictions where commodity exchanges operate, home governments may introduce specific regulations applicable to companies operating on that exchange in respect of payment disclosure.

The introduction of reporting requirements by one or by a few key jurisdictions could have a significant impact on global commodity trading transparency due to the concentration of buying companies in these key jurisdictions. For example, a report by the Swiss Federal Government in 2013 estimated that 70% of the global trade in metals took place in only three trading hubs (London, Singapore and Switzerland), while 95% of the global trade in crude oil took place in just four hubs (London, New York, Singapore and Switzerland) (FDFA, EAER and FDF, 2013[30]). Recent research from the OECD Development Centre has also highlighted the concentration of buying companies and their trading entities across five key trading hubs – The Netherlands, Singapore, Switzerland, the United Arab Emirates, the United Kingdom and the United States (OECD Development Centre, 2021[31]).

Furthermore, the introduction of reporting requirements by one jurisdiction may encourage other jurisdictions to follow, as evidenced by the adoption of regulations requiring the disclosure of payments to governments for the rights to explore and produce oil, gas and minerals. In that case, the United States passed initial legislation in 2010, followed by the EU and Norway (2013), Canada (2014) and Switzerland (2020).

However, if reporting requirements are introduced by home jurisdictions on a unilateral basis, this could lead to a fragmentation of reporting and challenges with usability of data by end-users, including for

comparability purposes. For example, the flexibility granted to national multi-stakeholder groups in the implementation of the EITI Standard (in terms of whether buyers are required to disclose: the availability, scope, and granularity of trade-related payments) has demonstrated that disclosures across host producing countries vary from one country to another.

The experience of the EU in introducing legislation to require the disclosure of payments to governments for the rights to explore and produce oil, gas and minerals further demonstrates the problems with the implementation of reporting requirements where the interpretation of the scope and content of the disclosures varies across implementing jurisdictions.

Unilateral reporting requirements would also act to increase the reporting burden and compliance costs for companies operating in multiple jurisdictions. A review of the EU Accounting and Transparency Directives in 2021 found that global alignment remains a major concern for the industry, and that a global reporting standard, applicable to all sector participants would improve the ability to compare payments accurately across companies. The European Commission noted that civil society and industry both agreed on the need for a global level playing field, and that regulators should to step up their efforts to meet this goal (European Commission, 2021[20]).

Given the proliferation of regimes and the failure to achieve fully consistent reporting legislation among EU Member States even while adhering to EU requirements, extractive companies participating in the review process recommended that a global reporting standard ideally should be developed by an international organisation, such as the OECD (European Commission, 2018[17]).

3 Self-regulatory approaches: The role of free zones, commodity exchanges and industry associations

Regardless of the adoption of specific corporate reporting requirements on commodity trading transparency by home governments of buying companies or by trading hubs, there is an opportunity for free economic zones, commodity exchanges and industry associations to take steps to encourage corporate disclosure of payments to governments for the purchase of publicly-owned commodities.

Free economic zones (also termed free zones or free ports) are specially designated areas that are set up to encourage economic activity – often through the use of tax incentives. Authorities in those free zones, such as the Dubai Multi Commodities Centre Authority, may enact specific regulations or rules to govern the operations of companies that are based in those jurisdictions. Where relevant, these regulations or rules could be extended to require companies to disclose payments to governments for the purchase of publicly-owned commodities.

Reporting requirements on payment disclosure can also be introduced by commodity exchanges and industry associations and apply to companies seeking to buy and sell on an exchange or that are members of an industry association.

These self-regulatory approaches could act to increase transparency in commodity trading on a hybrid basis. While registration or membership in a free zone, commodity exchange or industry association is voluntary, once a company has registered or joined, it would then be subject to binding reporting requirements. In this scenario, the incentives offered by registration or membership would need to outweigh any industry concerns about corporate disclosure of payments to governments for the purchase of publicly-owned commodities. For example, these concerns may include: the disclosure of commercially sensitive information, the risk of breaching anti-trust laws, and the possibility of competitors inferring current or future pricing or volume information.

The implementation of the *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas* (OECD Due Diligence Guidance) by free zones, commodity exchanges and industry associations provides an interesting model to build on for how to operationalise transparency requirements in order to improve transparency in commodity trading.

