Consultation on the UK Implementation of the EU Accounting Directive: Chapter 10 Extractive industries reporting

Response form

The closing date for this consultation is 16/05/2014

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Please return completed forms to:

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	Business representative organisation/trade body
	Central government
	Charity or social enterprise
	Individual
	Large business (over 250 staff)
	Legal representative
	Local Government
	Medium business (50 to 250 staff)
	Micro business (up to 9 staff)
	Small business (10 to 49 staff)
	Trade union or staff association

✓[1]	Other (please describe)

Extractive Companies

The following information will help us to better understand the impact of this reporting requirement on your company or group of companies:

	Oil	Minerals	Gas	Logging of primary forests
Please indicate in which of the extractive industries your company is engaged (NB: this question is relevant only to those companies actively engaged in extraction and not to those providing support or ancillary services)	✓		✓	

Is your company listed on:	Yes	No
• the London Stock Exchange?		✓
• AIM?		✓
• another recognised exchange within the EU? (if yes, please state which .....)		✓
• another international exchange? (if yes, please state which .....)		✓[2]
• are any of your subsidiaries listed on an exchange? (If yes, please provide details)		✓

[1] Esso Exploration and Production UK Limited has no employees. Services are recharged from other ExxonMobil undertakings.

[2] Esso Exploration and Production UK Limited is a member of the ExxonMobil group of companies and its ultimate parent company, Exxon Mobil Corporation, is listed on the New York Stock Exchange. Nothing in this consultation response is intended to override the corporate separateness of individual corporate entities. The terms "Corporation," "company", "affiliate," "ExxonMobil, "our" "we", and "its" as used in this consultation response may refer to Exxon Mobil Corporation, to one of its divisions, to the companies affiliated with Exxon Mobil Corporation, or to any one or more of the foregoing. The shorter terms are used merely for convenience and simplicity.

	Yes	No
Will your company be responsible for the preparation of the consolidated report on payments to governments for your group?	✓	

	Micro	Small	Medium	Large
Please indicate the number of subsidiaries within your group that are active in the extractive industries	TBD	TBD	TBD	TBD

(1) We propose that the first report should be prepared in respect of financial years commencing on or after 1 January 2015 (Para 5.3 – 5.4)

Question 1.1 Do you agree that companies should only be required to produce whole year reports and should not be required to provide a partial year report for the period between the regulations coming into force and 31 December 2014?

☒ Yes ☐ No ☐ Not sure

If no, please indicate:

(a) The minimum period you think should be provided between the regulations coming into force and the date from which reporting of payments made to governments commences:

Minimum period.....

and (b) How information from a partial year report will be used and the benefits that would arise from this approach.

Please provide comments on any difficulties/cost that might arise from requiring a partial report for 2014.

Affected companies are very unlikely to be ready to comply with reporting requirements that start in October 2014 given the compressed timeframe that will exist between Parliamentary approval for the UK implementing legislation and the start of such a reporting requirement (presumably, in any event, any partial year reporting requirement would not be imposed with a start date before the UK

implementing legislation takes effect). Creating time pressures of this kind for affected companies is also likely to increase implementation costs.

There seems to be little or no benefit in capturing data and publishing reports for a single quarter of 2014, particularly since the data captured will not be amenable to direct comparison with whole year data from subsequent reporting periods, and the additional administrative burden and costs appear likely to significantly outweigh any benefit.

Question 1.2 Do you agree that the first reports should relate to financial years commencing on or after 1 January 2015?

☐ Yes ☒ No ☐ Not sure

If no, please indicate your preference for the date from which reports should be required and provide an explanation for your preference. (Please note that UK-registered large extractives companies must report on in respect of financial years commencing on or after 20 July 2015 i.e. the deadline for transposition of the Directive.)

Preferred date.....Start of 2016.....

Reasons for preferred date:

A later start for the first payment reporting period creates a window for a finding of equivalency with reporting under the US Dodd Frank legislation to be made. As matters currently stand, ExxonMobil entities registered in the UK will need to report similar (but non-identical) information under three regimes (the UK EITI being the third) and the administrative burden of this essentially duplicative reporting would be reduced by a finding of equivalency.

