

BIS CONSULTATION ON THE UK IMPLEMENTATION OF THE EU ACCOUNTING DIRECTIVE: CHAPTER 10 EXTRACTIVE INDUSTRIES REPORTING

Rio Tinto appreciates the opportunity to comment on the proposed UK Implementation of the EU Accounting Directive.

The Rio Tinto Group is an Anglo Australian global mining and metals company. The Group comprises Rio Tinto plc, a company registered in England and Wales and listed on the London Stock Exchange, and Rio Tinto Limited, a company registered in Australia and listed on the Australian Securities Exchange. Rio Tinto is headquartered in London. Rio Tinto plc has a sponsored ADR facility and the underlying shares are registered with the US Securities and Exchange Commission and listed on the New York Stock Exchange.

Our major products are aluminium, copper, diamonds, gold, industrial minerals, iron ore, thermal and metallurgical coal and uranium. We employ 66,000 people in more than 40 countries across 6 continents.

The Rio Tinto Group has approximately 550 subsidiaries, of which two are separately listed on the Australian Securities Exchange and two are listed on the Toronto Stock Exchange.

Rio Tinto promotes high standards of transparency and accountability. We were an early supporter of the Extractive Industries Transparency Initiative (EITI) and we promote this in the countries where we operate. Debra Valentine, Rio Tinto's Group Executive Legal, External and Regulatory Affairs is on the Board of the EITI. We voluntarily publish an annual Taxes Paid Report which includes details of all payments made to all governments, wherever these are \$US1 million or more. Our latest report is available at http://www.riotinto.com/documents/RT_taxes_paid_in_2013.pdf. We support consistent global standards for extractives to report the payments they make to governments. We believe that mandatory reporting legislation and regulation must ensure the reporting burden on business is manageable and is fit for purpose, targeted at fighting corruption and delivering accountability.

General comments on proposed UK Implementation of EU directive

As noted in our responses to individual questions below, we agree with many of the consultation proposals. There are a small number of items in the consultation document and the proposed Regulations on which we wish to make more specific detailed comment.

1. Development of best practice guidance

Rio Tinto commends BIS for the level of consultation with industry that has occurred to date and supports the continuation of this approach. As noted in our comments below, there are a number of practical matters of interpretation of the proposed legislation still to be clarified and it is essential that industry leads in the production of authoritative best practice guidance to ensure that it is both relevant and practically workable. This will be key to the successful and fair implementation of the Regulations and their acceptance by relevant stakeholders. In turn, widespread acceptance by stakeholders will also help in encouraging the adoption of equivalent reporting regimes in other jurisdictions.

It is important that any best practice guidance is endorsed by the UK government and issued well in advance of the first reporting period.

2. Reporting on an “individual project” basis – definition of “project”

Rio Tinto understands that the principle of reporting government payments on an “individual project” basis is already imposed by the Directive and is not the subject of the Consultation. We are comfortable with this approach in principle, however, we wish to underscore the importance of the definition of “project” being practical in its scope and reflecting the reality of large-scale modern mining operations. We therefore believe that “project” should be defined in terms of a single or related collection of economic operations and assets (regardless of the number of leases, licences or concessions involved), rather than being more narrowly defined as the activity occurring in relation to a single licence or lease. The wording in the EU Accounting Directive supports this approach. It is important that the guidance to accompany the Regulations (which is currently being formulated by the industry-led working group) assists the interpretation of the definition “project” (and the related term “substantially interconnected”) by way of real life practical examples and that this guidance is afforded authoritative status. Provided this occurs, no further change to the Regulations is presently required.

3. Penalty regime where external factors affect/ prevent a company filing a report

While Rio Tinto does not believe that it is presently restricted from disclosing any payment made to a government by any existing third party/governmental confidentiality restrictions, we nevertheless consider it inequitable for a company to be penalised for a failure to disclose in such circumstances (particularly where the company indicates that payments have been made to the government but it is prevented by the terms of any existing agreement with that government from disclosing the details of such payments). In such circumstances, penalising a company for failure to disclose where the reason for its non-disclosure arises from confidentiality restrictions with a Government which existed before the Regulations were in place (or even in contemplation) and which may be backed by criminal sanction in case of a breach, would seem to breach principles of fairness and natural justice. It would also seem to run counter to the stated aim in the Consultation document that the reporting cycle “...should support strong extractive transparency whilst not placing unnecessary burdens on business.” Putting companies in the position where they are forced to choose between breaching the terms of a significant contract (and possibly incurring criminal liability) or breaching the requirements of the Regulations, and thereby being penalised, seems to be placing that company under an “unnecessary burden”.

While Rio Tinto appreciates that the Accounting Directive has chosen not to provide an exception where external factors result in non-compliance with reporting obligations imposed by the Directive (and we note that this aspect of the Regulations is not subject to the present consultation), the UK is, however, able to define the enforcement regime surrounding the reporting requirements. We therefore recommend that the authoritative best practice guidance to accompany the Regulations should address the above issue and, specifically, afford leniency under the penalty regime in such circumstances.