The implementation of the OECD Due Diligence Guidance shows how the ability of industry associations and commodities exchanges to restrict market access to non-complaint companies provides a powerful incentive for companies to comply with applicable transparency requirements. For example, in 2011, the Dubai Multi-Commodities Centre (DMCC) introduced its responsible sourcing guidelines – *Practical Guidance for Market Participants in the Gold and Precious Metals Industry* – that was closely modelled on, and intended to operationalise, the OECD Due Diligence Guidance.

Implementation challenges associated with self-regulatory approaches

The implementation of international standards through self-regulatory approaches by free zones, commodity exchanges and industry associations may give rise to several challenges with respect to putting these standards into practice.

Firstly, there is a need for an international standard or common benchmark enjoying broad multi-stakeholder ownership and legitimacy. It is important that there is one clear international standard for free zones, commodity exchanges and industry associations to operationalise, as opposed to competing international standards that all seek to address the same challenge.

Further challenges can arise even where a robust international standard or benchmark exists, as misalignment between the standard and industry-led implementing programmes may occur, as selective or less stringent requirements may be incorporated.

For example, in 2016-18, the OECD undertook an evaluation of the extent to which several industry programmes[5] align with the detailed recommendations of the OECD Due Diligence Guidance. This alignment assessment[6] found significant gaps between industry programmes and the recommendations of the OECD Guidance. These gaps at a standards level had an impact on implementation, and on average, only about half of the core overarching due diligence principles were being implemented by the participating programmes (OECD, 2018[32]).

A misalignment between the international standard and the implementing guidelines can have the effect of watering down the original intent of the standard and create potential loopholes (OECD, 2018[32]). Furthermore, the multiplication of deviations from the international standard may cause difficulties with companies that are operating across different free zones, commodity exchanges and industry associations, as this would likely increase the compliance burden if companies were subject to different reporting requirements across jurisdictions.

However, in the year following the initial 2016 assessment, the participating programmes were given time to make changes to their standards to better align their requirements with the recommendations of the OECD Guidance. Programmes' standards were re-assessed in early 2018. Following these changes, most of the programmes' standards now are in, or close to, full alignment with the recommendations of the OECD Guidance.

The role of industry associations in promoting compliance with international standards

Industry associations can play an important role in the uptake and implementation of international standards due to the nature of their membership and the powerful tools they are able to deploy to promote compliance and penalise non-complaint industry players. These tools can include the ability to revoke a company's accreditation or membership, which may have significant economic implications for that company's market access.

The experience of the London Bullion Market Association (LBMA) in implementing the OECD Due Diligence Guidance illustrates how self-regulatory approaches can act to increase transparency in commodity trading given the importance of LBMA membership to companies operating in the gold sector.

In 2012, the LBMA introduced its Responsible Gold Guidance, which is designed to implement the OECD Due Diligence Guidance at the refiner level. This is a significant step for the uptake of the OECD Due Diligence Guidance as the LBMA has a global membership, including the majority of the central banks that hold gold, private sector investors, mining companies, producers, refiners and fabricators, and has

oversight of the London gold market. The London Good Delivery refiners who must now comply with the LBMA's guidance represent approximately 85-90% of global refined gold production (OECD, 2016[33]).

Industry associations that implement international standards can then deploy a number of tools to ensure that their members comply with those requirements. For example, the LBMA may initiate special audits if it is not satisfied with the reports provided by the refiner in order to confirm the refiner's compliance with its responsible sourcing programme. These audits may be triggered by country of origin data reported confidentially to the LBMA, media allegations, whistleblowing, or as part of an incident review process. In 2018, the LBMA required three refiners to undergo special audits (LBMA, 2020[34]).

The LBMA also has the prerogative to revoke a company's accreditation status. For example, the LBMA will give refiners a reasonable opportunity to raise their standards to the required level if they are found to be applying the responsible sourcing programme in good faith generally, but have failed to comply with some aspects of the programme. If such failures cannot be remediated or if attempts at remediation have been significantly poor, the LBMA may revoke a refiner's accreditation status. As of 2020, three refiners have lost their accreditation due to failure to meet responsible sourcing requirements (LBMA, 2020[34]).

