

## FACT SHEET

### UK implementing regulations and rules for reports on payments to governments (EU Accounting and Transparency Directives)

Two sets of UK regulations became law in December 2014 in the form of Statutory Instruments (secondary legislation), implementing Chapter 10 of the revised 2013 Accounting Directive and article 1(5) of the 2013 Transparency Directive Amending Directive of the European Union respectively.

The **Reports on Payments to Governments Regulations 2014** were signed into law by Business Minister Jo Swinson MP on 28 November 2014 and came into force on 1 December 2014.<sup>1</sup> The responsible government ministry was the Department for Business, Innovation and Skills (“BIS”), which was replaced by the Department for Business, Energy and Industrial Strategy (“BEIS”) in July 2016.<sup>2</sup> The regulations transpose into UK law Chapter 10 “Report on payments to governments” of the revised 2013 EU Accounting Directive.<sup>3</sup> They require large and publicly listed oil, gas, mining and logging companies incorporated (registered) in the UK to annually disclose the payments they make to governments on a country-by-country and project-by-project basis.

Following identification of a minor error in the definition of “undertaking” in the Reports on Payments to Governments Regulations 2014 (also affecting definitions of “subsidiary undertaking” and “parent undertaking”), the UK Government introduced the Reports on Payments to Governments (Amendment) Regulations 2015 to fully reflect the Accounting Directive’s requirement for parent undertakings to report on payments to governments made by overseas subsidiaries. The government also took the opportunity to ensure that, should a partnership or limited partnership covered by the 2014 regulations file a report under those regulations, such reports will be available for inspection by the public in the same way as such reports from companies are. The amendments entered into force on 18 December 2015.<sup>4</sup>

The **Payments to Governments and Miscellaneous Provisions Regulations 2014** were laid before Parliament on 15 December 2014, and regulation 4 (“Provision of information by issuers of transferable securities”) came into force on 17 December 2014.<sup>5</sup> Regulation 4 transposes into UK law article 1(5) of the 2013 EU Transparency Directive Amending Directive, which replaces the former article 6 of the 2004 EU Transparency Directive with a

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<sup>1</sup> Statutory Instrument No. 3209, <http://www.legislation.gov.uk/uksi/2014/3209/contents/made>; Explanatory Memorandum, <http://www.legislation.gov.uk/uksi/2014/3209/memorandum/contents>. The regulations were made under powers conferred by the European Communities Act 1972, the Limited Liability Partnerships Act 2000 and the Companies Act 2006. House of Commons motion, 26 November 2014: <http://bit.ly/1w5ADOn>; House of Lords motion, 27 November 2014: <http://bit.ly/1ubPkdp>

<sup>2</sup> All reference to the “BIS” regulations in this fact sheet should be understood as now referring to the regulations overseen post-July 2016 by BEIS.

<sup>3</sup> Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32013L0034>

<sup>4</sup> Statutory Instrument No. 1928, <http://www.legislation.gov.uk/uksi/2015/1928/contents/made>

<sup>5</sup> Statutory Instrument No. 3293, <http://www.legislation.gov.uk/uksi/2014/3293/contents/made>; Explanatory Memorandum, <http://www.legislation.gov.uk/uksi/2014/3293/memorandum/contents>. Regulation 4 was made under powers conferred by the European Communities Act 1972.

new article 6 (“Report on payments to governments”).<sup>6</sup> The Financial Conduct Authority (“FCA”), as the UK listings authority, subsequently enacted, via its **Disclosure and Transparency Rules (Reports on Payments to Governments) Instrument 2014**,<sup>7</sup> rules requiring oil, gas, mining and logging companies whose securities are listed on UK-regulated markets to annually disclose the payments they make to governments on a country-by-country and project-by-project basis.<sup>8</sup> The responsible government ministry is Her Majesty’s Treasury (“HMT”).

The UK transposed these provisions ahead of the transposition deadlines (Accounting Directive: 20 July 2015; Transparency Directive Amending Directive: 26 November 2015) to meet its commitment during the UK’s G8 Presidency in 2013 to implement both Directives early and “demonstrate ... commitment to the global company transparency agenda”.<sup>9</sup>

The EU Accounting Directive (“AD”) and the Transparency Directive Amending Directive (“TDAD”) and amended Transparency Directive (“TD”) apply the same disclosure requirements to EU-registered and publicly listed extractives and logging companies respectively, with minor differences noted below. The AD contains the full detailed reporting requirements, while the TDAD and TD cross-refer to the AD without the detail. Similarly in the UK, the Reports on Payments to Governments Regulations (“BIS regulations”) contain the full detailed requirements, while the FCA’s Disclosure and Transparency Rules (Reports on Payments to Governments) Instrument 2014 (“FCA rules instrument”)<sup>10</sup> and amended Disclosure Rules and Transparency Rules (DTRs) (“FCA rules”)<sup>11</sup> cross-refer to the BIS regulations and to the AD without the detail.

