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Country-by-country reporting: why there should be no exemptions

The European Commission's proposed revisions of the EU Transparency and Accounting Directives would require EU-listed and large unlisted extractive and timber companies to publicly disclose tax and revenue payments to governments worldwide, with an exemption from reporting where "public disclosure of this type of payment is clearly prohibited by the criminal legislation of that country".[1]

The EU Council of Ministers, in its response to the proposals in June 2012, echoed the Commission's position: "The report shall exclude any type of payments made to a government in a country where the public disclosure of that type of payment is prohibited by the criminal law of that country. In such cases the undertaking shall state that it has not reported payments in accordance with paragraphs 1 to 3, and shall disclose the name of the government concerned" (Art. 38.5).

Subsequently, the Council position removed outright exemptions, replacing it with a "grandfathering clause" whereby a company would be exempt from reporting "if an explicit prohibition to public disclosure exists under the national criminal law at the date of entry into force of this Directive".

By contrast, the Legal Affairs Committee (JURI) of the European Parliament, at its September 2012 meeting, voted to permit no such reporting exemptions, and still maintains this position.

Although some companies have asserted that the laws of certain host countries would prohibit disclosure, **PWYP urges that the EU should not permit exemptions, whether or not on the basis of a "grandfather clause", for reasons outlined below.**

1. There is no evidence of the need for exemptions.

PWYP works in over 60 resource-rich countries, and has studied this concern since it was raised in 2010 during the rulemaking process for the US disclosure law. Our research has not found any evidence in national laws or contracts that would indicate that blanket exemptions are necessary in any country where we work. Industry representatives have not produced evidence of specific laws or contracts which prohibit disclosure.

Firstly, it is an ***accepted extractive industry standard for contracts to allow companies to disclose*** when required by home government or stock exchange regulators. The evidence of this fact is abundant. This has been confirmed by the Columbia University School of Law in a global survey of over 140 extractive industry contracts.[2] The Association of International Petroleum Negotiators (IAPN) has included such clauses in its Model Confidentiality Agreements used as the negotiating standard for leading petroleum companies for the last 20 years.[3] Many countries such as Angola and Cameroon include these clauses in their standard Model Contracts available online to attract

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[1] European Commission, COM(2011) 684 final, http://ec.europa.eu/internal_market/accounting/docs/other/20111025-legislative-proposal_ad_en.pdf, Art. 38.

[2] Revenue Watch Institute, *Contracts Confidential: Ending Secret Deals in the Extractive Industries*, 2009, chapter 2, http://www.revenuewatch.org/publications/contracts-confidential-ending-secret-deals-extractive-industries

[3] AIPN's 2007 "Model Form Confidentiality Agreement" authorises disclosure of otherwise confidential information "under applicable law, including by stock exchange regulations or by a governmental order, decree, regulation or rule" (Article 4.1, November 2007). The 1999 and 1991 versions of the same AIPN form contain equivalent language, demonstrating that such disclosure authorisations have been standard in the industry for at least the last 20 years: http://www.aipn.org

investors, since these clauses protect investors from regulatory risk. **Any existing contracts that do not use standard industry best practice are outside the norm, and should not be accommodated by European law.**

Secondly, ***countries cited by industry representatives as evidence of the need for such exemptions, specifically Angola, Cameroon, China and Qatar, do not, in fact, prohibit disclosure***. Brazilian oil company Petrobras, which operates in both Angola and China, informed the US Securities and Exchange Commission (SEC) in its official submission on the implementation of the 2010 US Dodd-Frank Act, which requires US-listed companies to publish their payments to governments on a country-by-country and project-by-project basis[4]: "We are active in 29 countries outside of Brazil and we are not aware of such a prohibition [against payment disclosure] in any of those countries."[5]

In Angola, production sharing agreements (PSAs) include the industry standard opt-out clause from confidentiality for compliance with home-country securities regulations.[6] This has been Angola's standard practice for 20 years, as evidenced by its model PSA for deep water blocks.[7] Statoil regularly reports payments made to the Angolan government,[8] and Angola has disclosed information similar to that called for by the European Commission's proposals.[9] Thus no exemption is needed in this case.