Article 53 of Directive 2013/34/EU allows Member States to delay the start of reporting and application of other provisions of the Directive until 2016. We do not believe that the assertion above that "UK-registered large extractives companies must report on in respect of financial years commencing on or after 20 July 2015 i.e. the deadline for transposition of the Directive" is, strictly, correct. Use of the flexibility under Article 53 would result in the UK being aligned with the expected timing on implementation in many other Member States and, as noted above, allows time for the US process to run its course such that its equivalency with the EU regime can be determined. By bringing forward the UK's implementing regulations during 2014, BIS will demonstrably have met the UK Government's commitment under the Lough Erne G8 Leaders Communique of June 2013 to quickly implement the EU Accounting Directive by introducing regulations during 2014, even if the first report is to be prepared in respect of calendar year 2016 in order to capture the benefits of consistency with other Member States.

A first payment reporting period starting in January 2016 would also allow affected companies a more reasonable timeframe in which to design and implement internal systems and tools for capturing payment data in the required format.

(2) We propose that UK registered companies are required to publish the extractive report no later than 11 months after the end of their financial year. (Para 5.5 – 5.7)

Question 2.1 Do you agree that UK registered companies should be allowed a maximum of 11 months after the end of their financial year in which to prepare and publish their extractive reports?

☒ Yes ☐ No ☐ Not sure

If no, please indicate:

(a) The maximum period, if any, you think should be permitted after the (financial) year end for companies to prepare and publish their extractive reports:

Maximum period.....

and (b) Indicate the benefits that would arise from this approach below.

Question 2.2 If a shorter period for reporting was imposed, what impact would this have on UK-registered extractives companies?

We do not believe that a shorter period for reporting should be imposed.

Question 2.3 If this approach would impose costs on business, please provide an estimate of the costs with an explanation of how these are derived.

Would such costs be recurring costs or transitional costs in the first year only?

☐ Recurring ☐ Transitional ☐ Not sure

(3) Comments are invited on any issues, such as changes to costs or benefits, that may arise from a later transposition deadline for the Transparency Directive. (Para 5.8)

Question 3.1 What issues might arise from a later transposition of the Transparency Directive? Please describe any possible impacts and, if appropriate, provide details of any costs or benefits that might result from this.

The existence of the Transparency Directive, and its probable later transposition, appear to add further complexity and potentially duplicative requirements to the payment reporting regime.

(4) Subsidiaries of overseas-registered companies will be unable to take advantage of the exemption until their parent company fulfils the obligation to report in either the UK or another EU Member State. Comments are invited on any issues that may arise from this approach. Comments are particularly welcome from subsidiaries of overseas registered companies which may not be able to take advantage of this exemption until their parent companies are obliged to produce a consolidated report under rules imposed by another Member State. (Para 5.9 – 5.10)

Question 4.1 Please provide information on any issues that arise for UK-registered subsidiaries of EU-registered companies. If appropriate please provide details of any costs that arise as a consequence of being unable to (fully) exercise the exemption in 2015. (All EU Member States are required to implement the reporting requirements by July 2015.)
Please use this space for any general comments that you may have, comments on the layout of this consultation would also be welcomed.

As noted in the response to Question 1.2, we believe that Article 53 of Directive 2013/34/EU allows Member States to delay the start of reporting and the application of other provisions of the Directive until 2016. Pushing the start of the first payment reporting period back to January 2016 would be likely to eliminate the need for payments by UK-registered subsidiaries of EU-registered companies to be reported temporarily in the UK before a shift to consolidated payment reporting by the EU-registered parent company in accordance with the implementing legislation of another Member State.

This approach would appear to provide benefits in terms of greater simplicity and the avoidance of costs resulting from any divergence in the payment reporting requirements, as implemented, in the relevant Member States.

(5) We propose that extractive reports should be published (filed) electronically with Companies House in a format which complies with industry developed best practice (to be determined as part of the systems development). (Para 5.11 – 5.14)

Question 5.1 Do you agree that it is appropriate that industry should be encouraged to lead in the production of best practice guidance to support the production of extractive reports and encourage consistency?

☒ Yes ☐ No ☐ Not sure

If no, please provide supporting reasons for your view.

ExxonMobil agrees that there are a number of areas for which the development of guidance would be beneficial, and that industry is well-placed to develop such guidance. The guidance should recognise the broad range of scenarios and structures that owners and operators of oil and gas assets encounter in a global industry; be designed to make the data readily compilable and usable by citizens of resource-producing countries for the stated purpose of government accountability of revenues received; and avoid an overly prescriptive approach.

Question 5.2 Do you agree that reports should be published (filed) electronically with Companies House only i.e. the submission of paper reports is not required or permitted?

☒ Yes ☐ No ☐ Not sure

If no, please provide supporting reasons for your view.