The following is a summary of the BIS regulations’ and the FCA rules’ key requirements and their relation to provisions in the AD and the TDAD/TD.

## 1. Who must disclose?

- **BIS regulations:** All **UK-registered** extractive limited or unlimited companies, partnerships or limited liability partnerships must disclose if they are
  - either a **large undertaking**<sup>12</sup> or a **public interest entity**,<sup>13</sup>
  - and a **“mining or quarrying undertaking or a logging undertaking”**.<sup>14</sup>
- **FCA rules:** **UK-listed** extractive issuers – i.e. extractive companies whose securities are publicly listed on a UK-regulated stock market, chiefly the **London Stock Exchange’s Main Market** – and whose **“home state”** is the UK are required to disclose.<sup>15</sup>
- **Number of companies affected:** The government has estimated that “177 large [UK-registered] extractive

<sup>6</sup> Directive 2013/50/EU of the European Parliament and of the Council of 22 October 2013 amending Directive 2004/109/EC of the European Parliament and of the Council on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market, Directive 2003/71/EC of the European Parliament and of the Council on the prospectus to be published when securities are offered to the public or admitted to trading and Commission Directive 2007/14/EC laying down detailed rules for the implementation of certain provisions of Directive 2004/109/EC, <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1415872329209&uri=CELEX:32013L0050>

<sup>7</sup> The Disclosure and Transparency Rules (Reports on Payments to Governments) Instrument 2014, [http://media.fshandbook.info/Legislation/2014/FCA\\_2014\\_63.pdf](http://media.fshandbook.info/Legislation/2014/FCA_2014_63.pdf)

<sup>8</sup> DTR 4.3A Reports on payments to governments, <http://fshandbook.info/FS/html/FCA/DTR/4/3A>

<sup>9</sup> Explanatory Memorandum, para 4.2, <http://www.legislation.gov.uk/ukxi/2014/3209/memorandum/contents>

<sup>10</sup> FCA rules instrument, FCA 2014/63, <http://fshandbook.info/FS/html/handbook/DTR>

<sup>11</sup> DTR 4.3A Reports on payments to governments, <https://www.handbook.fca.org.uk/handbook/DTR/4/3A.html>

<sup>12</sup> In this fact sheet, “undertaking” means the same as “company”.

<sup>13</sup> BIS regulation 4(a).

<sup>14</sup> BIS regulation 4(b).

<sup>15</sup> FCA rule 4.3A.1.

companies [are] in scope of the [AD], which are not subsidiaries, EU owned or listed”;<sup>16</sup> and HMT states that “80 extractive companies are listed on the London Stock Exchange” of which 37 are also UK registered.<sup>17</sup>

Update December 2015: In November 2015 the UK Government identified an error in the Reports on Payments to Governments Regulations 2014 (“BIS Regulations”): a too-narrow definition of “undertaking” (extending also to definitions of “subsidiary undertaking” and “parent undertaking”) as set out in regulation 2(1), and use of those terms in various places in the regulations. The main concern was that the Accounting Directive’s requirement for parent undertakings to report on payments to governments made by overseas subsidiary undertakings was not properly reflected in the 2014 BIS Regulations. To ensure that the BIS Regulations are fully in line with the Directive’s requirements, the government introduced the Reports on Payments to Governments (Amendment) Regulations 2015, and also took the opportunity to ensure that, should a partnership or limited partnership covered by the 2014 regulations file a report under those regulations, such reports will be available for inspection by the public in the same way as such reports from companies are. The amendments entered into force on 18 December 2015.<sup>18</sup>

- **Definitions:**

- A **UK-registered company** is a company incorporated in the UK and registered with the registrar of companies in England & Wales, Scotland or Northern Ireland.
- A **large undertaking** is one that meets at least two of the three following criteria: (a) balance sheet total on its balance sheet date exceeds GBP £18 million; (b) net turnover on its balance sheet date exceeds GBP £36 million; (c) the average number of employees during the financial year to which the balance sheet relates exceeds 250.<sup>19</sup>
- A **public interest entity** is one (a) whose transferable securities are admitted to trading on a regulated market of any EU Member State; or (b) a credit institution as defined in Directive 2006/48/EC; or (c) an insurance undertaking within the meaning of Directive 91/674/EEC of 1991.<sup>20</sup>
- A **mining or quarrying undertaking** or a **logging undertaking** is one that “perform[s] any activity involving the exploration, prospection, discovery, development, and extraction of minerals, oil, natural gas deposits or other materials” or that undertakes logging in primary forests.<sup>21</sup>
- The EU defines a **regulated stock market** in its **Markets in Financial Instruments Directive (MIFID)**.<sup>22</sup> All **Euronext** securities markets (Amsterdam, Brussels, Lisbon, London and Paris) are regulated markets within the meaning of this Directive.<sup>23</sup>
- UK-listed extractive companies **exclude** companies listed on the **AIM** market, which is regulated by the London Stock Exchange and not by the UK government.<sup>24</sup>
- “**Home state**” in the FCA rules: the EU defines the “home state” of an issuer as the EU member state where the issuer is registered, or, for issuers registered outside the EU, where its shares were first offered to the public or where it made its first application for admission to trading on a regulated

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<sup>16</sup> BIS, Impact assessment, March 2014,

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/298603/bis-14-669-impact-assessment-consultation-on-the-uk-implementation-of-the-eu-accounting-directive.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/298603/bis-14-669-impact-assessment-consultation-on-the-uk-implementation-of-the-eu-accounting-directive.pdf), page 6.

