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Committee on Foreign Affairs

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DRAFT OPINION

of the Committee on Foreign Affairs

for the Committee on Legal Affairs

on the proposal for a directive of the European Parliament and of the Council
on the annual financial statements, consolidated financial statements and
related reports of certain types of undertakings
(COM(2011)0684 – C7-0393/2011 – 2011/0308(COD))

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SHORT JUSTIFICATION

While the draft directive touches upon a broad range of issues related to the annual and consolidated financial statements of limited liability companies in Europe, this opinion focuses on the proposed requirements for large EU-based undertakings and public interest entities to disclose their payments to governments.

The European Commission proposes to require large undertakings and public interest entities active in the extractive industry and logging of primary forests to report on a country and project-basis on the payments they make to local, regional and national governments around the globe. Your rapporteur strongly welcomes this initiative. Such disclosure requirements will help investors make better-informed decisions and enable local civil society actors to better hold their governments to account when it comes to the use of the proceeds from their respective country's natural resources.

The improved transparency will contribute to better governance and reduce the risk of corruption, thereby improving the development prospects of the countries concerned. The disclosure requirements will also strengthen the existing, voluntary Extractive Industry Transparency Initiative. While your rapporteur therefore strongly supports the general line of the Commission proposal, she proposes some changes to certain provisions, in particular the project definition, materiality threshold, and exemptions.

In addition to these changes to individual provisions of the Commission proposal, your rapporteur also proposes to broaden the text in terms of industries covered and data to be disclosed. In fact, the new directive should not only improve state governance in third countries, but also corporate governance of large EU-based undertakings operating in these countries. Your rapporteur therefore proposes to include, on a country-basis (rather than on a project-basis), certain contextual data in the disclosure requirements, such as production volume, turnover and employee count.

This information is necessary to compare undertakings' tax payments with their economic activity, which will enable the general public and tax authorities to better evaluate the undertakings' tax payments across different jurisdictions. As a result, corporate accountability will be strengthened and the risk of transfer mispricing and tax avoidance and tax evasion will be reduced. By reducing the amount of tax payments avoided the revenue base of developing countries would be strengthened, thereby contributing to their economic development and reducing their dependency on foreign development aid. At the same time, such measures would also contribute to reducing tax avoidance and tax evasion in the European Union and would provide investors with better information to judge companies' exposure to different country contexts.

Such considerations of corporate governance and tax avoidance and tax evasion are not limited to any specific sector. Your rapporteur therefore proposes to extend the disclosure requirements (on a country-basis) to all industries.

The disclosure requirements proposed by your rapporteur would not impose any excessive administrative burden on undertakings since they would not have to collect any new data they do not already possess for internal management or other purposes. Moreover, no sensitive

commercial data would be disclosed to competitors since the data concerned, or close estimates thereof, are already available to competitors. Therefore, the effect of the law would primarily be that this information is also available to investors and the general public.

AMENDMENTS

The Committee on Foreign Affairs calls on the Committee on Legal Affairs, as the committee responsible, to incorporate the following amendments in its report:

Amendment 1

Proposal for a directive

Recital 32

Text proposed by the Commission

(32) In order to provide for enhanced transparency of payments made to governments, large undertakings and public interest entities ***which are active in the extractive industry or logging of primary forests*** should disclose in a ***separate*** report on an annual basis ***material*** payments made to governments in the countries in which they operate. ***Such undertakings are active in countries rich in natural resources, in particular minerals, oil, natural gas as well as primary forests. The report should include types of payments comparable to those disclosed by an undertaking participating in the Extractive Industries Transparency Initiative (EITI). The initiative is also complementary to the EU FLEGT Action Plan (Forest Law Enforcement, Governance and Trade) and the Timber Regulation which require traders of timber products to exercise due diligence in order to prevent illegal wood from entering into the EU market.***

Amendment

(32) In order to provide for enhanced transparency of payments made to governments, large undertakings and public interest entities should disclose in a report on an annual basis payments made to governments in the countries in which they operate. ***The report, which should form part of the notes to the financial statements, should also include certain contextual information. These measures aim at enabling investors to make better-informed decisions, improving corporate governance and accountability and contributing to the containment of tax evasion. The report should incorporate disclosures on a country basis, with certain additional reporting requirements on a project basis for undertakings active in the extractive industry or logging of primary forests.***