The report publication/filing mechanism should allow for some flexibility in terms of any formatting requirements, and should be capable of supporting the publication/filing, without substantial re-formatting, of reports produced for the final US Dodd Frank reporting regime and any other regimes that are found to be equivalent.

(6) We propose that the penalty regime for non-compliance with the obligation placed on large extractive companies to prepare and publish annually reports on the payments they make to governments should reflect that in place for failure to prepare and file statutory annual reports.

We welcome views on whether the proposed penalty scheme is effective, proportionate and dissuasive. In particular, we would welcome views on:

- **the imposition of an offence for filing a report containing misleading, false or deceptive information,**
- **on how the penalty regime should apply in cases where external factors affect the preparation of a report or prevent a company from filing a report.**

Question 6.1 Do you agree that it is appropriate for the penalty regime here to reflect that in place for failure to prepare and file statutory annual reports?

☐ Yes ☒ No ☐ Not sure

If no, please indicate your preferred option and provide an explanation for your suggested approach.

Although the legal basis for Directive 2013/34/EC is stated to be the harmonisation of accounting issues, it would appear that the underlying purpose of Chapter 10 of the Directive is firstly to increase transparency surrounding payments to resource rich countries with a view to encouraging good governance and accountability in those countries in respect of payments received from the extractive industry (see Recital 44 to the Directive) and secondly to ensure harmony between Member States' disclosure laws so as to promote cross-border investment (see Recital 55 to the Directive). It is unfortunate therefore that the decrease in IOC competitiveness that we expect will result from implementation of the Chapter 10 requirements will reduce the positive influence which Europe's oil and gas majors have on anti-corruption business practices, economic reform and capacity building through their investments in resource-rich countries.

Chapter 10 payment reporting is not intended to serve as a statutory (and externally audited) financial procedure to be relied upon by investors and the City in the same way that statutory annual reports are. Reputational considerations are likely to ensure compliance.

The penalty regime should allow for flexibility in applying sanctions for compliance failures, particularly in the initial years of compliance, taking into account the materiality of any reporting errors, ambiguities that may emerge in the practical application and interpretation of the payment reporting requirements and any other extenuating circumstances.

Question 6.2 Do you consider that the proposed penalty regime is effective, proportionate and dissuasive?

☐ Yes ☒ No ☐ Not sure

If no, please explain why you do not consider the regime would be effective, proportionate and dissuasive. Please provide any suggestions you may have as to how the regime could be improved.

If your suggestions relate to an existing regime, please provide appropriate references.

Chapter 10 payment reporting is not intended, as noted above, to serve as a statutory, and therefore externally audited, financial procedure to be relied upon by

investors and the City in the same way that statutory annual reports are. The proposed penalty regime, particularly to the extent that it imposes criminal liability, does not appear to reflect the underlying purpose of Chapter 10 of Directive 2013/34/EC.

In countries hosting the extractive industries where reporting payments are found to contravene domestic law or existing contractual requirements, oil and gas company executives based in those countries and the companies they represent run the risk of prosecution or legal proceedings in local law courts, a scenario which appears disproportionate to the objectives of the legislation. Establishing an inflexible sanctions regime allowing for the imposition of severe penalties will not only disadvantage companies with existing operations in these countries, it will also act as a deterrent to companies looking to start a business in such countries. Foreign investment by companies based in Europe and North America is a powerful influence for the promotion of anti-corruption business practices, economic reform and capacity building on the part of governments, and it would be unfortunate if an inflexible sanctions regime were to deter such investments.

Question 6.3 Are there any special circumstances that the Government should take in to account when determining the penalty regime?

☒ Yes ☐ No ☐ Not sure

If so what are they, and do you have any suggestions about how these might be dealt with within the penalty regime?

As indicated in the response to Question 6.2, the Government should take into account conflict of law issues in determining the penalty regime. The current provisions of Directive 2013/34/EU and the implementing legislation run the risk of leading UK listed or registered companies to break host-government law, with unknown consequences for locally based employees.

Question 6.4 Are there any other issues that the Government should consider in developing the penalty regime?

☒ Yes ☐ No ☐ Not sure

If yes, please provide an explanation and supporting evidence where appropriate.

The penalty regime should allow for flexibility in applying sanctions for compliance failures, as indicated in the response to Question 6.1. It should recognise that Chapter 10 payment reporting is not intended to serve as a statutory (and externally audited) financial procedure to be relied upon by investors and the City in the same way that statutory annual reports are, but rather serves different objectives, and take into account the likelihood that reputational considerations will ensure compliance.

(7) A copy of the draft regulations implementing Chapter 10 has been included within the consultation document.