The loss of a refiner's accreditation status will have serious commercial consequences for that company and will affect its ability to continue operating. The LBMA maintains that compliance with its responsible sourcing programme is a commercial necessity for any major refiner, as it allows access to the largest marketplace in the world for precious metals (LBMA, 2020[34]).

Commodities exchanges: A precedent for operationalising corporate disclosures of payments to governments for the purchase of publicly-owned commodities

The recent experience of commodities exchanges with the implementation of international standards may offer lessons for how disclosures of payments to governments for the purchase of publicly-owned commodities could be operationalised.

In October 2019, the London Metal Exchange (LME) announced that it would introduce responsible sourcing requirements for all brands listed for good delivery on the LME, and that these new requirements will be underpinned by the OECD Due Diligence Guidance (LME, 2020[35]). However, in addition to reflecting the framework of the OECD Due Diligence Guidance, the LME's new requirements go further by requiring that companies disclose information in respect of payments made to governments under the EITI Standard on a per-country basis – in order to address financial crimes and corruption risks arising from large-scale mining. (LME, 2019[36]).

In that regard, the LME's Red Flag Assessment template (that LME-listed brands are required to complete) includes the requirement to confirm whether companies have disclosed payments made to governments under the EITI Standard, whether the source country of the minerals is an EITI member country, and, if so, whether the producer, its suppliers and/or other upstream companies are in compliance with the EITI reporting requirements of that country. If the country is not an EITI member country, there is a requirement to confirm whether the producer, its suppliers and/or other upstream companies undertake other steps to provide transparency on payments and other matters in line with the aims of EITI (LME, 2019[36]).

In recognition of the compliance costs for the adherence to a new standard and the potential changes that companies may need to make to their systems and processes, a phased approach to the implementation of a new standard can increase the likelihood of widespread uptake and compliance.

For example, the LME has stipulated that its new requirements will not apply immediately, as they will be implemented in a phased manner. All LME listed brands were required to undertake a Red Flag Assessment, based on the OECD Due Diligence Guidance (and therefore incorporating the relevant EITI criteria and principles), by the end of 2020. If this assessment demonstrates potential responsible sourcing

red flags, then that brand will be classified as a Higher-Focus Brand and will also need to be audited as compliant with an OECD-aligned standard by the end of 2022 (LME, 2020[35]).

While developing its responsible sourcing requirements, the LME has recognised that the implementation of international standards through self-regulatory approaches may give rise to a risk of misalignment between the standard and the implementing guidelines.

In that regard, the LME has undertaken to monitor the implementation of its standards, to ensure that the resulting transparency meets globally accepted requirements (i.e. the underlying international standard). In the event that the LME does not believe that company reporting under its responsible sourcing requirements meets these globally-accepted requirements, the LME reserves the right to increase its expectations in respect of such transparency (LME, 2019[37]).

4 Setting out expectations on payment disclosure by buying companies: Options for host governments and SOEs

Alongside actions that could be taken by home governments, trading hubs, free zones, commodity exchanges and industry associations to operationalise transparency, host governments and SOEs have an important role to play to ensure a level playing field for the disclosure of payments to governments for the purchase of publicly-owned commodities. This may include the adoption of a disclosure policy by host governments and SOEs and the inclusion of specific disclosure obligations in commodity sales contracts. These options are complementary and mutually supportive as a disclosure policy clarifies expectations at the outset, and contractual obligations would reinforce the case for transparency and avoid any subsequent ambiguity.

The EITI has also recognised the importance of transparency measures undertaken at the producer country level. In September 2020, the EITI published specific guidelines for buying companies to encourage increased disclosures under EITI Requirement 4.2(c). The guidelines aim to ensure consistent disclosures of payments to the state or SOEs where oil, gas or minerals are being sold on behalf of the state and where EITI Requirement 4.2 is applicable and relevant, or where there is commitment to transparency in commodity sales.

Consequently, the scope of the EITI Guidelines includes:

> "purchases from SOEs in EITI and non-EITI countries[7] where the state or SOE have explicitly or publicly stated their support for buyers disclosing information on the selling entity's sales, have reflected this in their general terms and conditions for the sale of commodities, or where disclosures of volumes and values of sales are already being made in cooperation with the seller" (EITI, 2020[12]).

