

## FACT SHEET

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

Two sets of UK regulations and rules became law in December 2014 in the form of Statutory Instruments (secondary legislation) implementing Chapter 10 of the revised European Union 2013 Accounting Directive and article 1(5) of the 2013 EU Transparency Directive Amending Directive respectively. Amendments to these UK regulations were passed in 2015 and, to accommodate the UK's exit from the EU (Brexit) on 31 January 2020.

The UK transposed the original EU provisions ahead of the EU's 2015 transposition deadlines to meet its commitment during the UK's G8 Presidency in 2013 to implement both Directives early and to "demonstrate ... commitment to the global company transparency agenda".<sup>1</sup>

This fact sheet on the UK's legal provisions for extractive industry payments-to-governments disclosure updates an earlier pre-Brexit version.<sup>2</sup>

#### Law applying to UK-incorporated extractive companies if large and/or publicly listed

The **Reports on Payments to Governments Regulations 2014** were signed into law in November 2014 and came into force in December 2014.<sup>3</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 2016 (this fact sheet uses "BIS" not "BEIS" for references to the original legislation). The regulations transposed into UK law Chapter 10 "Report on payments to governments" of the revised 2013 EU Accounting Directive.<sup>4</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 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

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<sup>1</sup> Explanatory Memorandum, para 4.2, <http://www.legislation.gov.uk/uksi/2014/3209/memorandum/contents>

<sup>2</sup> Pre-Brexit version available at <https://www.pwyp.org/wp-content/uploads/2019/04/PWYP-UK-fact-sheet-UK-regulations-rules-for-reports-on-payments-to-governments-EU-Directives-updated-October-2016.pdf>

<sup>3</sup> Statutory Instrument 2014 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>4</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>

amendments entered into force on 18 December 2015.<sup>5</sup>

Following passage of the European Union (Withdrawal) Act 2018, the **Accounts and Reports (Amendment) (EU Exit) Regulations 2019** (“Reports amendment”) entered fully into force on EU Exit Day (31 January 2020).<sup>6</sup> Schedule 3, paras 35-42, of these amendments apply to the obligations on UK-registered extractive companies to report on payments made to governments and do not reduce or alter these but mainly ensure that the reporting requirements continue to have effect in the UK without reference to the EU.<sup>7</sup>

### **Law applying to UK-listed extractive companies (companies with shares publicly traded on regulated markets)**

The **Payments to Governments and Miscellaneous Provisions Regulations 2014** were laid before Parliament in December 2014, and regulation 4 (“Provision of information by issuers of transferable securities”) came into force in December 2014.<sup>8</sup> Regulation 4 transposes into UK law article 1(5) of the 2013 EU Transparency Directive Amending Directive, which replaced the former article 6 of the 2004 EU Transparency Directive with a new article 6 (“Report on payments to governments”).<sup>9</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>10</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>11</sup> The responsible government ministry is Her Majesty’s Treasury (“HMT”).

Following passage of the European Union (Withdrawal) Act 2018, the **Official Listing of Securities, Prospectus and Transparency (Amendment etc.) (EU Exit) Regulations 2019** (“Official Listing amendment”) entered into force on EU Exit Day (31 January 2020).<sup>12</sup> These amendments apply to the obligations on in-scope UK-listed extractive companies to report on payments made to governments and do not alter these but simply replace references to the applicable EU legislation with a direct requirement on extractive companies which are issuers of shares on UK regulated markets.<sup>13</sup>

### **UK regulations vs UK rules**

The UK Reports on Payments to Governments Regulations (“BIS regulations”) and their amendments contain the UK’s full detailed payments to governments disclosure requirements, while the FCA’s Disclosure and Transparency Rules (Reports on Payments to Governments) Instrument 2014 (“FCA rules instrument”)<sup>14</sup> and

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<sup>5</sup> Statutory Instrument 2015 No. 1928, <http://www.legislation.gov.uk/ukSI/2015/1928/contents/made>

<sup>6</sup> Statutory Instrument 2019 No. 145, <https://www.legislation.gov.uk/ukSI/2019/145/contents/made>

<sup>7</sup> Latham & Watkins, advisory memorandum to Publish What You Pay, 4 March 2019 (henceforth “Latham & Watkins”).

<sup>8</sup> Statutory Instrument 2014 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.

<sup>9</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>10</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>11</sup> DTR 4.3A Reports on payments to governments, <http://fshandbook.info/FS/html/FCA/DTR/4/3A>

<sup>12</sup> Statutory Instrument 2019 No. 707, <https://www.legislation.gov.uk/ukSI/2019/707/contents/made>

<sup>13</sup> Latham & Watkins.

