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Accounting Law in Practice: Compliance, Consistency and Substance Focusing on the UK's Implementation of EU Extractive Industry Country by Country Reporting of Government Payments to Governments

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ACCOUNTING LAW IN PRACTICE: COMPLIANCE, CONSISTENCY AND SUBSTANCE FOCUSING ON THE UK'S IMPLEMENTATION OF EU EXTRACTIVE INDUSTRY COUNTRY BY COUNTRY REPORTING OF CORPORATE PAYMENTS TO GOVERNMENTS

ABSTRACT

The passing into EU Law of a requirement that all companies domiciled in member states or listed on EU stock exchanges should publish a Report of Payments to Governments on the face of it is a victory for the civil society organizations long campaigning for the attendant increased transparency and accountability, a step towards better conditions and possibilities for many of the world's poor. But it cannot be taken for granted. It was passed with a condition that it be reviewed (at both member state level, where a review can feed into the federal level review, and at the level of the EU), which is an opportunity to better it or a threat to reverse positive potentialities. The UK Brexit vote adds some uncertainty regarding the future of the law in the UK. And studies of manifestations of practices such as accounting and auditing (often intersecting with the law) caution against too much optimism as to their straightforward effectiveness. With a view to understanding this particular law in practice, so that it be strengthened and better function in line with its intended aims, we explore processes of its construction and early adoption in the UK. In a preliminary analysis, we elaborate how interpretations of the Law within the Extractives Industry run counter to the spirit or substance of the law and give rise to different and apparently problematic translations of the law into practice. Reflecting on our analysis, we make some recommendations as to ways forward.

ACCOUNTING LAW IN PRACTICE: A STUDY OF COMPLIANCE, CONSISTENCY AND SUBSTANCE FOCUSING UPON EXTRACTIVE INDUSTRY COUNTRY BY COUNTRY REPORTING OF CORPORATE PAYMENTS TO GOVERNMENTS

INTRODUCTION

Accounting and auditing are often rhetorically supported as *professional* practices serving the *public interest*. And the more evident intersection of accounting and auditing manifestations with *the law* helps to signpost their regulatory, as well as their ethical, character – a regulatory dimension which, in any case, is quite pervasive in their mobilization and functioning. Such dimensions of accounting and auditing may be understood as indicating at least their potential to contribute to well-being. Here in introducing our study we bring out some of the anxieties and doubts that critical appreciations of manifestations in practice of accounting and auditing have articulated. We need to take these concerns seriously and we try to do so in our subsequent analysis. We go on, however, to affirm a commitment to the positive potential of broadly conceived notions of accounting and auditing practices (in interaction with the law) in advancing progressive projects for well-being.

Doubts and anxieties

Manifestations of accounting and auditing are not in the nature of straightforward phenomena. Such manifestations, as indeed manifestations of the law, are always manifestations *in a context*. While abstract principles may be employed to provide a rationale for their mobilization, construction, extension or modification, these phenomena always occur in a context of considerable complexity that is difficult to grasp. And, in practice, accounting and auditing may follow and engender complex and ambivalent trajectories, with consequences that are to an extent different from the intended and anticipated.

Theoretical and empirical research provides insights into this problematic. We can articulate some of the key insights of such research in reflecting upon efforts to ostensibly increase transparency, enhance accountability and impact behaviour to better well-being through various mechanisms of accounting and auditing (the focus of our subsequent analysis). We should initially acknowledge that it is even the case that such efforts may from a very early stage become more in the nature of tokenism, or even of fraud, than being substantially genuine. More generally, something less than an unambiguously positive impact may follow such efforts in practice (see Peters, 1993; Power, 1997; Gallhofer *et al.*, 2015).

Competing and conflicting interests may to varying degrees capture a nascent or introduced practice of accounting or auditing. These competing and conflicting interests may include interests scarcely aligned to the promotion of social well-being