In order to assist buying companies to comply with disclosure policies adopted by governments and SOEs, the EITI Secretariat maintains a list of SOEs in EITI countries where EITI Requirement 4.2 is applicable, or where the EITI is aware of other factors[8] that suggest that disclosure policies exist (EITI, 2020[12]).

The adoption of a disclosure policy by host governments and SOEs can help to clarify expectations at the outset, as buying companies not only become aware of host governments' and SOEs' position on transparency of payments, but can also anticipate any future payment disclosure obligations prior to entering into an agreement to purchase publicly-owned commodities.

The inclusion of disclosure obligations in commodity sales contracts can reinforce the objectives set out in the disclosure policy and avoid any ambiguity as to exactly what information is subject to disclosure requirements. Where possible, these disclosure obligations should align with relevant international

standards and should consist of model clauses applicable across all contracts to ensure comparability and to reduce the implementation burden for the government and SOEs but also for buying companies.

Adoption of disclosure policy by host governments and their SOEs

Host governments and SOEs may adopt policies that encourage or require buying companies to disclose information on the payments to governments related to commodity trading transactions.

Such policies can contribute to the creation of an environment where expectations around transparency of payments are clarified at the outset and where commodity sales contracts are entered into with the understanding that payments made to governments for the purchase of oil, gas and minerals will be made public. The adoption of a specific disclosure policy can be a catalyst for building the confidence of buying companies with respect to the disclosure of payments.

A clear disclosure policy can also create a level playing field where there are multiple buying companies purchasing commodities in the same producer country, as the policy can act to avoid selective disclosures or inconsistencies between different buyers. The equal treatment of buyers can also contribute to building trust between the buyer and the seller.

Furthermore, the adoption of a disclosure policy by a host government or SOE can also support the implementation of a global standard on payment disclosure or the operation of self-regulatory approaches by creating a consistent regulatory playing field and address any concerns regarding possible conflicting requirements on disclosures between host and home jurisdictions where the home jurisdiction of a buying company mandates sales payment disclosure. For example, the Nigerian National Petroleum Corporation's model contract for sale and purchase of Nigerian crude oil provides an exception to its confidentiality provisions, where "such data and information must be disclosed pursuant to any rules or requirements of any government or stock exchange having jurisdiction over such party" (NNPC, 2011[38]). In another example, Saudi Aramco's general terms and conditions for sales and purchases of petroleum products allow for the publication of confidential information where "such disclosure is required by law or by any securities exchange or regulatory or governmental body or fiscal authority having jurisdiction over it, wherever situated" (Saudi Aramco, 2011[39]).

In terms of the implementation of a disclosure policy, host governments considering this option should ensure that such disclosure policies are clearly communicated to buying companies and other stakeholders in advance of adoption, and ideally in advance of the contract or prior to any contractual negotiations. This can help to build support for the policy to ensure that it is adhered to by relevant buyers of commodities. Once a disclosure policy has been adopted, host governments should ensure that the policy is applied consistently to all transactions and to all companies that are purchasing publicly-owned oil, gas and minerals in their jurisdiction. For example, over 50 different buying companies in Iraq have disclosed their payments to governments in accordance with the disclosure policy of the Iraqi Government – see Box 4.1.

A policy on the disclosure of payments to governments from buying companies can be adopted by either the government or the SOE. In cases where the disclosure policy is adopted by the SOE, it may be beneficial for the government to provide public support or affirmation for this policy.

Box 4.1. Disclosure policy in Iraq

In 2008, the Government of Iraq joined the EITI. As part of its implementation of the EITI Standard, the Iraqi government committed itself to publish all revenues from its export sales of crude oil. In addition, the government would also implement a policy to require all buying companies that purchase Iraqi crude oil to participate in the EITI process by disclosing details of their purchase of publicly-owned crude oil from the Iraqi SOE, State Organization for Marketing of Oil (SOMO).

In 2013, Iraq's 2010 EITI report was released. This report provided details on the sale of Iraqi crude oil to 35 international buyers, and was the first EITI report to include reconciled data on the sale of publicly-owned oil, as Iraq was the first country to require buying companies to disclose cargo-by-cargo data on their purchases in EITI reports. In 2021, Iraq's 2018 EITI report was released. This report provided details on the sale of 1 116 751 349 barrels of Iraqi crude oil to 54 international companies with a total value of USD 73 408 922 662 (IEITI, 2021[40]).