<sup>14</sup> FCA rules instrument, FCA 2014/63, <http://fshandbook.info/FS/html/handbook/DTR>

amended Disclosure Rules and Transparency Rules (DTRs) (“FCA rules”)<sup>15</sup> cross-refer to the BIS regulations without the detail..

The following is a summary of the UK regulations’ and rules’ key requirements in light of the 2015 and especially the 2019 (anticipating Brexit) amendments.

## 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>16</sup> or a **public interest entity**;<sup>17</sup>
  - and a **“mining or quarrying undertaking or a logging undertaking”**.<sup>18</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>19</sup>
- **Number of companies affected:** The government originally estimated that “177 large [UK-registered] extractive companies [are] in scope of the [AD], which are not subsidiaries, EU owned or listed”;<sup>20</sup> and HMT originally stated that “80 extractive companies are listed on the London Stock Exchange” of which 37 are also UK registered.<sup>21</sup> In practice, since 2015 around 130 UK-incorporated and UK-listed extractive companies have reported their payments to governments.<sup>22</sup>
- **Effects of 2015 amendment:** In November 2015 the UK Government identified an error in the Reports on Payments to Governments Regulations 2014 (“BIS Regulations”): the AD’s requirement for parent undertakings to report on payments to governments made by overseas subsidiary undertakings was not properly reflected. The government therefore introduced the Reports on Payments to Governments (Amendment) Regulations 2015 (entered into force December 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.<sup>23</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>24</sup>

<sup>15</sup> DTR 4.3A Reports on payments to governments, <https://www.handbook.fca.org.uk/handbook/DTR/4/3A.html>

<sup>16</sup> In this fact sheet, “undertaking” means the same as “company”.

<sup>17</sup> BIS regulation 4(a).

<sup>18</sup> BIS regulation 4(b).

<sup>19</sup> FCA rule 4.3A.1, as amended 2019.

<sup>20</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>21</sup> HM Treasury, Impact Assessment: Implementation of Chapter 6 EU Transparency Directive – Country by Country Reporting, <http://www.legislation.gov.uk/ukxi/2014/3293/impacts>, Evidence Base, paras 63, 64.

<sup>22</sup> Filtered search for UK-reporting companies at <https://www.resourceprojects.org/sources>

<sup>23</sup> Statutory Instrument 2015 No. 1928, <http://www.legislation.gov.uk/ukxi/2015/1928/contents/made>

<sup>24</sup> BIS regulation 2(1).

- A **public interest entity** is one (a) whose transferable securities are admitted to trading on a UK-regulated or (b) a credit institution as defined in UK law.<sup>25</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>26</sup>
  - The London Stock Exchange Main Market became, in June 2020, the single UK-regulated market within the meaning of the legislation.<sup>27</sup> UK-listed extractive companies therefore **exclude** companies listed on the **AIM** market, which is regulated by the London Stock Exchange and not by the UK Government.<sup>28</sup>
  - “**Home state**” in the FCA rules: the UK is the home state of an issuer if (a) the transparency rules impose requirements on the issuer in relation to the securities or (b) the issuer has its registered office (or, if it does not have a registered office, its head office) in the UK.<sup>29</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>30</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>31</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>32</sup>
    - **Parent undertakings** are now required to prepare a consolidated report even if they are a subsidiary undertaking of a parent undertaking governed by the law of an EU Member State.<sup>33</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>34</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>35</sup> That is, if a parent company includes a subsidiary in its audited annual accounts, it must disclose that subsidiary’s payments to governments.

## 2. What payment information must be disclosed?

<sup>25</sup> BIS regulation 2(1), as amended 2019.

<sup>26</sup> BIS regulation 2(1).

<sup>27</sup> Official Listing amendment; see also <https://www.euronext.com/en/about/media/euronext-press-releases/euronext-ceases-london-regulatory-activities>

<sup>28</sup> <http://www.londonstockexchange.com/companies-and-advisors/aim/faq/faq.htm>

<sup>29</sup> Official Listing amendment, 37(2).

<sup>30</sup> BIS regulations 8, 9.

<sup>31</sup> BIS regulation 6.

<sup>32</sup> BIS regulation 10(1)(a, b). Small and medium-sized groups are defined in BIS regulation 10(2-5).

<sup>33</sup> Reports amendment.

<sup>34</sup> BIS regulation 11(1).

<sup>35</sup> BIS regulation 11(2).

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>36</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>37</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>38</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>39</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>40</sup>

### 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>41</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>42</sup>

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

The following payment categories or types must be disclosed:<sup>43</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**.

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

<sup>36</sup> BIS regulations 4, 5(1).

<sup>37</sup> For payment types, see section 3 below.

<sup>38</sup> BIS regulation 5(1)(a-d).