Or. en

Amendment 2

Proposal for a directive Recital 33

Text proposed by the Commission

(33) The reports should serve to facilitate governments of resource-rich countries in implementing the EITI Principles and Criteria and account to their citizens for payments such governments receive from undertakings active in the extractive industry or loggers of primary forests operating within their jurisdiction. *The report should incorporate disclosures on a country and project basis, where a project is considered as the lowest level of operational reporting unit at which the undertaking prepares regular internal management reports, such as a concession, geographical basin, etc and where payments have been attributed to such projects. In the light of the overall objective of promoting good governance in these countries, the materiality of payments to be reported should be assessed in relation to the recipient government. Various criteria on materiality could be envisaged such as payments of an absolute amount, or a percentage threshold (such as payments in excess of a percentage of a country's GDP) and these can be defined through a delegated act. The reporting regime should be subject to a review and a report by the Commission within five years of the entry into force of the Directive. The review should consider the effectiveness of the regime and take into account international developments including issues of competitiveness and energy security. The review should also take into account the experience of preparers and users of the payments information and consider whether it would be appropriate to include additional payment information such as effective tax rates and recipient*

Amendment

(33) In the reports by large undertakings and public interest entities which are active in the extractive industry or logging of primary forests¹, payments to governments should also be disclosed on a project basis, where "project" means an operational unit set up on the basis of one or more licences, concessions, contracts or other specific legal agreements which give rise to fiscal or parafiscal liabilities. However, the requirements in respect of disclosure on a project basis should be limited to projects for which the total payments exceed EUR 100 000. The reports should include types of payments comparable to those disclosed by an undertaking participating in the Extractive Industries Transparency Initiative (EITI). The initiative is also complementary to the EU FLEGT Action Plan (Forest Law Enforcement, Governance and Trade)² and the Timber Regulation³, which require traders of timber products to exercise due diligence in order to prevent illegal wood from entering into the EU market. The reports should serve to facilitate governments of resource-rich countries in implementing the EITI Principles and Criteria and account to their citizens for payments such governments receive from undertakings active in the extractive industry or loggers of primary forests operating within their jurisdiction.

details, such as bank account information.

¹ *Defined in Directive 2009/28/EC as "forest and other wooded land of native species, where there is no clearly visible indication of human activity and the ecological processes are not significantly disturbed."*

² *See Council Regulation (EC) No 2173/2005 of 20 December 2005 on the establishment of a FLEGT licensing scheme for imports of timber into the European Community (OJ L 347, 30.12.2005, p. 1).*

³ *Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market (OJ L 295, 12.11.2010, p. 23). Companies that import wood products under EU voluntary agreements will be exempt from this requirement.*

Or. en

Amendment 3

Proposal for a directive Recital 33 a (new)

Text proposed by the Commission

Amendment

(33a) The reporting regime on payments to governments should be subject to a review and a report by the Commission within four years of the entry into force of this Directive. The review should consider the effectiveness of the regime and take into account international developments including issues of competitiveness and energy security. It should also consider whether the reporting obligations for

undertakings which are active in the extractive industry or logging of primary forests should be extended to certain other industries, including in particular fisheries. The review should also take into account the experience of preparers and users of the payments information and should consider whether it would be appropriate to include additional payment information such as effective tax rates and recipient details such as bank account information.

Or. en

Amendment 4

Proposal for a directive Article 36 – paragraph 1

Text proposed by the Commission

1. "Undertaking active in the extractive industry" means an undertaking with any activity involving the exploration, discovery, development, and extraction of minerals, oil and natural gas deposits, as referred to in Section B-Divisions 05 to 08 of Annex I to Regulation (EC) No 1893/2006 of the European Parliament and of the Council.

Amendment

1. "Undertaking active in the extractive industry" means an undertaking with any activity involving the **prospection**, exploration, discovery, development, and extraction of minerals, oil and natural gas deposits, as referred to in Section B-Divisions 05 to 08 of Annex I to Regulation (EC) No 1893/2006 of the European Parliament and of the Council.

Or. en

Amendment 5

Proposal for a directive Article 36 – paragraph 4

Text proposed by the Commission

4. "Project" *is equivalent to a specific operational reporting unit at the lowest level within the undertaking at which*

Amendment

4. "Project" *means an operational unit set up on the basis of one or more licences, concessions, contracts or other specific*

regular internal management reports are prepared to monitor its business.

legal agreements which give rise to fiscal or para-fiscal liabilities.

Or. en

Justification

The legal agreements used here as basis for the project definition are common use across the industry and their characteristics are well-understood. This is preferable to a definition based on internal management reporting arrangements, which may vary widely from one company to another.