<sup>17</sup> HM Treasury, Impact Assessment: Implementation of Chapter 6 EU Transparency Directive – Country by Country Reporting, <http://www.legislation.gov.uk/uksi/2014/3293/impacts>, Evidence Base, paras 63, 64.

<sup>18</sup> Statutory Instrument No. 1928, <http://www.legislation.gov.uk/uksi/2015/1928/contents/made>

<sup>19</sup> BIS regulation 2(1).

<sup>20</sup> BIS regulation 2(1).

<sup>21</sup> BIS regulation 2(1).

<sup>22</sup> EU Directive 2010/78/EU consolidated version (as amended and corrected):

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2004L0039:20110104:EN:PDF>

<sup>23</sup> <https://europeanequities.nyx.com/regulation/nyse-euronext-regulations>

<sup>24</sup> <http://www.londonstockexchange.com/companies-and-advisors/aim/faq/faq.htm>

market.<sup>25</sup>

- **Parent undertakings and subsidiaries:** subject to the exclusions below, a **parent undertaking** that is large or a public interest entity and obliged to prepare consolidated group accounts must prepare a **consolidated report** on relevant payments to governments by (or in relation to the activities of) itself and any subsidiary undertakings included in its consolidated group accounts.<sup>26</sup>
- **Exclusions:**
  - An **undertaking** (subsidiary or parent) is exempt from preparing a report if its payments to governments are included in a consolidated report drawn up by its parent undertaking.<sup>27</sup>
  - **Parent undertakings of small and medium-sized groups** are not required to prepare a consolidated report unless any member of the group qualifies as a **public interest entity**.<sup>28</sup>
  - **Parent undertakings** are not required to prepare a consolidated report if they are a subsidiary undertaking of a parent undertaking governed by the law of an EU Member State other than the UK.<sup>29</sup>
  - **Subsidiary undertakings** need not be included in a parent undertaking's consolidated report on payments to governments under certain limited conditions: "(a) **severe long-term restrictions** substantially hinder the exercise of the rights of the parent undertaking over the assets or management of that subsidiary undertaking; (b) the information necessary for the preparation of the consolidated report **cannot be obtained without disproportionate expense or undue delay**; or (c) the **shares of that undertaking are held exclusively with a view to subsequent resale**".<sup>30</sup>
  - The exclusions for **subsidiary undertakings** on grounds (a) to (c) above will apply only "**where the subsidiary undertaking is excluded from the consolidated group accounts on the same basis**".<sup>31</sup> That is, if a parent company includes a subsidiary in its audited annual accounts, it must disclose that subsidiary's payments to governments.
- **Transitional provision for certain subsidiaries:** the BIS regulations do not apply in relation to a financial year beginning before 1 January 2016 of a subsidiary undertaking whose parent undertaking is required to prepare consolidated group accounts in a Member State other than the UK.<sup>32</sup>

#### EU AD and TDAD/TD

- *The BIS regulations provisions transpose into UK law AD articles 41(1, 2) and 42.1 and, regarding parent and subsidiary undertakings, articles 42.2 and 44.*
- *The FCA rules provisions for listed companies transpose into UK law TDAD article 1(5) and TD article 6.*
- *The AD defines large undertakings in article 3.4 according to EURO thresholds. The UK definition converts these thresholds to GBP.*
- *The AD does not provide for "transitional provision for certain subsidiaries" – this is a UK-specific measure.*

<sup>25</sup> Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC, Art. 2.1(m)(i-iii), [http://www.esma.europa.eu/system/files/ProspectusDir\\_2003\\_71.pdf](http://www.esma.europa.eu/system/files/ProspectusDir_2003_71.pdf)

<sup>26</sup> BIS regulations 8, 9.

<sup>27</sup> BIS regulation 6.

<sup>28</sup> BIS regulation 10(1)(a, b). Small and medium-sized groups are defined in BIS regulation 10(2-5).

<sup>29</sup> BIS regulation 10(1)(c).

<sup>30</sup> BIS regulation 11(1).

<sup>31</sup> BIS regulation 11(2).

<sup>32</sup> BIS regulation 3(2).