that may subvert better intentions. Further, it has been noted that a disclosure in the *public realm* cannot be easily restricted in terms of who uses it and for what purposes (see Stiglitz) – something that might facilitate the countering of more negative regulatory phenomena (see Gallhofer and Haslam, 2003, 2007) but also the countering, undermining and displacing of the more positive. And those ostensibly being rendered visible and held to account to some extent may capture or modify accounting and auditing mechanisms (in the phenomenon, for instance, referred to as ‘regulatory capture’). Law-makers and standard-setters may in effect lean towards the interests of particular constituencies (including the constituencies ostensibly being rendered visible and held to account). This could reflect a perceived overlapping of interests between the regulator and the regulated as considered by the regulator from a broader perspective (e.g. a perception giving weight to perceived national, local and/or powerful economic interests). The accounting and auditing practices that emerge may displace alternative practices and this could to some extent undermine better intentions. Manifest accounting and auditing practices may be bolstered if reflecting professional expertise and language and if reflecting legal authority. This may render the practices difficult to understand in the public realm including by the ostensibly intended user constituencies. It may render the practices difficult to challenge. On the other hand, the functioning of such practices may give rise to a phenomenon whereby key constituents assume all is in order and do not critically question that which is ostensibly accounted for or audited. The danger is that accounting and auditing practices may be relied upon even where the assurances they suggest may actually be somewhat illusory. Wider critical investigation may be displaced. Accounting and auditing in practice may amount to ‘tick box’ exercises that detach too much from the substance or spirit of their mobilization. Where accounting and auditing practices are found wanting in relation to financial failings or crises or more general levels of poor performance, it may be that so strong is their normative and underlying image that the proposed solution or way forward (often followed) is *more* accounting and auditing - albeit that where accounting and auditing are themselves directly tainted by something akin to scandal that might at least more likely lead to *some* questioning and reforming (perhaps temporary) of these practices even where they are extended (see Gallhofer and Haslam, 1991; Power, 1997).

And initiatives concerned to mobilize accounting or auditing are not without costs. Aside from the more obvious direct costs involved there are possible impacts, e.g., on socio-economic motivations and activities. Costs may here fall disproportionately on particular types of companies or countries.

Affirmation and illustration (the potential of accounting and auditing in enhancing transparency and accountability for the world’s poor)

None of the above insights (seen as doubts and anxieties) suggest – even if it were possible – that getting rid of, or not mobilizing, accounting and auditing (and the law) are better ways forward! We might note at this juncture, however, that aspects of the above argumentation (insights in the form of doubts and anxieties, which might be

exaggerated in policy discourse) may be used to try to negate even what we may see as more clearly progressive accounting and auditing developments. The insights should rather properly point us to the need to critically assess particular manifestations of accounting and auditing in practice with great care, to explore the detail in order to better assess and work out ways forward in line with the desired aim.

In this study we are concerned to explore a particular manifestation of accounting practice that is also a legal phenomenon. Further, this accounting law was ostensibly introduced, quite clearly, to increase transparency, enhance accountability and impact behaviour to better well-being. We see this as having great positive potential, with the European Commission (2013) specifically announcing the benefit of this legislation to stakeholders as enabling:

Communities to better demand that government accounts for how the money has been spent locally [and] civil society will be in a position to question whether the contracts entered into between government and extractive and logging companies had delivered adequate value to society and government.

And doing so by implementing the EU rules on:

... country-by-country reporting ... where businesses in the extractive and logging industries have to publish their payments to governments relating to the exploitation of natural resources. (European commission, 2016)

Our focus is the UK Department of Business, Innovation and Skills' (BIS') transposition into UK law of an aspect of the EU Accounting Directive, specifically Chapter 10 'Report on Payments to Government' relating to undertakings active in the extractive industries (Official Journal of the European Union, 2013). The resulting UK 'Report on Payments to Governments Regulation (2014) came into force on 1st of December, 2014, and mandates for certain undertakings active in upstream oil, gas and mining extraction or primary logging industries to publish reports on payments made to governments. According to the regulations, companies domiciled or listed in UK are required to disclose certain payments to governments on a country-by-country or project-by-project basis. The UK here is an early implementer of EU law, requiring disclosure in relation to the financial year starting on or after 1st January 2015. In substance this appears to be a simple and straightforward legislative requirement. Reporting entities are required in law to disclose payments to governments, identifying the government and the country to, 'whether in money or in kind' according to several different payment types, as follow:

- Production entitlements
- Taxes levied on income, production or profits
- Royalties
- Dividends
- Signature, discovery and production bonuses

- Fees and concessions (licence, rental, entry)
- Payments for infrastructure improvements

But reflecting on the insights elaborated above, we seek to explore this accounting law in practice - with a view to better understanding it and strengthening its alignment to its ostensibly intended rationale.

The structure of our paper is as follows: appreciating the context of the accounting manifestation focused upon; research method for the subsequent analysis; exploration of the nature of the law and some insights into how the law is being interpreted through an analysis of industry views and guidelines and a preliminary analysis of practices; discussion and analysis; concluding comments.