When the disclosure policy was first adopted, several buying companies indicated a reluctance to disclose this information. However, since 2010 approximately 50 international buying companies and refineries have disclosed details of their purchases of crude oil from SOMO. Subsequently, both the Iraqi authorities and the buyers have noted the positive effect of these disclosures on the reputation of buying trading companies.

Source: (IEITI, 2016[41]), (OECD Development Centre, 2018[42]).

Inclusion of disclosure obligations in commodity sales contracts

An option for SOEs to facilitate increased transparency by buying companies is to include specific clauses in commodity sales contracts that require buying companies to disclose information in respect of their payments to governments.

In this scenario, it is important for SOEs to communicate to potential buyers well in advance of any negotiations or competitive tenders that specific transparency obligations will be set out in the sales contract.

Ideally, SOEs should set out model provisions in their sales contracts to ensure that all buyers are treated equally and that expectations around disclosure obligations are clearly understood prior to entering into the commodity sales contract. The use of model contractual provisions can help prevent the SOE from having to negotiate specific disclosure requirements with each potential buyer, which could lead to a fragmentation of disclosure obligations for different companies, and could increase the compliance burden.

The inclusion of specific clauses in commodity sales contracts requiring buying companies to disclose information on payments to governments may also align with other options for enhanced transparency in commodity trading. For example, if a buying company was required to disclose information on payments to governments as a consequence of legislation enacted by a home government or trading hub, or through obligations imposed by a free zone, commodity exchange or industry association, that company's domestic obligations would then align with its contractual obligations with the SOE. In Iraq, the model crude oil sales agreement, specially incorporates the EITI framework as a means to give effect to disclosure obligations – see Box 4.2.

Box 4.2. Contractual disclosure obligations in Iraq

In Iraq, a model clause is set out in crude oil sales agreements between the SOE SOMO and buying companies purchasing Iraqi crude oil. Section 1, Article 7 of the *Heads of Export Oil Sales Agreement for the [Area] Contract Area Between Oil Marketing Company of the Iraqi Ministry of Oil And [buyer]* provides that:

> "Without prejudice to the General Terms and Conditions of this agreement, the Second Party will be committed to the requirements of the Extractive Industries Transparency Initiative (EITI) by confirming the price paid for crude oil under this agreement and taking such other reasonable measures as may be agreed between the Parties."

Source: (Ministry of Oil (Iraq), 2018[43]).

In order to facilitate the uptake of the contractualisation of transparency obligations and to increase the disclosure of information in respect of payments to governments for the purchase of oil, gas and minerals, the EITI is supporting SOEs in reviewing the general terms and conditions of their commodity sales contracts and is providing guidance on the drafting of model disclosure provisions (EITI, 2020[12]).

5 Making payment disclosure by buying companies work in practice

Usability of the data generated from corporate payment disclosures

Corporate disclosure of payments to governments for the purchase of oil, gas and minerals would result in the generation of a significant amount of information that would then need to be aggregated and disclosed. Home governments, trading hubs, or other organisations such as free zones, commodity exchanges and industry associations will need to consider the practicalities related to the usability of these disclosures in order for them to contribute meaningfully to effective accountability in commodity trading.

Format of the disclosures

Consideration should be given to ensuring that the information is disclosed in a format that is comparable and usable by both governments and third parties – such as journalists, citizen watchdog groups and other civil society organisations. Examples of existing disclosure regulations in the upstream extractive sector show that companies compile reports in many different ways and that this reduces the ability for stakeholders to locate the information they require. For example, there is no specific requirement in the EU Accounting and Transparency Directives in respect of the format of the information that is published. In the first round of reporting, many extractive companies in EU Member States (other than the United Kingdom) made their reports available on their websites in PDF format rather than a machine-readable format (European Commission, 2018[17]). The importance of digital usability was identified in a review of the Accounting and Transparency Directives by the European Commission in 2021 where it was noted that in the absence of machine-readable documents, users found it difficult to exploit data reported on a large and recurring scale (European Commission, 2021[20]).

