

EXTRACTING TRANSPARENCY

LANDMARK LEGISLATIVE PROPOSALS FOR EXTRACTIVES AND FORESTRY COMPANIES TO DISCLOSE THEIR PAYMENTS TO GOVERNMENTS ARE UNDER DISCUSSION IN BRUSSELS. THESE PROPOSALS PROMISE THREE SIGNIFICANT OUTCOMES: EU LEADERSHIP ON A GLOBAL ISSUE, WIDER MOMENTUM FOR THE PRINCIPLES OF TRANSPARENCY AND ACCOUNTABILITY, AND THE ELUSIVE PROMISE OF EU POLICY COHERENCE. **TEXT NEIL CAMPBELL, HEAD OF EU POLICY DEVELOPMENT, OPEN SOCIETY INSTITUTE, BRUSSELS**

'Publish What You Pay' is the simple idea behind the intricate details of the issue. It is a mantra, a global network of over 600 civil society groups, and a 10-year campaign. It is not a panacea for countries rich in natural resources and poor in governance, but it is a crucial step to allow citizens to hold their governments to account.

GOLDEN TRIANGLE

Initially, the campaign focused on building a voluntary base, leading to the 2002 launch of the Extractives Industries Transparency Initiative (EITI), an innovative approach that exploits the *'golden triangle'* of government, the private sector and civil society to report on and monitor payments to governments. EITI has been successful. 21 countries are following the process to join the 14 that are already *'EITI compliant'*. However, as

one observer noted: *'Step one was win the argument and build a critical mass, step two was to use that power base to push for a stronger approach.'*

In July 2010, the US Dodd-Frank Act was signed into law by President Obama. Section 1504 requires all companies registered with the Securities and Exchange Commission to publicly report on an annual basis what they pay governments for their oil, gas and minerals. In parallel, the European Commission began to prepare its review of two legally binding documents that govern accounting and transparency standards. The Commission's subsequent proposals from October 2011 included many elements that could lead to strong *'publish what you pay'* type legislation, and a couple of elements that would undermine it. Meanwhile the industry lobby,

caught napping in the US, has started to energetically target decision-makers in Brussels. At the time of writing, the position of the European Parliament and member states are yet to be fixed. Final decisions and negotiations are expected over the summer months and it is likely that it will not be until closer to the end of 2012 that we will see EU legislation emerge.

THREE LINKS

The proposals can be laid out as a chain with a series of links; weakness in one could undermine the whole. There are three links in particular that parliamentarians and member states should retain intact.

The first is *'project-level reporting'*. This was contained in the Commission proposal and matches US legislation, allowing for disclosure of payments at a level that makes them useful to local communities. This requires a definition of project that reflects the legal basis on which the extractive and timber industries are organised, equivalent to a legal agreement between the company and the host government. Interpretation of project in terms of the local context, rather than the company's own definition or internal reporting, would ensure a common standard.

The second is a realistic threshold for 'materiality'. This refers to the lowest level of payment which is actually significant enough to be reported. The European Parliament is debating between €50,000 and €100,000. The Council has suggested €500,000. One company has even gone as high as €1 million, completely failing to grasp the benefit of the law. The local context means that anything over €50,000 would not reveal payments that are meaningful to local communities.

Lastly, the Commission included an exemption clause for countries with criminal laws against disclosure. It is debatable as to whether such laws exist, and the inclusion of the clause might act as an incentive to do so. Other attempts have been made to exempt companies from reporting intra-EU payments. This would be an unfortunate message of EU double standards. In reality, most European companies would be covered by the US law.

What would a strong EU disclosure regulation, with each link in the chain supporting the next, achieve both for the communities in which extractives industries operate and the companies themselves?

Exemptions for companies reporting in countries where they already report in voluntary initiatives (read, EITI) have also been suggested. Reporting practices vary widely between countries and an attempt to establish an artificial equivalence between the EU Directives and the EITI would be time-consuming, politically controversial and likely to fail.

STRONG DISCLOSURE

What would a strong EU disclosure regulation, with each link in the chain supporting the next, achieve both for the communities in which extractives industries operate and the companies themselves?

Enabling access to information, one of the EU's own operating principles, is not an end in itself. It is only the start towards empowering individuals, communities and societies with the tools to ensure their government is representative and responsible. Had the extent and destination of European oil and gas company payments been systematically disclosed, the context of the Arab Spring would have differed significantly.

At the same time companies, far from being dragged into costly reporting requirements or giving away sensitive information would be competing on a level-playing field. Rather than hurting them it would support their competitiveness. There have been no undue costs reported from companies that have already started reporting under US or Hong Kong disclosure rules. Bids for contracts would not require endless and expensive additional sweeteners. Each company would be competing on the merits of their service rather than having to exploit other avenues for securing contracts.

Commitment to transparency and accountability are almost a thread through the EU's external action. The European Commission is already a signatory to the International Aid Transparency Initiative, publishing what it funds. The Commissioner for Development Andris Piebalgs plans to make EU development assistance more targeted and effective. 'Budget support' is to be re-branded a 'good governance and development contract' that also contributes to the fight against corruption and fraud. Criteria for engaging in such contracts will be transparent and competent management of national budgets.

Disclosure rules at EU level, consistently applied, would close the information gap between public and private funds to third governments. They would also signify a broader remedy for the economic crisis that requires accountability for the use and abuse of revenues; an important step away from exclusive gains and towards inclusive growth.

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