APPRECIATING THE CONTEXT OF THE ACCOUNTING LAW FOCUSED UPON

The resource curse phenomenon is one aspect of the wider issue of poverty and under-development across the globe. In relation to the wider issue, it is arguably difficult not to be shocked about why today we still have problems of a very basic nature to resolve. But many surely find especially shocking the phenomenon of the resource curse, whereby countries that are rich in extractable natural resources somehow find themselves even worse off as a result. And as such the resource curse is only an extreme instance of a more general phenomenon of poor performance in relation to what is expected of a country finding itself more richly endowed with extractable natural resources.

Numerous research studies have explored this problematic (see, for instance, Dollar and Easterly, 1999; Gary and Karl, 2003; Ferguson, 2005; Craig and Porter, 2006; Yates, 2006; Chang, 2007; Humphreys *et al.*, 2007; Moss, 2007; Zafar, 2007; Collier, 2008; Woods, 2008; Yergin, 2008; Asamoah, 2009; Kolstad and Søreide, 2009; Southall and Melber, 2009; Breisinger *et al.*, 2010; Gillies, 2010; Kelley, 2011; Cunguara and Hanlon, 2012; Acemoglu and Robinson, 2013; Dowden, 2014; Burgis, 2015). And in articulating suggested ways forward, several have called for greater accountability and transparency. At the same time, legal and accounting practicalities of such calls have until relatively recently (see for example Crawford, 2016) not been much appreciated or elaborated.

The calls for greater accountability and transparency (or openness) here focus substantively on a few key areas. There is an interest in making clearer the socio-economic impact of extractive activities carried out in the relatively resource rich countries upon these countries themselves. More specifically, in relation to this matter, there is an interest in disclosing how much money is received, arising from such activities, directly by every relatively resource rich country's government – and in making visible by whom the payments (in forms such as corporate taxes, fees, license payments and royalties) are made. And, also more specifically and following on from the latter interest, there is an interest in making visible how these revenues into government coffers are then spent by each of these governments. Thus, it is intended

that a light is cast on the resource curse and aspects of the performance of relatively resource rich countries, on the financial sums paid directly by corporations to governments of these countries and on the spending of these sums by these governments. Such transparency is intended to potentially raise further issues including in the public domain that would in effect encompass issues of accountability (for instance, if it were found that direct payments made by corporations were scant or the spending by government was controversial in terms of its size and/or character) (Gallhofer and Haslam, 2007). While such transparency might be less than easily achieved and in practice may be imperfect, it is deemed by many commentators to be quite a bit better than the serious lack of transparency that has constrained discourse and that would threaten to do so in future in the absence of strong regulatory requirements.

A prominent campaigner in relation to seeking greater accountability and transparency here, especially in the first of the last two mentioned specific areas, has been Publish What You Pay (PWYP), a campaigner that has formed a global coalition of civil society organizations that are 'united in their call for an open and accountable extractive sector' and that has attracted the support of George Soros and The Open Society Foundation. PWYP is committed to pursuing:

...a world where all citizens benefit from their natural resources, today and tomorrow...a more transparent and accountable extractive sector, that enables citizens to have a say over whether their resources are extracted, how they are extracted and how their extractive revenues are spent (PWYP Objectives, 2015).

PWYP advocate transparent, country-by-country reporting of payments to governments as a crucial tool for stakeholders concerned to assess the impact of extractive industry operations on the community and well-being of the relatively richly resource endowed countries, for example: Angola, Indonesia, Kazakhstan, Venezuela, Nigeria, Algeria, Sudan, Equatorial Guinea. And PWYP have over relatively recent times made strides towards facing up to the legal and accounting practicalities of the vision of enhanced accountability and transparency (PWYP & Global Witness, 2005; Oranje & Parham, 2009). Taking advice from and in collaboration with those with expertise in the law and accounting, PWYP have sought to influence prominent accounting policy-makers throughout the world (notably the International Accounting Standards Board, IASB, and the U.S. Financial Accounting Standards Board, FASB), towards the more detailed and disaggregated disclosures that would help realize the vision. In relation to the IASB, PWYP were active especially in relation to two accounting standards: International Financial Reporting Standard 6 (IFRS6), which focuses upon accounting for extractive industries, and IFRS8, which focuses upon segment reporting. PWYP have also sought to influence stock exchanges and governments in relation to their aims (Gallhofer and Haslam, 2007).