Individual responses to Consultation Questions

The following is a summary of Rio Tinto’s responses to the specific Consultation questions:

Question 1.1	Yes, we agree.
Question 1.2	Yes, we agree.
Question 2.1	Yes, we agree.
Question 2.2	No comment.
Question 2.3	No comment.
Question 3.1	We assume that the substantive reporting requirements under the Transparency Directive when implemented into UK law will be the same as under the Regulations. Further issues and costs may, however, arise to the extent that the requirements under the Transparency Directive (and/or its implementation into UK law) are materially different and/or more onerous than under the UK's implementation of the Accounting Directive through the Regulations.
Question 4.1	Not applicable to Rio Tinto.
Question 5.1	Yes, we strongly agree – see General comment 1 above.
Question 5.2	Yes, we agree that reports should be filed electronically with Companies House. Our strong preference is that reports should be provided in a widely available format such as a PDF file, or similar format. The development of reports in more specialised electronic reporting formats will significantly increase costs with little or no additional benefit for the majority of users.
Question 6.1	Yes, we agree.
Question 6.2	See General comment 3 above.
Question 6.3	See General comment 3 above.
Question 6.4	See General comment 3 above.
Question 7.1	See comments below on individual draft Regulations.
Question 8.1	As Rio Tinto has for several years voluntarily reported on taxes paid to governments, the incremental direct cost of this new reporting obligation is not anticipated to be significant. Provided the matters raised in General comments 1 and 2 above are taken into account we expect additional reporting costs to be relatively small.
Question 8.2	No comment.
Question 9.1	See General comments 1-3 above. As noted in our response to Question 8.1, we expect the direct financial costs of implementing the EU Accounting Directive to be modest and manageable. It is important in implementing the Directive that the UK government maintains an awareness of potential effects on competitiveness of different companies being subject to differing regimes depending on their jurisdiction of incorporation and/or listing. The UK should strive to achieve and maintain a level playing field both within the EU and, particularly, world-wide for the reporting of payments to governments.

Comments on the draft Regulations set out in Annex 5 of the Consultation document:

Definition of “undertaking” / geographical scope of Regulations

The explanatory notes at the back of the draft Regulations state that the meaning of “undertaking” (and any other terms undefined in the regulations) is the same as that in the Companies Act 2006, and therefore includes companies and partnerships. The Companies Act definition encompasses both UK and non-UK undertakings, but the Consultation document states in a number of places that, in relation to the Accounting Directive implementation, it is aimed at UK undertakings only, and so this definition (and the resulting scope of the Regulations) needs to be clarified.

Regulation 2, definition of “payment”, sub-para (d)

It is not clear what is meant by “ordinary shareholder”. A clearer term to use would be “holder of ordinary or common shares”. Given that this definition is likely to have equal or greater relevance to dividends paid in overseas jurisdictions (where the term “ordinary shares” may not be recognised), a more generic definition of ordinary shares may be more appropriate. Clarification of this issue could also be addressed by way of guidance. We note that recital 48 to the Accounting Directive states “an undertaking in the extractive industry ... does not need to disclose dividends paid to a government as a common or ordinary shareholder of that undertaking as long as the dividend is paid to the government on the same terms as to other shareholders. However the undertaking will be required to disclose any dividends paid in lieu of production entitlements or royalties”.

Regulation 2, definition of “project” and related definitions set out in sub-paras (3), (4) and (5)

The meanings of “project” and, particularly, “substantially interconnected” need to be clarified (together with illustrative and authoritative guidance to the Regulations). In particular, the current definition of “substantially interconnected”, (a term not used in the Accounting Directive) which currently refers to “operationally and geographically integrated contracts, licence, leases or concessions or related agreements...” may not provide sufficient clarity when considering the range of mining operations which occur in practice. We consider it more appropriate and practical to view a single project by reference to “operationally and geographically integrated assets and operations”. This issue needs to be carefully addressed in guidance developed in consultation with industry. (See also General comment 2 above).

Regulation 4, para (5) and Regulation 7, para (6), “The disclosure of payments must reflect the substance, rather than the form, of each payment, activity or project concerned.”

Given the detailed and very specific reporting requirements set out in the Regulations, it is not clear what is meant by this provision or why it is required. Although this wording appears in the Accounting Directive, it is used in a different and more meaningful context. The provision should be clarified, possibly with the inclusion of illustrative examples of how reporting substance might override form in practice.

Regulation 4, para (6) and Regulation 7, para (7), providing a “value” for payments in kind made to a government

This requirement could result in a number of equally valid but different reported numbers, depending on the basis of valuation (prevailing market price / spot rate / contract price) and the time at which the valuation is made. Authoritative guidance is needed regarding how and at what point in time such a valuation should be made for the purpose of the Regulations.

Regulations 5 and 10

In the first line, the word “or” should be changed to “of” in order for these two provisions to make sense.

Regulation 16, para (4)

Given that the area of government payments reporting is presently at a very early stage, and is rapidly developing, it would make sense if the regulations were reviewed again by the Secretary of State in three rather than five years’ time. The Regulations may have become quite out of date in five years’ time and require updating in order make sure that they are working properly and/or so as to ensure that UK companies are not put at disadvantage to companies in other jurisdictions operating under more flexible reporting regimes. We note that the time period prior to review is not prescribed by the Accounting Directive.

Schedule 1, Table 2

The list of mining categories does not clearly include the mining of precious and semi-precious stones (unless this is deemed to fall within the “Other mining and quarrying” category of the “other mining and quarrying not elsewhere classified” category) – hence it is not totally clear whether the Regulations apply to diamond mining. Such an omission would appear to be illogical and not set a level playing field among miners – particularly those mining across a number of metals and minerals. Although we appreciate that Table 2 reflects the classifications of mining set out in Section B, Divisions 05 to 08 of Annex I to Regulation (EC) No 1893/2006 of the European Parliament and of the Council of 20 December 2006 (to which the Accounting Directive refers); it would add to clarity if Table 2 also specifically referred to: “Mining of precious and semi-precious stones”.