Furthermore, the rules of publication of the reports are not harmonised across different EU jurisdictions. Transparency International EU has noted that the effectiveness of payments to governments reporting could be improved by requiring companies to publish payments reports directly to a central online repository, hosted and maintained by the European Commission and freely accessible to the public (Transparency International EU, 2018[21]).

Regulations requiring the disclosure of data on payments to governments for the rights to explore for and extract publicly-owned oil, gas and minerals has resulted in the generation and disclosure of a significant amount of data across several different jurisdictions, including Canada, the European Union, Norway, Switzerland and the United States. Given that each of these different jurisdictions has a different procedure for companies to disclose their payments to governments, it is difficult for civil society groups and oversight actors in resource-rich countries to access and interpret the payments to governments' data relevant to them.

In response to this lack of harmonisation, civil society groups have had to build their own tools to enable the comparison of payment data across different jurisdictions. The NRGI's *Resource Projects* database brings these disclosures together where they can be easily compared and analysed (NRGI, 2015[15]).

In order to improve the usability of the data, *Resource Projects* collects reports of all identified payments to governments, and then standardises the currency, project name and government entity name data, making them easier to use for comparison and analysis. In order to improve access to the data, *Resource Projects* enables users to search the data by country, project, recipient government agency, company, year and payment type (NRGI, 2015[15]).

If new requirements are introduced by home governments (including trading hubs), free zones, commodity exchanges, industry associations, host governments or SOEs for the disclosure of payments to governments for the purchase of publicly-owned oil, gas and minerals, the creation of a common repository for disclosing information would be recommended.

Implementation guidelines to ensure consistent interpretation of disclosure requirements

Experience from reporting under the EU Accounting and Transparency Directives demonstrates the complications that can arise where there is a lack of implementation guidelines. In this context, extractive companies reporting under EU Directives have adopted different interpretations of key reporting requirements – for example, the reporting of the payments of joint ventures – some companies report only payments when they are the controlling party while other companies report the payments even when they are not the controlling party. As a consequence, these discrepancies have resulted in a lack of comparability across reports (European Commission, 2018[17]).

Constraints for host governments and SOEs

Host governments and SOEs that introduce general disclosure policies and that include specific disclosure obligations in commodity sales contracts, will need to consider the practicalities associated with these disclosure requirements. Similarly to the considerations set out above for home governments and trading hubs, host governments and SOEs will need to consider the scope of the information to be disclosed, the frequency of the disclosures, and to whom such disclosures should be made.

However, host governments and SOEs will also need to consider the practicalities of the introduction of disclosure requirements in a developing country context. For example, infrastructure and resources will be necessary in order to collect the data generated through the disclosures made by buying companies. Consideration will need to be given to whether the governments or SOE has the capacity and knowledge to meaningfully analyse and interpret the data contained in the disclosures, and whether additional capacity building is required.

Host governments and SOEs will also need to be properly resourced to address any aspects of non-compliance by buying companies with disclosure requirements, provided that penalties or follow-up mechanisms to sanction non-compliance are set out in the SOEs commodity sales contracts or any other relevant legislative instrument.

Implications for buying companies

Buying companies themselves may need to adjust their internal processes to meet any new disclosure requirements. Existing industry systems are often built in a certain way for a specific purpose and it may be difficult to modify these systems in order to extract new or aggregated data. Many large trading companies have well-developed commodity trading risk management systems in place and heavily invest in the development of IT infrastructure. A commodity trading risk management system enables basic tasks

related to physical trading such as deal capturing and valuation, contract and invoice generation, inventory management, credit management, position reporting and analysis (Engebretsen, forthcoming[44]).

Buying companies would likely need time and resources in order for their systems to be modified to the extent that they are able to capture the information specified by any new requirements (OECD Development Centre, 2019[14]).

Use of technology to facilitate disclosures

Recent advancements in technology could be harnessed to facilitate the disclosure of commodity trading data. Home and host governments, as well as trading hubs, free zones and commodity exchanges can consider the adoption of technological tools, in particular blockchain, to increase transparency in commodity trading.