PWYP have had some impact in the domains of their engagement. In the case of accounting policy-making, a detailed appreciation of the case of IFRS8 bears witness to this, as the analysis of Gallhofer and Haslam (2007) suggests. The alternative

accounting standard for IFRS8 that was submitted (in accordance with IASB submission criteria, which required submission of comments on proposed standards or changes thereto to be from the investor perspective of the IASB's framework) by PWYP and supported by some three hundred members of their coalition (including charities such as Oxfam and Save the Children), received substantial publicity, with *The Guardian*, *The Financial Times* and *Accountancy Age* lending support to the initiative and George Soros making explicit that as an investor he supported the PWYP formulated standard. And two members of the IASB (a significant number) went on record to express their view that the PWYP's desired changes were 'decision useful' for investors. Arguably, the political opportunity structure of IASB's due process was ultimately hostile to PWYP's campaign (Crawford, 2016). While the IASB nevertheless decided to throw out the PWYP proposal in favour of a revised standard that was a most permissive 'standard' - deemed by the IASB to assist the IASB's aims of keeping in tandem with the FASB - the IASB acknowledged that further consideration should be given to the issue, set up a process and increased interaction with the United Nations and the International Financial Institutions. Gallhofer and Haslam (2007) report that some IASB members understood the IASB's decision to be one of 'realpolitik' and that some expressed the hope that legislation might intervene in favour of the desired disaggregated disclosures.

One aspect of the relationship between international accounting standards and the law indicates a further area of PWYP influence. From 2005, the EU required all companies listed on the stock exchanges of its member countries to comply with the IASB's standards. In turn, this meant that the EU had to ratify any new IASB standard for prior to it being mandated for member states. Often a matter of rubber-stamping, this was not the case with IFRS8 (Crawford et al., 2010; Crawford et al., 2014). The forces of the PWYP combined with prominent investment bodies which saw the revised standard as a backward step, prompting Members of the European Parliament (MEPs) to require the European Commission to carry out a Europe-specific potential effects assessment before authorising endorsement (European Commission, 2007; Crawford et al., 2014). While IFRS8 was subsequently ratified, this event helped to increase pressure for legislation at the EU level to take cognisance of the needs of user and civil society; in the case of IFRS8, the endorsement instrument specifically called for relevant information to be disclosed on a country-by-country basis (European Parliament, 2007; Crawford et al., 2010). Meanwhile, lobbying activity in the United States had led to provisions being inserted by the Obama administration in the Dodd-Frank Act (at section 1504), to the effect that the desired disaggregated disclosures would be required of companies listing in the United States (Dodd-Frank, 2010). Also, the OECD proposed country by country reporting to tax authorities, as part of its Base Erosion and Profit Shifting (BEPS) initiative, which comes into effect in the UK from 1 January 2016.

The US legislation has been disappointing in practice. The corporate sector took legal action to arrest its application, with the powerful American Petroleum Institute bringing a lawsuit (Ross, 2015) and the US courts effectively left a politically constrained Obama administration failing to re-enforce the original law (see Baudot and Cooper, 2016). The EU initiative, already implemented in the UK, on the face of it constitutes

the most important success of the campaigners at the time of writing. But what can we report of its construction and mobilization in practice?

RESEARCH METHOD

We here conduct an analysis of and reflect upon the construction and interpretation of this accounting law in the UK, considering industry views and the emergence of industry guidelines. In particular, this document analysis included interpreting the International Association of Oil and Gas Producers (IOGP) guidance for extractive companies to meet the requirements of the UK Regulations (IOGP, 2016), together with comment letters submitted in responses to BIS's consultation over the UK's implementation of EU Accounting Directive Chapter 10 (BIS, 2014a; BIS, 2014b). We also conduct and reflect upon a preliminary analysis of early implementations of the law in the UK. Our analysis is enhanced and deepened by the findings of an interview with the lawyer, Paul Lasok, who has counselled civil society on early interpretations of this accounting law.

Our philosophy of method is consistent with the middle-range perspective of Laughlin (1995) in that (aside from balance in terms of the philosophical assumptions we bring to research and our critical stance) we have a prior theoretical position (reflecting our worry that the potential of the accounting law may be undermined and the likelihood that the law will need to be defended and strengthened) but we are also open to being informed by the field.

RESEARCH FINDINGS

Aspects of the accounting law focused upon

The UK law was substantially meant to be a direct translation of the EU directive. Hence, issues in the drafting of the law may be mainly located at the EU level, which is beyond the scope of this particular study (but is being considered in relation to a project we have in process – there was substantial industry lobbying and interaction with industry at this stage). At the same time we were concerned to assess whether there was anything problematic in the translation (so far we have not found anything that appears to be an issue here – although there is the issue that the UK likes to draft laws in a UK 'style').