In Cameroon, payment disclosure does not conflict with the law. In its submission to the US SEC, civil society organisation RELUFA confirms that Cameroon's model PSA of 2007 allows disclosure, and that its status as an EITI Implementing Country does not allow it to have disclosure prohibitions in place.[10] Thus no exemption is needed in this case.

China: Based on a single legal opinion from a Chinese law firm, Shell has asserted that the Chinese government may treat some payment disclosures as state or business secrets, but it provides no textual evidence in law or regulation to indicate that payments of the kind laid out in the US Dodd-

[4] http://www.sec.gov/about/laws/wallstreetreform-cpa.pdf, Section 1504.

[5] Petrobras letter to the SEC, 21 February 2011, p.5, http://www.sec.gov/comments/s7-42-10/s74210-25.pdf

[6] Official Angolan PSA templates state that no information can be disclosed by the operator *except* "to the extent required by any applicable law, regulation or rule (including … any regulation or rule of any regulatory agency, securities commission or securities exchange on which the securities of such Party or of any such Party's Affiliates are listed)": http://www.sonangol.co.ao/wps/portal/epNew/atividades/concessions/licitacoes, PSA templates.

[7] Cited in Global Witness, http://pwypdev.gn.apc.org/sites/pwypdev.gn.apc.org/files/All_the_Presidents_Men.pdf, 2002, p.47.

[8] Statoil, http://www.statoil.com/annualreport2010/en/financialperformance/positiveimpacts/pages/overviewofactivitiesbycountry.aspx

[9] Global Witness, http://www.globalwitness.org/sites/default/files/library/Oil%20Revenues%20in%20Angola_1.pdf, 2010.

[10] Cameroon PSA 2007: "Each entity comprising the CONTRACTOR may, after having so informed the other entities and the STATE, communicate Contractual Data … d) when and to the extent required by a recognized stock exchange": RELUFA letter to the US SEC, 11 July 2011, http://www.sec.gov/comments/s7-42-10/s74210-96.pdf. On Cameroon EITI: "Cameroon is an Extractive Industries Transparency Initiative (EITI) implementing country that is 'close to compliant' and has shown its commitment to transparency … The EITI Rules require that countries remove any obstacles to EITI implementation, such as confidentiality clauses in government and company contracts, as well other areas in the legal and regulatory framework": RELUFA letter to SEC, 14 March 2011, http://www.sec.gov/comments/s7-42-10/s74210-74.pdf

Frank Act or the European Commission's proposals constitute such secrets.[11] The legal opinion states that there is no "specific regulation on whether the information of Payment constitutes state secret". However, the letter confirms that Shell has used industry standard confidentiality provisions in its contracts with China: ***"when the disclosure will be made by Shell Party to the governments and stock exchanges of its home country, the prior consent of the Chinese Party may not be required***" (emphasis added). Thus no exemption is needed in this case.

Qatar: Joint venture and production sharing agreements in Qatar include standard exceptions to confidentiality where disclosure is required by law. This was confirmed in a 2009 letter from the Qatari Minister of Energy and Industry to ExxonMobil, which Exxon shared with the US SEC as part of its official submission to the US regulatory process. [12] The Qatari government's letter indicates that it began drafting new laws to control public information disclosure. While the interim requirements outlined in the letter prohibit disclosing certain types of "commercially sensitive information", none of these are required by the European Commission's proposals. Thus no exemption is needed in this case. If future Qatari law prohibits compliance with the new EU Directives, an exemption to accommodate this would be misguided for reasons given below.

