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Scottish Catholic International
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United Nations Association of
the UK
World Vision International

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To: Cabinet Office, transparencystrategy@cabinetoffice.gov.uk

Cc: b.worthy@bbk.ac.uk; opengovuk@opengovernment.org.uk

Subject: Civil society consultation response to Open Government Partnership National Action Plan 2013-15: mid-term self-assessment pre-final report (<https://www.gov.uk/government/consultations/open-government-partnership-national-action-plan-2013-to-2015-mid-term-assessment>)

From: Publish What You Pay UK, on behalf of CAFOD, Christian Aid, Global Witness, ONE, Open Knowledge Foundation, OpenCorporates, Natural Resource Governance Institute (formerly Revenue Watch Institute), Tearfund, Transparency International UK

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NAP Commitment 21

Thank you for this opportunity to comment on the pre-final version of the UK's OGP NAP mid-term self-assessment report.

We focus this civil society response on the UK's NAP Commitment 21: "The UK government will implement and internationally champion a global standard of financial transparency and accountability in the extractive industries (oil, gas and mining) on the part of governments and companies, in line with the principles in the G8 Open Data Charter."

CSO have enthusiastically welcomed the UK's early implementation of the EU Accounting and Transparency Directives and its prompt implementation of the EITI, alongside application of open data principles, as signs that the UK is leading by example and demonstrating strong commitment to global standards of extractives transparency.

CSOs, however, have two major concerns about current UK implementation of Commitment 21, which we have raised a number of times with Government Ministers and officials yet so far without satisfactory resolution. We summarise these concerns below and propose language whereby the final version of the self-assessment report can constructively acknowledge the two areas of civil society concern expressed in this response.

Milestone 4: Industry guidance

Milestone 4 of Commitment 21 refers to accompanying guidance for UK-registered extractive companies on how to publish their payment data. This guidance is being prepared by and on behalf of the International Association of Oil and Gas Producers and the International Council on Mining and Metals. The Government has publicly stated that it “continues to encourage industry and civil society to work together to produce guidance for companies”,¹ and that “Industry and civil society are working together” to create this guidance.²

The reality of the promised industry–civil society collaboration to produce this guidance has, however, been very problematic, despite a public consultation stage. Crucially, three elements in the current version of the industry guidance are highly questionable. Industry has refused to modify these elements despite civil society concerns shared with both industry and Government.

Legal opinion obtained by civil society from K.P.E. Lasok QC, a leading EU law specialist and Head of Monckton Chambers, states that the guidance in these particular respects is “inaccurate”, “incorrect”, without “legal basis”, “highly unsatisfactory ... to the extent of being positively misleading”, “not mandated by either the 2014 Regulations or the Directive”, “a discreet indicator as to how (in the view of the authors of the Guidance) the 2014 Regulations may be circumvented”, “misleading and wrong” and that “companies that relied on it could well be led into error ... [and] would be in breach of the regulations”. (Legal opinion available on request.)

Moreover, our legal opinion states with respect to one element in the guidance: “It would not be lawful or appropriate for [the Government] to support in any way, or appear to support, guidance that does not satisfy the requirements of the Directive. That would potentially involve a failure to achieve the result intended by the Directive (contrary to the Directive and to Article 288 of the TFEU) and a breach of Article 4(3) of the TEU, exposing the United Kingdom to infringement proceedings commenced by the Commission.” (Legal opinion available on request.)

With respect to the two other elements in the guidance about which we are concerned, the legal opinion states: “In my view, the Guidance is inaccurate and misleading. In those circumstances, it would be unwise and inappropriate for the Guidance to be endorsed by [the Government]. If the Guidance remains as something that has been drawn up by industry and has not received the benediction of BIS, there is no commitment by the UK Government to the errors contained in the Guidance. That means that the Guidance does not, in itself, expose the UK to infringement proceedings and should not have any effect on BIS' ability to prosecute breaches of the Regulations. The position would be different if the Guidance were endorsed by BIS.” (Legal opinion available on request.)

It is deeply unsatisfactory to civil society that the Government has permitted the guidance to be on the verge of being published, possibly with a Government welcome, while these elements remain part of it, with so little time remaining for the current Coalition Government to resolve matters.

Milestone 7: Open and accessible data

It is Government policy, set out in Milestone 7, that in 2016 “***UK listed*** and UK registered extractive companies will start to publish data under the EU Directives in an open and accessible format” (emphasis added). While BIS and Companies House are moving forward steadily in developing a reporting schema and output format for UK registered companies to meet this commitment, there has been no proper

¹ Department for Business, Innovation and Skills (BIS), UK Implementation of the EU Accounting Directive, Chapter 10: Extractive industries reporting - Government response to consultation, August 2014, para 10, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/343599/bis-14-1006-eu-accounting-directive-implementation-extractive-industries-reporting-response.pdf

² BIS, Explanatory Memorandum to the Reports on Payments to Governments Regulations 2014, 2014 No. 3209, para 9, <http://www.legislation.gov.uk/ukxi/2014/3209/memorandum/contents>

indication from HM Treasury and the Financial Conduct Authority that they will make the same arrangements for UK listed companies. Indeed, the FCA’s official position is that it “will not be imposing a prescribed reporting format at this time”.³

The Government has recognised the importance of open and machine readable data and has committed to that “principles of open data ... which will be applied to extractives’ data”.⁴

While there have been informal indications that HM Treasury and the FCA are looking into this matter, civil society has major misgivings that some branches of the Government may not implement Government policy on open extractives data. This again is deeply unsatisfactory.

Concluding remarks

The above two concerns relate to the effective implementation of Government policy. CSOs consider that the final published version of the Government’s mid-term self-assessment report should include an explicit – if brief – mention of both matters.

We would propose the following language be inserted under “Extractives transparency” on page 11 of the mid-term self-assessment (following the sentence “The UK is the first EU member state to implement the directives, again demonstrating the standard we are setting internationally.”):

“Civil society has expressed concerns about two aspects of UK implementation of the directives – industry reporting guidance and the application of open data principles to reporting by UK listed companies – and the government commits to working with civil society to resolve these matters.”

³ 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.

⁴ Open Government Partnership UK National Action Plan 2013 to 2015, page 49.