## 2. What payment information must be disclosed?

Companies must disclose, in an annual report, their payments made to governments in relation to their relevant activities for each financial year, in the following form:<sup>33</sup>

- (a) the **government to which each payment has been made**, including the **country of that government**;
- (b) the **total amount of payments made to each government**;
- (c) the **total amount per type of payment made to each government**;<sup>34</sup> and
- (d) where those payments have been attributed to a specific project, the **total amount per type of payment made for each project** and the **total amount of payments for each project**.<sup>35</sup>

**Payments in kind** must be reported in value and, where applicable, in volume, with notes provided explaining how the value has been determined.<sup>36</sup>

Where any payment is **not attributable to a specific project**, that payment may be disclosed in the report **without splitting or disaggregating the payment** and **without allocating it to a specific project**.<sup>37</sup>

### EU AD

*These provisions transpose into UK law AD article 43.2-3, with one notable difference in wording:*

- *AD: "Payments made by the undertaking in respect of obligations imposed at entity level may be disclosed at the entity level rather than at project level" (article 43.2).*
- *BIS regulations: "Where an undertaking makes a payment that is not attributable to a specific project, that payment may be disclosed ... without splitting or disaggregating the payment to allocate it to a specific project" (regs 5(2), 9(3)).*

*We have been told informally that UK legislators considered that there was insufficient explanation of the meaning of the term "entity" in the AD and they therefore adopted alternative wording.*

## 3. What is the threshold of payments to be disclosed?

- A **single payment** must be disclosed if it amounts to at least GBP £86,000.<sup>38</sup>
- A **series of related payments within a financial year** must be disclosed if the series of payments amounts to at least GBP £86,000.<sup>39</sup>

### EU AD

*These provisions transpose into UK law AD article 43.1. GBP £86,000 has been established as the equivalent of EURO €100,000, the threshold set in the AD.*

<sup>33</sup> BIS regulations 4, 5(1).

<sup>34</sup> For payment types, see section 3 below.

<sup>35</sup> BIS regulation 5(1)(a-d).

<sup>36</sup> BIS regulations 5(6), 9(7).

<sup>37</sup> BIS regulation 5(2).

<sup>38</sup> BIS regulations 5(3)(a), 9(4)(a).

<sup>39</sup> BIS regulations 5(3)(b), 9(4)(b).

#### 4. Which categories of payments must be disclosed?

The following payment categories or types must be disclosed:<sup>40</sup>

- (a) **Production entitlements:** for example, “profit oil” (oil production shared between a company and government once investment and operating costs are recovered through cost oil - the physical oil or revenue used to cover the operator's costs).
- (b) **Taxes** levied on the income, production or profits of companies. Excluded: consumption taxes such as value added taxes, personal income taxes or sales taxes.
- (c) **Royalties.**
- (d) **Dividends.** Included: dividends paid to a government in lieu of production entitlements or royalties. Excluded: dividends paid to a government as an ordinary shareholder on the same terms as to other ordinary shareholders and not paid in lieu of production entitlements or royalties.
- (e) Signature, discovery and production **bonuses.**
- (f) **Fees** including licence fees, rental fees and entry fees, and other payments for licences and/or concessions.
- (g) **Payments for infrastructure improvements.**

#### EU AD

*These provisions transpose into UK law AD article 41(5).*

#### 5. For which activities must payments be disclosed?

Disclosure is required for payments arising from any activity involving

- **exploration**
- **prospection**
- **discovery**
- **development**
- **and extraction**

of **minerals, oil, natural gas deposits or other materials;** and

- any payments arising from the **logging of primary forests.**<sup>41</sup>

#### EU AD

*These provisions transpose into UK law AD articles 41(1,2) and 43.2.*

#### 6. Payments to which government entities?

Payments must be disclosed if they are made to “**any national, regional or local authority of a country**” including a “**department, agency or undertaking that is a subsidiary undertaking where the authority is the parent undertaking**”;<sup>42</sup> the latter would include **state-owned companies.**

<sup>40</sup> BIS regulation 2(1), which groups together various definitional issues and is organised on an alphabetical basis by keyword.

<sup>41</sup> BIS regulation 2(1).

<sup>42</sup> BIS regulation 2(1).

## EU AD

*These provisions transpose into UK law AD article 41(3).*

### 7. How is a project defined?

- “Project” is defined as **“the operational activities which are (a) governed by a single contract, licence, lease, concession or similar legal agreement and (b) form the basis for payment liabilities with a government”**.<sup>43</sup>
- **Two or more “agreements of the kind referred to in the definition of ‘project’”** (above) that are **“substantially interconnected”** are treated for the purposes of the BIS regulations as a single project.<sup>44</sup>
  - **“Substantially interconnected”** agreements mean **“a set of operationally and geographically integrated contracts, licences, leases or concessions or related agreements with substantially similar terms that are signed with a government”**.<sup>45</sup>
  - Two or more such agreements **“may be governed by a single contract, joint venture, production sharing agreement, or other overarching legal agreement”**.<sup>46</sup>