<sup>39</sup> BIS regulations 5(6), 9(7).

<sup>40</sup> BIS regulation 5(2).

<sup>41</sup> BIS regulations 5(3)(a), 9(4)(a).

<sup>42</sup> BIS regulations 5(3)(b), 9(4)(b).

<sup>43</sup> BIS regulation 2(1), which groups together various definitional issues and is organised on an alphabetical basis by keyword.

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>44</sup>

## 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>45</sup> the latter would include **state-owned companies**.

## 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>46</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>47</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>48</sup>
  - Two or more such agreements **“may be governed by a single contract, joint venture, production sharing agreement, or other overarching legal agreement”**.<sup>49</sup>

## 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>50</sup> and **“by electronic means”**.<sup>51</sup> The registrar of Companies for England and Wales is based at **Companies House**.<sup>52</sup>
- The UK government has committed to **“principles of open data through the G8 Open Data Charter, which**

<sup>44</sup> BIS regulation 2(1).

<sup>45</sup> BIS regulation 2(1).

<sup>46</sup> BIS regulation 2(1).

<sup>47</sup> BIS regulation 2(5).

<sup>48</sup> BIS regulation 2(6).

<sup>49</sup> BIS regulation 2(7).

<sup>50</sup> BIS regulation 14(1).

<sup>51</sup> BIS regulation 14(3).

<sup>52</sup> <http://www.companieshouse.gov.uk/about/functionsHistory.shtml>

will be applied to extractives' data".<sup>53</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>54</sup>
- In January 2016 Companies House launched its online **Extractives Service** for companies to file reports and users to access reports.<sup>55</sup> Company payments reports to the Extractives Service can be found by searching 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>56</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>57</sup>
- The UK's **National Storage Mechanism** (NSM), for storing and accessing regulated information as required under the FCA rules and DTRs is the FCA's online repository <https://data.fca.org.uk/#/nsm/nationalstoragemechanism>. Company payments to governments reports can be retrieved here, including reports filed before April 2020, when the NSM was at <http://www.morningstar.co.uk/uk/NSM>.
- **Format requirement from 2016:** Following a public consultation on applying open data reporting requirements to UK-listed extractive companies, the FCA introduced in 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 by **uploading it to the 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" (i.e. HTML, PDF or Word) form.<sup>58</sup>

## 9. When must 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**

<sup>53</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>54</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)

<sup>55</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>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> 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>58</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>

January 2015”.<sup>59</sup>

- UK-registered undertakings are required to prepare and deliver reports or consolidated reports **within 11 months of the end of their financial year**.<sup>60</sup>

#### 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>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 reporting requirements.<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>

### 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>65</sup>
- Disclosure must reflect “the **substance, rather than the form, of each payment, relevant activity or project**”.<sup>66</sup>

### 12. Do the BIS regulations and FCA rules, as amended in 2019, allow for any reporting regimes beyond the UK to be considered equivalent?

- The BIS regulations as amended will recognise as “**equivalent reporting requirements**” those reporting requirements in any non-EU country or territory that were assessed by the European Commission before EU Exit/Brexit Day (31 January 2020) as being equivalent.<sup>67</sup> PWYP UK has asked Companies House (June 2021) to confirm that the UK still recognises as equivalent the reporting regimes in Norway and Canada.<sup>68</sup> EU Member States’ reporting regimes existing at Brexit, however, are not, post-Brexit, recognised as equivalent to the UK regime.<sup>69</sup>
- Post-Brexit, the Secretary of State, rather than the European Commission, is responsible for determining if reporting requirements in states other than the UK amount to “equivalent reporting requirements”. This

<sup>59</sup> BIS regulation 3.

<sup>60</sup> BIS regulation 14(1).

<sup>61</sup> FCA rules 4.3A.5-6.

<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> BIS regulations 5(4), 9(5).

<sup>66</sup> BIS regulations 5(5), 9(6).

<sup>67</sup> Reports amendment, para 37, new regulation 12ZA.

<sup>68</sup> *Ibid.*

<sup>69</sup> Reports amendment, para 40, omitting BIS regulation 17(7) paras (e) and (h).

determination is to be made by reference to the same nine criteria as those which the European Commission is required to consider when making its determination.<sup>70</sup>

- The Secretary of State may also identify additional reporting requirements in a state as equivalent to the UK regulations if “they facilitate a direct comparison of reporting requirements of the other country or territory” with UK reporting requirements.<sup>71</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>72</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>73</sup>

### **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>74</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>75</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>76</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>77</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>78</sup>
- Prosecutions for this offence must be “by or with the consent of” the Secretary of State or the Director of Public Prosecutions.<sup>79</sup>

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

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<sup>70</sup> Ibid.