Blockchain is a distributed ledger technology that could be utilised to make trading commodities more transparent. Blockchain works by recording transaction data in a permanent way on a single, secure digital ledger shared by trusted counterparties. It creates a system where parties can connect directly with each other, without the need for intermediaries like banks, brokers or utilities (S&P Global, 2018[45]).

Blockchain allows the authenticity of documents to be guaranteed, as any subsequent changes to the transaction history are not possible. All parties involved in a blockchain transaction are able to reconcile and verify individual details (for example, payments, location, status) in real time (Federal Council, 2018[46]). Blockchain-based records make it substantially difficult to alter the quantity and quality specifications provided by a party to a transaction (for example, a SOE and trading company), as a decentralised system such as blockchain cannot be controlled by a single party, but are cross-verified by all parties on the relevant network. Once a transaction is validated, it is synchronised across all ledgers in the network – in other words, it becomes a permanent record. Since there is no single control in the network and the parties are dispersed, consensus provides protocol for its operation (Jiang, 2019[47]).

The use of blockchain technology can be beneficial in sectors where there are multiple parties in a system, where establishing trust in the system is difficult, where the system is susceptible to corruption, and where eliminating information asymmetry and improving transparency is key to the successful functioning of the system (Jiang, 2019[47]).

Although the emergence of blockchain technology is fairly recent, discussions have already begun on whether blockchain technologies could be utilised in the commodity trading sector. However, those discussions have largely been confined to whether blockchain can be used to increase efficiencies in trading operations, rather than for specific transparency and anti-corruption purposes (Jiang, 2019[47]).

For example, in the oil industry, three commercial consortia have been testing the opportunity to trade crude oil using blockchain technologies. Participants in these three consortia include major independent commodity trading companies and integrated oil companies, namely: BP, Freepoint, ENI, Gazprom, Gunvor, Koch, Mercuria, MGN Energie, Petroineos Shell, Statoil, Total, Trafigura and Wattenfall (NRGI, 2020[48]).

Beyond the use of blockchain for increasing efficiencies in trading operations, there is potential for blockchain regarding the transparency of international trading processes (Federal Council, 2018[46]). The use of blockchain technology in commodity trading disclosures could offer an opportunity to reduce corruption through the generation of permanently stored data, and would make it easier for regulatory authorities to oversee reporting from buying companies and to ensure compliance (Jiang, 2019[47]).

The commodity trading sector's widespread use and reliance on physical paperwork can increase opportunities for corruption throughout the value chain. Blockchain technologies with standardisation and digitisation of documents on a centralised platform can reduce this risk by improving the transparency of

the value chain. Blockchain can allow for all relevant parties in the transaction to be able to reconcile individual details (e.g. payments, location, status) in real time (Federal Council, 2018[46]).

Home and host governments, trading hubs, free zones and commodity exchanges that introduce requirements that blockchain technologies be used for the disclosure of payments to governments for the purchase of oil, gas and minerals may decide to extend the availability of that information to NGOs, citizen watchdog groups and other oversight bodies. Within an inclusive public framework that integrates all relevant stakeholders, including governments, SOEs, buying companies, and civil society watchdog groups, the disclosure of payments to governments for the purchase of oil, gas and minerals supported by blockchain could act as a deterrent for hiding resources and associated revenues, altering numbers, and trade misinvoicing (Brooks, 2018[49]).

Notes

[1] Template 1: Disclosure of volumes and value by individual seller; Template 2: Disclosure of volumes by sale/cargo and of value by individual seller; and Template 3: Disclosure of volumes and value by sale/cargo.

[2] The United Kingdom was a member of the European Union when these directives were adopted and the directives were applicable in the UK. Since leaving the EU, the UK has retained its reporting requirements.

[3] Directive 2013/34/EU1 and Directive 2013/50/EU2.

[4] If a resource extraction issuer makes an in-kind production entitlement payment under the rules and then repurchases the resources associated with the production entitlement within the same fiscal year, the resource extraction issuer must report the payment using the purchase price (rather than at cost, or if cost is not determinable, at fair market value).

[5] The Dubai Multi Commodities Centre (DMCC), the London Bullion Market Association (LBMA), the Responsible Jewellery Council (RJC), the Responsible Minerals Initiative (RMI), and the International Tin Supply Chain Initiative (ITSCI).