## EU AD

*These provisions transpose into UK law AD article 41(4). The AD clarifies the meaning of “substantially interconnected” in Recital 45.*

### 8. How will the information be published?

#### **UK-registered companies**

- The BIS regulations require UK-registered undertakings to deliver their report or consolidated report each year **“to the registrar”**<sup>47</sup> and **“by electronic means”**.<sup>48</sup> The registrar of Companies for England and Wales is based at **Companies House**.<sup>49</sup>
- The UK government has committed to **“principles of open data through the G8 Open Data Charter, which will be applied to extractives’ data”**.<sup>50</sup>
- The registrar of Companies for England and Wales at Companies House has committed to **“make digital copies of the [reports on payments to governments] filed available free of charge”**.<sup>51</sup>
- In January 2016 Companies House launched its online **Extractives Service** for companies to file reports and

<sup>43</sup> BIS regulation 2(1).

<sup>44</sup> BIS regulation 2(5).

<sup>45</sup> BIS regulation 2(6).

<sup>46</sup> BIS regulation 2(7).

<sup>47</sup> BIS regulation 14(1).

<sup>48</sup> BIS regulation 14(3).

<sup>49</sup> <http://www.companieshouse.gov.uk/about/functionsHistory.shtml>

<sup>50</sup> <https://www.gov.uk/government/consultations/open-government-partnership-uk-national-action-plan-2013-to-2015#natural-resource-transparency-ensuring-natural-resources-and-extractive-revenues-are-used-for-public-benefit>

<sup>51</sup> BIS, UK Implementation of the EU Accounting Directive, Chapter 10: Extractive industries reporting - Government response to consultation, August 2014, para 61,

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/343599/bis-14-1006-eu-accounting-directive-implementation-extractive-industries-reporting-response.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/343599/bis-14-1006-eu-accounting-directive-implementation-extractive-industries-reporting-response.pdf)

users to access reports.<sup>52</sup> Company reports to the Extractives Service on their 2015 payments can be identified at <https://extractives.companieshouse.gov.uk/api/year/2015/json> and then searched for by company name or number at <https://extractives.companieshouse.gov.uk/>

### UK-listed companies

- Under the FCA’s **policy statement** of January 2015, UK-listed companies’ reports on payments to governments “will be treated as **regulated information**” and subject to the requirements of chapter 6 of the DTRs.<sup>53</sup> The DTRs’ chapter 6 requires “regulated information” to be filed with the FCA “using a primary information provider” (also referred to as a “Regulatory Information Service” (“RIS”) to disseminate the information “to as wide a public as possible”, including “an indication of the website on which the relevant documents are available”.<sup>54</sup>
- The UK’s **National Storage Mechanism** (NSM), for storing regulated information as required under the Transparency Directive, is Morningstar at <http://www.morningstar.co.uk/uk/NSM>; Morningstar “will automatically receive all regulatory announcements that must be published via the RIS regime. It will get these via regulatory feeds and store them within the NSM”, where users can search for them.<sup>55</sup>
- The UK National Storage Mechanism (NSM) can accept reports prepared under the BIS regulations by UK-registered companies that are also UK-listed.
- **Update August 2016:** The FCA’s 2015 policy statement did not prescribe a **template for reporting**.<sup>56</sup> However, in 2016 following a public consultation on applying open data reporting requirements to UK-listed extractive companies, the FCA introduced on 1 August 2016 a **requirement** that, for financial years beginning on or after 1 August 2016, UK-listed extractive companies must file their report on payments to governments with the FCA by **uploading it to the NSM** (<http://www.morningstar.co.uk/uk/NSM>) in **XML** (extensible markup language) format using the FCA’s **prescribed XML data schema** – such reports to be “displayed free of charge” and “accessible” – as well as ensuring the report is available via the NSM in a “human readable” form.<sup>57</sup>

### EU AD and TDAD/TD

- *The BIS regulations transpose into UK law AD articles 42.1 (“prepare and make public a report” and 45.1 (“published as laid down by the laws of each Member State”).*
- *The FCA rules transpose into UK law TDAD/TD article 1(5)/6.*
- *Neither the AD nor the TDAD/TD prescribes specific reporting or publishing requirements or formats.*
- *The UK has committed to apply open data principles to extractives data, and has chosen to provide free public access to the UK-registered and UK-listed company reports, as noted above.*

<sup>52</sup> Company filing and user searches: <https://extractives.companieshouse.gov.uk/>; guidance: <https://www.gov.uk/government/publications/filing-reports-for-the-extractives-industries/guidance-for-the-companies-house-extractives-service>; XML schema: <http://xmlgw.companieshouse.gov.uk/extractives.shtml>

<sup>53</sup> FCA, Early implementation of the Transparency Directive’s requirements for reports on payments to governments: Including feedback on CP14/17 and final rules, policy statement PS15/1, January 2015, <http://www.fca.org.uk/your-fca/documents/policy-statements/ps15-01>, pages 7-8.