Question 7.1 Do you have any comments on the draft regulations included at Annex 4?

☐ Yes ☐ No ☐ Not sure

If yes, please provide details. Please note that the UK does not have the discretion to amend the requirements set out in the Directive. As such comments should relate to matters of understanding or those areas where the UK has discretion in determining an option e.g. the timeframe within which an annual report must be published.

The Explanatory Note states that where a term is used but not defined in the Regulations, it has the same meaning as in the Companies Act 2006. As the Explanatory Note is not, however, part of the Order, we believe that this interpretative provision should appear in the Order itself to avoid unnecessary uncertainty as to the meaning of terms such as 'undertaking' (assuming that the intention is for 'undertaking' to have the Companies Act 2006 meaning). It appears to us that definitions of "balance sheet date" and "registrar" may also be required.

In paragraph (b) of the definition of "equivalent reporting requirements", we believe that "adopted" should be replaced by "designated", and the cross reference should be extended in scope to cover Article 47 of Directive 2013/34/EU also.

In relation to paragraph (d)(i) in the definition of "payment", we would suggest that the word "ordinary" should be deleted. There may be a variety of different classes of shareholder in a company – the exemption should be available to all such classes of shareholder, not just ordinary shareholders, provided that the dividends are not paid in lieu of production entitlements or royalties.

The exemptions in Article 44(3) of the Directive do not appear to be captured in the draft Regulations at present. Is this intentional?

(8) The Government would like to gather information which is directly relevant to UK registered companies on the anticipated costs of implementing this reporting requirement. (Para 7.1)

Question 8.1 We would welcome views on the impacts (costs and benefits) arising on business from this new reporting obligation. It would be particularly helpful if you could provide monetised

information relating to any additional costs or benefits you identify. Where possible, please indicate if these additional costs are transitional or recurring costs.

In responding to this question, please note:

(i) *where a company voluntarily produces a similar or related report already*, the costs identified for this purpose should represent only the additional costs necessary to comply with this requirement and not the total cost of production.

(ii) BIS is happy to receive information considered to be commercially sensitive separately from the consultation response or, if requested, to remove such information from a response prior to its publication on the consultation website.

ExxonMobil's compliance costs have yet to be determined, and will depend in part on whether other regimes are found to be equivalent with the Chapter 10 payment reporting regime. UK implementation of the Chapter 10 payment reporting regime should be undertaken in a manner that minimises duplicative reporting requirements for companies, and supports the publication/filing, without substantial re-formatting, of reports produced for the US Dodd Frank reporting regime and any other regimes that are found to be equivalent.

The Government has prepared an initial impact assessment. However, it should be noted that this assessment has been prepared using cost data gathered by the European Commission prior to the publication of its proposals for the Directive in October 2011. This is because there is little evidence available on the costs for UK companies specifically.

The Government, therefore, seeks to gather information from UK registered companies in the following areas:

(a) benefits to UK companies of increased accountability and governance;

(b) benefits to UK investors;

(c) costs of reporting; and

(d) wider costs to business associated with extractives reporting, e.g. evidence of the extent to which UK companies would be disadvantaged due to having to disclose commercially sensitive information and additional reporting costs and/or evidence around the costs of a lack of exception clause.

ExxonMobil would query the relevance of attempting to assess impacts on business arising from the new reporting requirements at this stage in the process, given that Directive 2013/34/EU has already entered into force.

In relation to commercial harm, the UK Government will be aware that the International Association of Oil and Gas Producers (OGP), of which ExxonMobil is

a member, made a number of submissions to the European Commission during the course of the Commission's consultation on the Directive, in which it repeatedly highlighted the competitive disadvantage that the Chapter 10 payment reporting requirements would cause EU companies. In particular, we note the submissions made by OGP in response to the Commission's 22 December 2010 public consultation to the effect that there was a need for exemptions to be built into the Directive because:

(i) "*country by country disclosure may … harm investors by revealing sensitive information, for example, if a company has only one project or is the sole foreign company present in a country*";

(ii) "*companies may withdraw from or may choose not to begin operations in certain countries if disclosure of payments breaches local law or contract conditions. This would place companies at a competitive disadvantage in international terms and has the potential to impact EU security of supply*"; and

(iii) "*some States will prefer to work with companies not subject to reporting requirements*".[3]

These representations echo concerns voiced by the American Petroleum Institute (API) in its successful challenge to a comparable rule requiring project-level disclosure of payments promulgated by the United States Securities and Exchange Commission (SEC): in the API's words, such a rule "*forces U.S. companies to engage in speech that discloses sensitive, confidential information that the [SEC] concedes will cause them substantial commercial harm*".[4]

ExxonMobil fully agrees with the observations made by OGP and the API in this regard and is extremely disappointed that the EU legislature failed to take adequate or appropriate account of such submissions in the drafting or scheme of the Directive, and that it removed provisions in the draft legislation that would have assisted in protecting industry from such harm after the SEC published its now vacated rules.