[6] For more information on the Alignment assessment of industry programmes with the OECD minerals guidance, please see: http://mneguidelines.oecd.org/industry-initiatives-alignment-assessment-minerals.htm.

[7] Non-EITI countries refer to countries that do not implement the EITI Standard.

[8] These include: where the government or SOE has stated their support for buying companies making disclosures or have reflected this in the general terms and conditions in their commodity sales agreements; where disclosures are already being made to the public; and where the Secretariat is aware of the existing practice of disclosures of volumes and values of sales by SOEs.

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Annex A. OECD initiatives on corruption in commodity trading

The OECD hosts a number of initiatives focusing on illicit financial flows and corruption in the commodity trading sector. For ease of reference, the outputs of those initiatives are listed below.

Thematic Dialogue on Commodity Trading Transparency

Hosted by the OECD Development Centre, the Thematic Dialogue on Commodity Trading Transparency was launched in response to the call made at the London 2016 Anti-Corruption Summit to provide a multi-stakeholder dialogue platform for collaboration on how the global and multifaceted challenges of corruption in commodity trading can be addressed from both the supply and demand sides. The outputs of the Thematic Dialogue (listed below) provide complementary and mutually supportive tools that home countries, trading hubs, trading companies and producing countries, including state-owned enterprises, can use to reduce drivers of corruption, increase transparency and achieve improved accountability in commodity trading.

- OECD (2020), *How to Select Buyers of Oil, Gas and Minerals: Guidance for State-Owned Enterprises*, OECD Development Policy Tools, OECD Publishing, Paris, https://doi.org/10.1787/a522e6c0-en.
- OECD (2021), *Typology of Corruption Risks in Commodity Trading Transactions*, OECD Development Policy Tools, OECD Publishing, Paris, https://doi.org/10.1787/590e80e8-en.
- OECD (2021), *Options for Operationalising Transparency in Commodity Trading Transactions*, OECD Development Policy Tools, OECD Publishing, Paris, https://doi.org/10.1787/70007e06-en.
- "Online Mapping Tool of State-Owned Enterprises and Their Subsidiaries" (2021), https://www.oecd.org/dev/online-mapping-tool-state-owned-enterprises-their-subsidiaries.htm.
- "Online Stocktake of Company Reporting Requirements Applicable in Different Trading Hubs" (2021), https://www.oecd.org/dev/company-reporting-requirements-different-trading-hubs-stocktake.htm.

Illicit Financial Flows in Oil and Gas Commodity Trading

Led by the Anti-Corruption Task Team (ACTT), a subsidiary body of the OECD's Development Assistance Committee (DAC), the OECD-DAC's Programme of Work on Illicit Financial Flows in Oil Commodity Trading is undertaken in dialogue with oil producing African economies, and aligns with the OECD's high priority afforded to tackling IFFs. Focusing on the vulnerabilities to IFFs that arise in the oil sales process, the OECD-DAC Programme of Work highlights what OECD members and partners can do to mitigate IFF risks in the commodity trading sector, including through official development assistance (ODA) and in their role as the home or host of the range of markets and enablers that may raise or exacerbate IFF risks.

- Anderson, C. (forthcoming), "Review of complementary ODA engagement efforts in reducing IFFs in oil trade activities and identification of potential points for ODA intervention", *OECD IFFs and Oil Trading Programme Working Paper*, OECD Publishing, Paris.
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OECD Development Policy Tools

Options for Operationalising Transparency in Commodity Trading Transactions

Given their sheer magnitude, the payments made by companies for the purchase of oil, gas and minerals from governments or state-owned enterprises are of significant public interest. However, only a few commodity trading companies regularly publicly disclose information in respect of their payments to governments for the purchase of these publicly-owned commodities. This report makes a case for the development of a common global standard on transparency of payments that trading hubs, home governments and industry associations can use to ensure consistency, comparability and usability of data, building on the 2019 EITI Standard. Complementary measures by host governments and SOEs are necessary to set shared expectations across jurisdictions, including in producing countries. These include the adoption of disclosure policies as well as the inclusion of disclosure obligations in commodity sales contracts to set clear expectations on transparency of payments, and avoid potential conflicting requirements and bilateral negotiations.

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