2. Exemptions would incentivise passage of secrecy laws in autocratic regimes.

Any disclosure exemptions would contradict the European Commission's intention, which is "to make governments accountable for the use of these [natural] resources and promote good governance"; and "to provide relevant information to civil society … to hold government and business to account".[13] Autocracies in resource-rich countries would instead be incentivised to pass secrecy laws, outlawing disclosure, as observed by the US Agency for International Development with respect to the US Dodd-Frank Act: "if such exemptions are granted, the intent of [Dodd-Frank] will then be easily thwarted by every opaque government seeking to hide some or all of its revenue streams".[14]

3. A "grandfather clause" would risk undermining the purpose of the EU Directives.

The Council position has moved from supporting outright exemptions to proposing a "grandfather clause" whereby a company would be exempt from reporting payments to a particular country government "if an explicit prohibition to public disclosure exists under the national criminal law at the date of entry into force of this Directive".

Any such clause would entail two major risks:

(1) Uncooperative companies might use a "grandfather clause" to disrupt implementation of the Directives by making legal challenges at every opportunity to claim a pre-existing clause or agreement prohibits disclosure. This could undermine the widely agreed purpose and operationalisation of the Directive.

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[11] Royal Dutch Shell letter to SEC, 17 May 2011, appendix C , p.3, http://sec.gov/comments/s7-42-10/s74210-90.pdf

[12] ExxonMobil letter to the SEC, 15 March 2011, p.5, http://www.sec.gov/comments/s7-42-10/s74210-73.pdf

[13] European Commission, C, COM(2011) 684 final, http://ec.europa.eu/internal_market/accounting/docs/other/20111025-legislative-proposal_ad_en.pdf, Explanatory Memorandum, p.5; and European Commission, http://ec.europa.eu/internal_market/accounting/docs/sme_accounting/review_directives/20111025-impact-assessment-part-2_en.pdf, p.20.

[14] US Agency for International Development letter to the US SEC, 15 July 2011, p.3, http://sec.gov/comments/s7-42-10/s74210-101.pdf

(2) The time-lag between a "grandfather clause" being agreed in trialogue and the Directives coming into force could allow autocratic regimes to pass laws prohibiting disclosure, again undermining the intention behind the EU legislation.

4. Exemptions or a "grandfather clause" would prevent complementarity with the US Dodd-Frank Act.

Any proposed exemption and/or "grandfather clause" contradicts the European Commission's intention to achieve a "level playing field between EU companies themselves as some EU companies active in the extractive sector are listed in the US, and would have to comply with the US rules".[15] The US SEC includes no exemptions in the implementation rules of the Dodd-Frank extractive industry transparency requirements approved on 22 August 2012. This decision was the result of two years of examination of the evidence provided by stakeholders from the business community and civil society. The SEC explicitly rejected an exemption on the basis of foreign laws prohibiting disclosure, saying that "adopting such an exemption … could undermine the statute by encouraging countries to adopt laws, or interpret existing laws, specifically prohibiting the disclosure required under the final rules".[16]

The US SEC has maintained this position in the face of legal challenge by the American Petroleum Institute and the American Chamber of Commerce, and denied their request to stay the rules pending a decision on the challenge. In its denial, the SEC dismissed assertions regarding the four countries mentioned above, since these groups failed to demonstrate that any foreign government prohibits disclosures: "Although Movants have alleged that four countries bar the disclosures, their submissions on this issue during the rulemaking process (as well as those of others taking the same position) were both unpersuasive and vigorously contested by other commentators."[17]

5. Industry associations have opposed a "grandfather clause" in the US rules because it would lead to "uneven harm".

The American Petroleum Institute, whose members include Shell, BP, Total and others, opposed the inclusion of a "grandfather clause" in its official submission to the US financial regulator: "Incorporation of an exception that is tied to prohibitions that were in place prior to enactment of the Act could also result in uneven harm, with some issuers impacted and others not."[18]

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[15] European Commission, http://ec.europa.eu/internal_market/accounting/docs/other/20111025-impact-assessment-part-2_en.pdf, p.23.
[16] http://www.sec.gov/rules/final/2012/34-67717.pdf, p.32.
[17] http://www.sec.gov/rules/other/2012/34-68197.pdf, p.7.
[18] American Petroleum Institute comment to SEC, 28 January 2011, http://sec.gov/comments/s7-42-10/s74210-10.pdf, p. 27.