<sup>54</sup> DTRs, chapter 6, <https://www.handbook.fca.org.uk/handbook/DTR/6/?view=chapter>, rules 6.2.2, 6.2.3, 6.3; see also <https://www.fca.org.uk/markets/ukla/regulatory-disclosures>

<sup>55</sup> <https://www.the-fca.org.uk/markets/ukla/regulatory-disclosures/national-storage-mechanism>

<sup>56</sup> FCA, Early implementation of the Transparency Directive’s requirements for reports on payments to governments: Including feedback on CP14/17 and final rules, policy statement PS15/1, January 2015, <http://www.fca.org.uk/your-fca/documents/policy-statements/ps15-01>, pages 7-8.

<sup>57</sup> <https://www.the-fca.org.uk/markets/ukla/regulatory-disclosures/reports-payments-governments>; <https://www.fca.org.uk/static/documents/handbook-notice/fca-handbook-notice-35.pdf>; <https://www.handbook.fca.org.uk/handbook/DTR/4/3A.html>

## 9. When will the information be disclosed?

### UK-registered companies

- The BIS regulations apply “in relation to a financial year of an undertaking **beginning on or after 1st January 2015**”,<sup>58</sup> except for those subsidiary undertakings to which the **transitional provision** noted in section 1 above applies.
- UK-registered undertakings are required to prepare and deliver reports or consolidated reports **within 11 months of the end of their financial year**.<sup>59</sup>
- All UK-registered companies required to report that are not UK-listed must therefore report for the first time by end of **November 2016** at the latest.

### UK-listed companies

- Under the FCA rules, UK-listed issuers must prepare and publish a report at the latest **six months after the end of each financial year**, and must ensure that the report remains **publicly available for at least ten years**.<sup>60</sup>
- Reports for UK-listed companies’ **financial years starting on 1 January 2015** must therefore be published by the end of **June 2016** at the latest.

### EU AD and TDAD/TD

- *The AD does not prescribe specific reporting deadlines for EU registered companies, only that the reports be published “on an annual basis” and “as laid down by the laws of each Member State in accordance with Chapter 2 of Directive 2009/101/EC” (articles 42.1, 45.1).*
- *The TDAD/TD specify an annual report, published “at the latest six months after the end of each financial year and [to] remain publicly available for at least 10 years” (article 1(5)/6).*
- *The UK government committed in its Open Government Partnership National Action Plan to require UK-registered and -listed extractive companies to report in 2016.*<sup>61</sup>

## 10. Do the BIS regulations and FCA rules grant any exemptions on grounds of alleged prohibitions in foreign law, confidentiality or commercial sensitivity?

- The BIS regulations “**do not allow any exemptions related to conflict of law or conflict of contract**”;<sup>62</sup> the UK government has not seen “sufficient evidence that action would be taken in other countries for criminal offences against directors or individual companies for complying with the EU Directive”.<sup>63</sup>
- By cross-reference, the FCA rules also allow no such exemptions, and the FCA policy statement rejects such a possibility.<sup>64</sup>
- “The [Accounting] Directive does not allow Member States to waive the requirement for companies to report, even if the company believes that they will be breaking a law in another country.”<sup>65</sup>

<sup>58</sup> BIS regulation 3.

<sup>59</sup> BIS regulation 14(1).

<sup>60</sup> FCA rules 4.3A.5-6.

<sup>61</sup> <https://www.gov.uk/government/consultations/open-government-partnership-uk-national-action-plan-2013/open-government-partnership-uk-national-action-plan-2013-to-2015#natural-resource-transparency-ensuring-natural-resources-and-extractive-revenues-are-used-for-public-benefit>

<sup>62</sup> Ibid., para 89.

<sup>63</sup> Ibid., para 89.

<sup>64</sup> FCA, policy statement PS15/1, <http://www.fca.org.uk/your-fca/documents/policy-statements/ps15-01>, page 11.

<sup>65</sup> Explanatory Memorandum to the Reports on Payments to Governments Regulations 2014, para 8.5, <http://www.legislation.gov.uk/ukSI/2014/3209/memorandum/contents>

#### EU AD and TDAD/TD

- The AD does not refer to, or provide for any exemptions in, cases of alleged disclosure prohibitions in foreign law or on confidentiality or commercial sensitivity grounds.
- The amended TD's Recital 8 states that "no exemptions, for instance for issuers active in certain countries, should be made which have a distortive impact [on country-by-country reporting] and allow issuers to exploit lax transparency requirements".

