

## Disclosure requirements for natural resource companies: baring all in Europe

New rules have been proposed in Europe for disclosure of payments to governments by natural resources undertakings, both listed and unlisted. If you're negotiating concession agreements today, it's time to start preparing.

### Summary

The European Commission has proposed new disclosure rules requiring large natural resources groups and companies based in Europe to disclose payments to governments anywhere in the world. The rules are similar to – but go further than – measures proposed under the US Dodd-Frank Act.

When first announced in spring 2011 the rules were expected to be on a country-by-country approach, but by the time the proposals finally came out, the Commission had moved to project-by-project reporting. This created a storm between NGOs and natural resources companies in a bid to influence the outcome of the European Union's (EU's) lengthy legislative process. Based on the latest developments as of mid-June 2012, it looks like a country-by-country approach has won the day. However the legislative journey is not over yet.

Whatever the outcome, European companies need to get ready: more reporting is on its way. **Any European natural resources company negotiating a licence or concession with a government today needs to ensure it will be able to comply with forthcoming EU disclosure requirements without breaching its licence or concession.**

### The sum not the parts

The rules, as currently drafted, require companies to disclose, in a report to be issued annually, *total* payments such as production entitlements, taxes on profits, royalties, discovery and production bonuses, licence fees and 'other direct benefits' (including payments in kind) made to each government and the total

per type of payment. The proposed rules do not specify whether the report would form part of the annual accounts and management report.

### More than Dodd-Frank

The Proposal goes further than the US Dodd-Frank Act. Its application is not restricted to listed oil, gas and mining companies, but targets all companies incorporated in a member state of the EU active in the extractive industries (defined as any activity involving the exploration, discovery, development and extraction of minerals, oil and gas or other materials) or the logging of primary forests.

A parent company that has a subsidiary active in the extractive industries or the logging of primary forests must publish a consolidated report covering payments by itself and its subsidiaries, if it is also required to prepare consolidated financial statements. There is no distinction made between European and non-European subsidiaries.

However these companies will only have to disclose payments if they meet two of the three following criteria: (a) they have a balance sheet total of at least EUR 20,000,000, (ii) they have a net turnover of at least EUR 40,000,000 or (iii) they employed an average of at least 250 employees during the financial year.

"Public interest entities" will also qualify: these are companies whose securities are listed on a regulated market in the EU, certain credit institutions and insurance undertakings, as well as entities designated as such by an EU member state because they are considered to be of significant public relevance because of the

### Key issues

- Proposed EU legislation to require European natural resources companies to disclose total payments to each government.
- Materiality threshold of EUR 500,000.
- Legislation not yet final but concession and licence agreements need to take into account forthcoming obligations.

nature of their business, their size or the number of employees.

### Why the debate

The latest round of the EU legislative process has provided a view on a **materiality** threshold: if the total amount of payments to a government within a financial year does not exceed EUR 500,000 those payments do not have to be disclosed. NGOs and large businesses have diverged on the amount: EUR 500,000 being viewed as too high by some NGOs, while one multinational has pointed out that it paid more than \$20 billion in direct taxes alone to governments in 2011.

Breach of **confidentiality** is also an issue. The rules provide that if disclosure would breach a country's criminal law, then disclosure of payments to that government would not be required. However disclosure which would be a breach of contract is still required under the rules, and oil and mining concessions routinely contain such clauses. Businesses have suggested that this could lead to competitors outside the EU and US being favoured by host

governments when awarding mineral rights.

But the most public spat has been about whether disclosure should be **country-by-country, or project-by-project** referred to above. The Commission proposed that where 'payments have been attributed to a specific project', the amount per type of payment made for the project should be disclosed.

Companies have protested that this would not 'focus on where the money went' and not give citizens access to meaningful data, whereas NGOs have argued the opposite, and pointed out that project-by-project reporting is required under section 1504 of the Dodd-Frank Act.

A compromise tabled by EU member states – to require disclosure of payments to central and local governments with **only a list of projects** in each country, but without a break-down of the numbers by project - is expected to be adopted by the Council. However, in order to become effective, this needs to be agreed with the European Parliament. Indeed, the law as a whole cannot be finalised until the Parliament and member states agree jointly on the wording. Therefore, **the final text of the law is still open to being amended.**

## What's next?

We will continue to monitor developments

in the European Parliament, which is currently expected to vote on the proposals in October 2012. The Council (member states) will vote after the Parliament. Once adopted, the Directive would need to be enacted into local law by each EU member state before becoming binding on companies in that state, and the current proposal gives states until 1 July 2014 to do that. However, any European natural resources company negotiating a licence or concession with a government today needs to ensure it will be able to comply with forthcoming EU disclosure requirements without breaching its agreement with the host government.

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