Amendment 6

Proposal for a directive

Article 37 – paragraph 1

Text proposed by the Commission

1. Member States shall require large undertakings and all public interest entities ***active in the extractive industry or the logging of primary forests*** to prepare and make public a report on payments made to governments on an annual basis.

Amendment

1. Member States shall require large undertakings and all public interest entities to prepare and make public a report on payments made to governments ***and certain contextual information as defined in Article 38*** on an annual basis. ***The report shall include information concerning activities of subsidiaries, associates, joint ventures, permanent establishments and other trading arrangements to the extent that they are consolidated in the annual financial statements of the undertaking or entity in question. The report shall form part of the notes to the financial statements.***

Or. en

Justification

The publication of payments made to governments and certain contextual information should not be limited to the extractive industry and the logging of primary forests because the effects of enhanced transparency would be beneficial in any sector. Moreover, the reports should be part of the notes to the financial statements, thereby improving the accessibility and reliability of the data and avoiding the need for undertakings to make arrangements for auditing and publishing the reports separately.

Amendment 7

Proposal for a directive

Article 38 – paragraph 1 – introductory wording

Text proposed by the Commission

1. The report shall specify the following
***when material to the recipient
government.***

Amendment

1. The report shall specify the following:

Or. en

Amendment 8

Proposal for a directive

Article 38 – paragraph 1 – point c

Text proposed by the Commission

(c) where those payments have been attributed to a specific project the amount per type of payment, including payments in kind, made for each such project within a financial year, and the total amount of payments for each such project.

Amendment

(c) for undertakings active in the extractive industry and the logging of primary forests and subject to the materiality threshold defined in paragraph 1a, where those payments have been attributed to a specific project, the amount per type of payment, including payments in kind, made for each such project within a financial year, and the total amount of payments for each such project;

Or. en

Justification

Project-by-project reporting should be limited to payments to governments made by undertakings active in the extractive industry and the logging of primary forests.

Amendment 9

Proposal for a directive

Article 38 – paragraph 1 – point c a (new)

Text proposed by the Commission

Amendment

(ca) net turnover broken down by main categories of activity;

Or. en

Justification

This additional information is important to contextualise the information on payments made to government in order to compare undertakings' tax payments with their economic activity, which will enable the general public and tax authorities to better evaluate the undertakings' tax payments across different jurisdictions.

Amendment 10

Proposal for a directive

Article 38 – paragraph 1 – point c b (new)

Text proposed by the Commission

Amendment

(cb) production volumes broken down by main categories of activity;

Or. en

Justification

This additional information is important to contextualise the information on payments made to government in order to compare undertakings' tax payments with their economic activity, which will enable the general public and tax authorities to better evaluate the undertakings' tax payments across different jurisdictions.

Amendment 11

Proposal for a directive

Article 38 – paragraph 1 – point c c (new)

Text proposed by the Commission

Amendment

(cc) production cost with its associated

employee count;

Or. en

Justification

This additional information is important to contextualise the information on payments made to government in order to compare undertakings' tax payments with their economic activity, which will enable the general public and tax authorities to better evaluate the undertakings' tax payments across different jurisdictions.

Amendment 12

Proposal for a directive

Article 38 – paragraph 1 – point c d (new)

Text proposed by the Commission

Amendment

(cd) total cash cost of operations;

Or. en

Justification

This additional information is important to contextualise the information on payments made to government in order to compare undertakings' tax payments with their economic activity, which will enable the general public and tax authorities to better evaluate the undertakings' tax payments across different jurisdictions.

Amendment 13

Proposal for a directive

Article 38 – paragraph 1 – point c e (new)

Text proposed by the Commission

Amendment

***(ce) fixed production assets at year-end
with associated accumulated depreciation;***

Or. en

Justification

This additional information is important to contextualise the information on payments made to government in order to compare undertakings' tax payments with their economic activity, which will enable the general public and tax authorities to better evaluate the undertakings'

tax payments across different jurisdictions.

Amendment 14

Proposal for a directive

Article 38 – paragraph 1 – point c f (new)

Text proposed by the Commission

Amendment

(cf) net profit and loss before tax with associated cash and deferred tax on an accrual basis.

Or. en

Justification

This additional information is important to contextualise the information on payments made to government in order to compare undertakings' tax payments with their economic activity, which will enable the general public and tax authorities to better evaluate the undertakings' tax payments across different jurisdictions.