There are some observations that one can quite readily make on reading the law and the way it was introduced, although these observations gain greater weight and support when, for the UK case, industry views and emergent guidelines are consulted and even more so when one analyses early implementation of the law. One is that one might have the view that the language of the law is not as simple or straightforward as one might have assumed it would be given the basic principle it is ostensibly trying to put into the law. Another is the inclusion of size criteria, e.g. concerning the size of payments (companies domiciled or listed in the EU are required to disclose all payments *greater or equal to 100,000 Euros or the equivalent* made to governments relating to oil, gas, mining and logging projects) – which may make avoidance and evasion of the law easier. Another is the absence of any provision requiring that the Report of Payments to Government be audited. Another is that the law would be subject to a review (to be conducted early in the life of the legislation) at the level of

each member state and, more importantly, at the EU level, which would assess its usefulness. All of these points may already be developed into a critical appreciation of the law and the first two mentioned points are already suggestive of how the law might be improved.

An interesting aspect of the initial EU Law, which was appreciated by Paul Lasok QC who counselled civil society on the UK transposed law, was the way in which 'substantially interconnected' is explained in the EU Law (Article 41). Basically, it is not - which means it is a matter of legal interpretation – and Counsel advises a range of interpretations are possible, from narrow to broad, but there is a question of reflecting the spirit or substance of the Directive. Rather, it is illustrated in the pre-ambule to the Directive (it is in Recital 45). This may reflect that the term was controversial – in the interests of getting the Directive passed within a parliamentary timeframe, putting something in the pre-ambule may have been seen as something of a compromise. Interestingly, this illustration from Recital 45 has been taken into the main body of the UK accounting law at pp. 4-5 (which actually raises questions about this aspect of the UK law – a better approach would have been to preface the wording with 'substantial intervention *encompasses*').

Comments submitted as the law was in process

Let us turn, however, to insights from practice beyond the actual manifestation of the law. The BIS, which invited comment on a discussion paper 'UK implementation of the EU Accounting Directive: Chapter 10: Extractive industries reporting', received submissions from industry in relation to the proposed law (available at www.gov.uk/bis). This reflected a very limited amount of autonomy that the UK government had in transposing the law – such as the particular character of the penalties and the precise timing of the introduction of the law. It was arguably also a way of getting a sense of industry views. In total, 31 comment letters were received from: 14 extractive companies; 3 industry representative groups; 2 professional bodies; 2 Big4 accounting firms, 9 civil society organisations and 1 all party parliamentary group. It is helpful to review these submitted views especially in relation to the subsequent production of industry guidance.

Some of the Big 4 accountancy firms sent in views. PricewaterhouseCoopers (PwC), while prefacing their views by stating that they have their own commitment to corporate transparency in relation to taxation payments, expressed a concern that 'mandatory public disclosure requirements can become a "tick box" exercise rather than enabling a clear articulation of the information which is useful to the user'. They also refer to the 'additional costs involved' (costs which 'should not be underestimated'). And they refer to 'the risk of a disproportionate burden being placed on UK registered or listed entities if implementation results in inconsistency internationally'. This suggests that if some UK companies have to implement something that equivalent companies in other countries do not have to this will be very problematic. And they cite in this context the 'reassessment' of the implementation of s. 1504 of Dodd-Frank after the lawsuit. They thus stress that '[i]t...is important that the implementation guidance is drafted in a way that is at least consistent with other jurisdictions and does not place a disproportionate burden on UK registered/listed entities'. And they point to the 'potential for adverse

consequences for companies of putting commercially sensitive data into the public domain'. PwC also agreed with the BIS' suggestion that industry should be encouraged to lead in the production of best practice guidance in relation to the publication of the reports. And PwC refer to one aspect of complexity: '...clarity may be required for an organisation listed in more than one jurisdiction and if there is a 'primary' jurisdiction, when determining if the organisation is in the scope of the regulations'. Here, they raise the prospect that a company with a 'primary' listing in Japan, for instance, would fall outside of the regulations.