<sup>71</sup> Ibid, para 12ZA(4).

<sup>72</sup> BIS regulation 15(1-3).

<sup>73</sup> FCA rule 4.4.8.

<sup>74</sup> BIS regulation 17(1-7).

<sup>75</sup> BIS regulation 18(1-4).

<sup>76</sup> BIS regulation 19.

<sup>77</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>78</sup> BIS regulation 16(1-5).

<sup>79</sup> BIS regulation 16(6).

- 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>80</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>81</sup>
- Prosecutions for either offence must be “by or with the consent of” the Secretary of State or the Director of Public Prosecutions.<sup>82</sup>
- Breach of the **court order provision** in regulation 19 would be **contempt of court**, which is a criminal/imprisonment matter.

#### 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>83</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>84</sup>

### 14. Reviews of the UK regulations and FCA rules

#### BIS regulations

- The Secretary of State “must from time to time” **review the regulations, set out conclusions and publish a report**.<sup>85</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>86</sup>
- In the pre-Brexit legislation, the review was required to have regard to how Chapter 10 of the AD is implemented in other EU Member States,<sup>87</sup> but post-Brexit this requirement has been scrapped.<sup>88</sup>
- The UK’s **first review report**, published in 2018, concluded that the legislation was “on course to achieve its objectives and key success criteria have been met in terms of greater levels of transparency, compliance levels and avoidance of unnecessary costs to business”.<sup>89</sup>

<sup>80</sup> BIS regulation 17(8-13).

<sup>81</sup> BIS regulation 18(5-10).

<sup>82</sup> BIS regulations 17(14), 18(11).

<sup>83</sup> FCA, DEPP, <http://fshandbook.info/FS/html/FCA/DEPP>

<sup>84</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>85</sup> BIS regulation 21(1).

<sup>86</sup> BIS regulation 21(3).

<sup>87</sup> BIS regulation 21(2).

<sup>88</sup> Latham & Watkins.

<sup>89</sup> BEIS, *The Reports on Payments to Governments Regulations 2014, Post Implementation Review*, PIR No. BEIS024(PIR)-18-BF, Feb. 2018, [http://www.legislation.gov.uk/ukxi/2014/3209/pdfs/ukxi0d\\_20143209\\_en.pdf](http://www.legislation.gov.uk/ukxi/2014/3209/pdfs/ukxi0d_20143209_en.pdf), p. 22; also *Reports on Payments to Governments Regulations: Final report*, BEIS Research Paper, Jan. 2018, [http://www.legislation.gov.uk/ukxi/2014/3209/pdfs/ukxi0d\\_20143209\\_en\\_001.pdf](http://www.legislation.gov.uk/ukxi/2014/3209/pdfs/ukxi0d_20143209_en_001.pdf)

- **Subsequent reports** are required to be published at least every five years.<sup>90</sup>

#### FCA rules

- The FCA does not refer to a review of its country-by-country reporting rules.
- However, in Primary Market Bulletin 20, referring to some reporting companies' omission of payee government entity names and/or omitting to file in XML as well as "human readable" format, the FCA states: "We propose doing a further review in due course. If we are still concerned, then we will consider whether to take action on this."<sup>91</sup>

### 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>92</sup> Each participating country publishes an annual report and/or systematically discloses data reconciled between payments to governments reported by companies and governments' reported receipts and revenues, along with an expanding body of sector-wide information. More than 50 countries are now implementing the EITI, including the UK.<sup>93</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 and rules, the UK EITI is overseen by a **multi-stakeholder group** of government, industry and civil society representatives.<sup>94</sup> The UK has published EITI reports covering every year since 2014.<sup>95</sup>

#### More information:

- For further information, please contact Miles Litvinoff, Coordinator, Publish What You Pay UK, [mlitvinoff@pwypuk.org](mailto:mlitvinoff@pwypuk.org)
- For information on PWYP UK please visit [https://www.pwyp.org/pwyp\\_members/united-kingdom/](https://www.pwyp.org/pwyp_members/united-kingdom/)
- For information on the global Publish What You Pay movement, please visit <https://www.pwyp.org/>

<sup>90</sup> BIS regulation 21(4-5).

<sup>91</sup> FCA, *Primary Market Bulletin* No. 20, February 2019, <https://www.fca.org.uk/publication/newsletters/primary-market-bulletin-20.pdf>, pp. 9-10.

<sup>92</sup> <https://eiti.org/eiti>

<sup>93</sup> <https://eiti.org/countries>

<sup>94</sup> <https://www.ukeiti.org/multi-stakeholder-group>

<sup>95</sup> <https://www.ukeiti.org/publications-reports>