Amendment 15

Proposal for a directive

Article 38 – paragraph 1 a (new)

Text proposed by the Commission

Amendment

1a. The information referred to in paragraph 1 shall be disclosed on a country basis except for that referred to in point (c), which shall be disclosed on a project basis provided the total payments attributed to a specific project exceed EUR 100 000.

Or. en

Justification

The obligation for undertakings active in the extractive industry and the logging of primary forests to report payments on a project-by-project basis should be limited to payments that are material to the recipient government. Bearing in mind that many of the recipient governments in question will be local and national authorities in developing countries, the materiality threshold should be defined as EUR 100 000.

Amendment 16

Proposal for a directive

Article 38 – paragraph 2 – point b

Text proposed by the Commission

(b) taxes on profits;

Amendment

(b) taxes on profits ***and the effective tax rate applied;***

Or. en

Amendment 17

Proposal for a directive

Article 38 – paragraph 2 – point f a (new)

Text proposed by the Commission

Amendment

(fa) payments to state security forces for security services;

Or. en

Justification

The use of state security forces for corporate operations, in particular in the context of extractive activities, is a key area of risk for investors and affected communities. The disclosure of payments to governments should therefore include the payments for state security forces.

Amendment 18

Proposal for a directive

Article 38 – paragraph 3

Text proposed by the Commission

Amendment

3. Where payments in kind are made to a government, they shall be reported in value ***or*** in volume. Where they are reported in terms of value, supporting notes shall be provided to explain how their value has

3. Where payments in kind are made to a government, they shall be reported in value ***and*** in volume. Where they are reported in terms of value, supporting notes shall be provided to explain how their value has

been determined.

been determined.

Or. en

Amendment 19

Proposal for a directive Article 38 – paragraph 4

Text proposed by the Commission

Amendment

4. The Commission shall be empowered to adopt delegated acts in accordance with Article 42 in order to specify the concept of materiality of payments. **deleted**

Or. en

Justification

The definition of materiality is crucial for the effectiveness of the disclosure requirements and should therefore be defined by the legislator in the directive itself rather than by the Commission in a delegated act. This is done in the proposed paragraph 1a (new) of article 38.

Amendment 20

Proposal for a directive Article 38 – paragraph 5

Text proposed by the Commission

Amendment

5. The report shall exclude any type of payments made to a government in a country where the public disclosure of this type of payment is clearly prohibited by the criminal legislation of that country. In such cases the undertaking shall state that it has not reported payments in accordance with paragraphs 1 to 3, and shall disclose the name of the government concerned. **deleted**

Justification

Such an exemption clause could perversely incentivise certain governments to pass opacity laws outlawing disclosure, which could lead to less transparency in some countries compared to the status quo. The exemption clause should therefore be deleted.

Amendment 21

Proposal for a directive
Article 39 – paragraph 1

Text proposed by the Commission

1. A Member State shall require any large undertaking or any public interest entity ***active in the extractive industry or the logging of primary forests and*** governed by its national law to draw up a consolidated report on payments to governments in accordance with Articles 37 and 38 if that parent undertaking is under the obligation to prepare consolidated financial statements as laid down in Article 23(1) to 23(6) of this Directive.

Amendment

1. A Member State shall require any large undertaking or any public interest entity governed by its national law to draw up a consolidated report on payments to governments in accordance with Articles 37 and 38 if that parent undertaking is under the obligation to prepare consolidated financial statements as laid down in Article 23(1) to 23(6) of this Directive.

Amendment 22

Proposal for a directive
Article 41

Text proposed by the Commission

The Commission shall review and report on the implementation and effectiveness of this Chapter, in particular as regards the scope of the reporting obligations and the modalities of the reporting on a project basis. The review should also take into account international developments and

Amendment

The Commission shall review and report on the implementation and effectiveness of this Chapter, in particular as regards the scope of the reporting obligations and the modalities of the reporting on a project basis. The review should also take into account international developments and

consider the effects on competitiveness and security of energy supply. It should be completed at the latest **five** years after the date of entry into force of this Directive. The report shall be submitted to the European Parliament and the Council, together with a legislative proposal, if appropriate.

consider the effects on competitiveness and security of energy supply. It ***should also consider whether the reporting obligations for undertakings which are active in the extractive industry or logging of primary forests should be extended to certain other industries, including in particular fisheries. The review*** should be completed at the latest **four** years after the date of entry into force of this Directive. The report shall be submitted to the European Parliament and the Council, together with a legislative proposal, if appropriate.

Or. en