#### **11. How do the BIS regulations and FCA rules address attempts to evade disclosure?**

- In the BIS regulations, and by cross-reference applied similarly by the FCA rules, payments, activities and projects "**may not be artificially split or aggregated**" to avoid disclosure.<sup>66</sup>
- Disclosure must reflect "**the substance, rather than the form, of each payment, relevant activity or project**".<sup>67</sup>

#### EU AD

*These provisions transpose into UK law AD article 43.4.*

#### **12. Do the BIS regulations and FCA rules allow for any reporting regimes beyond the EU to be considered equivalent?**

- The BIS regulations will recognise as "**equivalent reporting requirements**" those reporting requirements in non-EU countries that have been assessed by the European Commission as being equivalent in accordance with AD article 47.<sup>68</sup>
- Undertakings subject to such equivalent reporting requirements must deliver "information contained in any report or consolidated report prepared in accordance with equivalent reporting requirements **within 28 days** after such report is made publicly available under the equivalent reporting requirements", either **in English** or accompanied by a certified translation into English, and **by electronic means**.<sup>69</sup>
- The FCA rules allow an issuer "whose registered office is in a non-EEA State whose relevant laws are considered equivalent by the FCA" to be exempted from reporting.<sup>70</sup>
- However, the FCA policy statement adds that "At this stage, we cannot assume that an Accounting Directive equivalence decision will follow across into the Transparency Directive. Therefore, the current position is that decisions on equivalence within the Accounting Directive framework remain outside the scope of the Transparency Directive."<sup>71</sup> PWYP UK is engaging with UK officials on this issue.

#### EU AD

*These provisions transpose into UK law AD articles 46 and 47.*

<sup>66</sup> BIS regulations 5(4), 9(5).

<sup>67</sup> BIS regulations 5(5), 9(6).

<sup>68</sup> BIS regulation 2(1).

<sup>69</sup> BIS regulation 15(1-3).

<sup>70</sup> FCA rule 4.4.8.

<sup>71</sup> FCA, policy statement PS15/1, <http://www.fca.org.uk/your-fca/documents/policy-statements/ps15-01>, page 10.

### 13. How will the BIS regulations and FCA rules be enforced, and what penalties do companies face for failing to comply?

#### Enforcement – BIS regulations

- Where the registrar believes that a company has **failed to deliver a required report or consolidated report** by the required date, **the registrar will require a report or an adequate explanation** for the company's failure to deliver a report by that date.<sup>72</sup>
- Where the registrar believes that a company has failed to deliver **equivalent reporting requirements information** by the required date, the registrar will **require equivalent reporting requirements information or an adequate explanation** for the company's failure to deliver this by that date.<sup>73</sup>
- The registrar or a member of the company (i.e. a shareholder) can **apply to the courts for a court order** requiring the company's directors to deliver to the registrar a required report or equivalent reporting requirements information within 28 days.<sup>74</sup>

#### Penalties – BIS regulations

- The UK "penalty regime is ... based on those penalty regimes already existing in company law, i.e. based on a system of **criminal enforcement**".<sup>75</sup>

#### Delivery of a **misleading, false or deceptive** report:

- The regulations establish it as an **offence** on the part of the company and its directors to deliver to the registrar a report that is known, or should have been known, to be "**misleading, false or deceptive**", for which penalties available are **imprisonment or a fine or both**.<sup>76</sup>
- Prosecutions for this offence must be "by or with the consent of" the Secretary of State or the Director of Public Prosecutions.<sup>77</sup>

#### **Failure to deliver** a required report or equivalent reporting requirements information :

- The regulations establish it as an **offence** on the part of the company and its directors to fail to comply within 28 days with a notice from the registrar to deliver a report or an or an adequate explanation, for which the penalty available is a fine.<sup>78</sup>
- The regulations also establish it as an **offence** on the part of the company and its directors to fail to comply within 28 days with a notice from the registrar to deliver equivalent reporting requirements information or an adequate explanation, for which the penalty available is a fine.<sup>79</sup>
- Prosecutions for either offence must be "by or with the consent of" the Secretary of State or the Director of Public Prosecutions.<sup>80</sup>
- Breach of the **court order provision** in regulation 19 would be **contempt of court**, which is a criminal/imprisonment matter.

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<sup>72</sup> BIS regulation 17(1-7).

<sup>73</sup> BIS regulation 18(1-4).

<sup>74</sup> BIS regulation 19.

<sup>75</sup> Explanatory Memorandum to the Reports on Payments to Governments Regulations 2014, para 4.4, <http://www.legislation.gov.uk/uksi/2014/3209/memorandum/contents>

<sup>76</sup> BIS regulation 16(1-5).

<sup>77</sup> BIS regulation 16(6).

<sup>78</sup> BIS regulation 17(8-13).

<sup>79</sup> BIS regulation 18(5-10).

<sup>80</sup> BIS regulations 17(14), 18(11).