ExxonMobil considers (by way of illustration and without prejudice to the generality of its concerns in respect of the Directive and its implementation) that commercial harm will be occasioned to reporting companies by the implementation of the Directive in the following ways:

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[3] Consultation response and cover letter submitted by the OGP Europe to the European Commission on 20 December 2010 available (together with the Commission's consultation document) at: http://ec.europa.eu/internal_market/consultations/2010/financial-reporting_en.htm.

[4] API Complaint before the US District Court of Colombia dated 10 October 2012 at paragraph 79.

(i) the information required to be disclosed is not just sensitive, but also confidential and will have significant commercial value to reporting companies' competitors and state counterparties given the highly competitive, global market for oil and gas exploration and exploitation opportunities;

(ii) the disclosure of the information will therefore put reporting companies at a competitive disadvantage vis-à-vis non-reporting competitors (which include, as OGP highlighted in its submissions to the Commission, national oil companies who already have considerable market power). In particular the disclosure of the information will adversely impact commercial negotiations and give rise to a risk of undercutting by competitors;

(iii) this could ultimately cause reporting companies to lose out on commercial opportunities and/or prompt requests from states for contract renegotiation to the potential material detriment of reporting companies;

(iv) separately, such disclosure may have the effect of exacerbating security risks through identification of the value of particular projects in specific geographical regions, and could, in cases where ownership of a resource may be in dispute, increase regional tensions or make it more difficult to reach a diplomatic solution; and

(v) finally, the Chapter 10 payment reporting requirements could place reporting companies in the invidious position of potentially having to breach the terms of foreign, national laws and/or contracts, exposing companies and their employees to the prospect of real prejudice – including prosecution. The potential criminal liability that could result well illustrates the disproportionate risks faced by reporting companies. Alternatively, companies may be forced to cease doing business in countries which prohibit disclosures that would be required by Chapter 10. The SEC found in its initial rulemaking[5] that United States listed companies and their shareholders could be exposed to literally tens of billions of dollars of losses should the US disclosure requirements force the companies to abandon investments in even one country (in this case, Qatar). Chapter 10 is meant to impose transparency requirements, not trade sanctions.

Question 8.2 Please describe any other issues associated with this requirement that you would like to draw to our attention.

We have described a number of issues in the covering letter to this consultation response.

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[5] US SEC Release No. 34-67717, Disclosure of Payments by Resource Extraction Issuers (August 22, 2012), pp. 195-203.

(9) The same reporting requirements apply to listed extractives companies under the amended *Transparency Directive*. The Government would like to gather information which is directly relevant to these companies on the anticipated costs of implementing this reporting requirement.

Question 9.1 Please outline any quantifiable costs and benefits specifically relating to the following issues:

- Economic impact
- Legal implications
- Practical implications
- Competitiveness impact including the position of the UK as a centre for international listings

In the absence of UK implementing legislation (which will in practice cover key elements as to what reporting pursuant to the amended Transparency Directive will entail) it is difficult, and premature, for ExxonMobil to provide a detailed assessment of the potential range of impacts that may arise. Suffice it to say that ExxonMobil considers that, in terms of economic impacts, equivalent commercial and other harm as set out in this consultation response (see, in particular, the response to Question 8, above) will arise as a result of the implementation of an identical reporting regime pursuant to the Transparency Directive.

Economic impacts:

Legal implications:

Practical implications:

Competitiveness impact including the position of the UK as a centre for international listings

(10) The Government would welcome any other comments on the implementation of Chapter 10 within the scope of this consultation

Do you have any other comments that might aid the consultation process as a whole?

Please use this space for any general comments that you may have, comments on the layout of this consultation would also be welcomed.

We have made a number of general comments in the covering letter to this consultation response.

Thank you for taking the time to let us have your views. We do not intend to acknowledge receipt of individual responses unless you tick the box below.

Please acknowledge this reply ☒

At BIS we carry out our research on many different topics and consultations. As your views are valuable to us, would it be okay if we were to contact you again from time to time either for research or to send through consultation documents?

☒ Yes ☐ No

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