### Enforcement and penalties – FCA rules

- Payment reports are “**regulated information**”, so false reporting attracts the **full sanctioning regime** available to the FCA under its Decision Procedure and Penalties Manual (DEPP) for misleading the market.<sup>81</sup>
- The FCA has the power to set fines at a level that nullifies the financial gain occasioned by deceit and to consider the circumstances and seriousness of any breach, which in this case should include the consequences for the host country where the concealed payment took place and whether the company’s senior management was aware of the breach or the breach facilitated any form of dishonest dealings or financial crime. The FCA seeks to set fines on the basis of their deterrence value.<sup>82</sup>

#### EU AD

- *The BIS regulations transpose into UK law AD article 51, which states simply that “Member States shall provide for penalties applicable to infringements of the national provisions adopted in accordance with this Directive and shall take all the measures necessary to ensure that those penalties are enforced. The penalties provided for shall be effective, proportionate and dissuasive.”*
- *Under the BIS regulations, the UK has adopted a stringent penalty regime for misleading, false or deceptive reporting, and breach of the court order provision in regulation 19 would be a serious offence.*
- *The FCA’s DEPP’s sanctioning regime is equally “effective, proportionate and dissuasive”.*

## 14. When will the regulations and FCA rules be reviewed and on what basis?

### BIS regulations

- The Secretary of State “must from time to time” **review the regulations, set out conclusions and publish a report.**<sup>83</sup>
- The review should have regard to how Chapter 10 of the AD is implemented in other EU Member States.<sup>84</sup>
- The report must consider the regulations’ **objectives**, the extent to which those objectives are achieved, whether those objectives remain appropriate and the extent to which they could be achieved with less regulation.<sup>85</sup>
- The **first report** must be published within three years of when the regulations come into force (i.e. by 1 December 2017), with **subsequent reports** published at least every five years.<sup>86</sup>

### FCA rules

- The FCA does not refer to a review of its country-by-country reporting rules.

#### EU AD

- *AD article 48 requires the European Commission to review and report on the implementation and effectiveness of Chapter 10 by 21 July 2018 but does not require Member States to undertake a review.*
- *The UK has decided to undertake its own review of the regulations at an earlier date “to inform [the Commission’s] review .... [to] allow the government to consider whether the regulations and associated penalties have been effective and suggest appropriate amendments to the Commission”.*<sup>87</sup>

<sup>81</sup> FCA, DEPP, <http://fshandbook.info/FS/html/FCA/DEPP>

<sup>82</sup> The FCA may levy fines based on a percentage of the company’s revenue from the relevant business in order that such fines are “relevant in terms of the size of the financial penalty necessary to act as a credible deterrent” and fines can be adjusted for full deterrent effect, DEPP 6.5A.2G, 6.5A.4G, <http://fshandbook.info/FS/html/FCA/DEPP>

<sup>83</sup> BIS regulation 21(1).

<sup>84</sup> BIS regulation 21(2).

<sup>85</sup> BIS regulation 21(3).

<sup>86</sup> BIS regulation 21(4-5).

<sup>87</sup> BIS, UK Implementation of the EU Accounting Directive, Chapter 10: Extractive industries reporting - Government response to consultation, August 2014, para 91,

- *Whereas the Commission review will have in scope “the extension of the reporting requirements to additional industry sectors”, “whether the report on payments to governments should be audited”, “the disclosure of additional information on the average number of employees, the use of subcontractors and any pecuniary penalties administered by a country” and “the feasibility of the introduction of an obligation for all Union issuers to carry out due diligence when sourcing minerals to ensure that supply chains have no connection to conflict parties and respect the EITI and OECD recommendations on responsible supply chain management”; the UK review will be more limited but will explicitly consider the regulations’ objectives.*

## 15. What is the connection between the BIS regulations/FCA rules and the EITI?

The **Extractive Industries Transparency Initiative (EITI)** is a “global coalition of governments, companies and civil society working together to improve openness and accountable management of revenues from natural resources”.<sup>88</sup> Each participating country publishes an annual report that reconciles the payments to governments that companies are required to disclose with governments’ data on receipts and revenues, highlighting any discrepancies. Forty-eight countries are now implementing the EITI, including the UK, which was accepted as a candidate country in October 2014.<sup>89</sup>

Unlike the mandatory reporting requirements in the BIS regulations and FCA rules, the payments covered by the **UK EITI** are limited to those that extractive companies make to the UK government alone. Also unlike the regulations, the UK EITI is overseen by a **multi-stakeholder group** of government, industry and civil society representatives.<sup>90</sup> Besides payment data, each participating country’s EITI report provides contextual information about the country’s extractive industries. The first UK EITI report is due to be published in April 2016.

### More information:

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- For information on the Publish What You Pay campaign, please visit: [www.publishwhatyoupay.org](http://www.publishwhatyoupay.org)

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<sup>88</sup> <https://eiti.org/eiti>

<sup>89</sup> <https://www.gov.uk/government/news/new-standard-boosts-mining-and-energy-transparency>

<sup>90</sup> <https://www.gov.uk/government/groups/uk-extractive-industries-transparency-initiative-multi-stakeholder-group>