Companies from the extractives industry reported in comments concern about a number of factors. They expressed concern about the basic and immediate cost of compliance (many requested more time). This included specifically the cost of the electronic filing that the law required (with a view to making the reports user friendly). They often reported a view that the proposed penalties (similar to those related to failures to properly prepare and file the annual report and accounts – involving criminal liability for company directors and civil liability for companies) were too harsh and that leniency should be shown by government in the initial years of compliance. They preferred in some cases monetary penalties, leniency or no penalties (a number argued that reputational effects would be enough). Some argued that heavy penalties might deter companies and reduce foreign investment which might serve to promote anti-corruption business, economic reform and capacity building. Some referred to the negative prospects of reduced economic competitiveness, including as a result of finding themselves in conflict with host-government laws and confidentiality obligations. This indicates the challenge in the context of globalization of countering the race to the bottom in standards and laws globally or the preservation of corrupt and very unethical practices. Some companies sought to be excused from compliance by dint of conflict with host-government laws. But Counsel advises this is not permissible as per prior legal cases. Petrofac raised an interesting issue, requesting clear guidance including in areas 'such as whether or not interest and penalties associated with a payment should be included within the amount disclosed for that payment or should be itemised separately'. Many of the comments made by companies reflect views appearing in the text of the industry guidance (indicating communication between the companies and the industry association drawing up the guidelines).

The Guidelines of the International Association of Oil and Gas Producers

It was agreed early in the transposition process that industry representatives would draw up guidance to accompany the Regulations to further clarify companies' reporting obligations. The Industry Guidance that has come to be most influential was originally prepared by a working group of representatives of the International Council on Mining and Metals (ICMM) and the International Association of Oil and Gas Producers (IOGP, which became the author of the published guidance). The working group included representatives of major companies in the industry. The working group was referred to as an IOGP-ICMM-BIS implementation guidance working group, which indicates BIS' support for the idea of industry guidance. The BIS stopped short of actually standing behind the guidance. The guidance document reports that the BIS 'reviewed' the guidance. The guidance was provided to civil society representatives for feedback

but the latter expressed concern about consultation over the final draft, which they reported as being poor, and they were disappointed in any case by a relative failure to take into account their feedback.

The Industry Guidance includes interpretation of 'substantially interconnected' which has been criticised in Counsel legal opinion. The term 'substantially interconnected' allows a narrow set of circumstances in which companies can treat operations with multiple licenses or governing contracts as one 'project' for reporting purposes. It has been interpreted in the guidance in such a way as to arguably pave the way for practices that are against the spirit or a reasonable interpretation of the law. Companies might disingenuously aggregate payments in their reports to avoid providing project level data.

Further, the Industry Guidance states that payments made on behalf of participants in joint ventures by the operator should be reported by the operator not by the joint venture participant on whose behalf the payments are made. This approach again paves the way for practices that are against the spirit or a reasonable interpretation of the law. Companies might evade disclosure by adjusting the payment structure employed by their joint ventures. By this interpretation, if a joint venture project is operated by a company which is not subject to the EU Directive and the joint venture is structured so that payments are made by the operator on participants' behalf, no payments would be reported for the project (unless the reporting is done under another applicable reporting regime).

Furthermore, the Industry Guidance advises on reporting payments to state owned companies acting as field operator. The guidance states that disclosure is only required when payments that are in-scope (and satisfy the size criteria) are distinguishable from other costs. This could once more pave the way for practices that are against the spirit or a reasonable interpretation of the law.

The industry guidance (reflected in the comments also of the industry association Oil and Gas UK) refers to the need to establish a common reporting mechanism which 'is user-friendly, not overly-prescriptive and not over-engineered or over-designed – as this would create unnecessary cost'.

And the Industry Guidance includes a text (echoed by particular company comments, e.g. ExxonMobil and Petrofac, the latter including the text; 'This transparency initiative is intended to be for the benefit of the public and whilst we fully support the intentions, we feel that the nature of the penalties suggested is excessive and disproportionate to the legal obligations of company directors') that reads like an attempt to delimit the status of the Law: '[UK government] should recognise that the Chapter 10 payment reporting process is not intended to serve as a statutory, and therefore externally audited, financial procedure to be relied upon by investors and the City in the same way that statutory annual reports are, and that in fact the payment reporting process has entirely different objectives'. This problematic view contradicts the claims of PWYP who have often indicated that the transparency serves investors (as two members of the IASB agreed, see Gallhofer and Haslam, 2007, and as the BIS agree).

Early reporting manifestations from practice

In practice, early reporting by UK in-scope companies indicates practices that are deserving of further scrutiny (based on what we have found through a preliminary analysis). At the time of writing, over 70 companies had reported their payments to governments under the new regulations. However, the form and content of the report varied across our sample, from a statutory minimum spreadsheet uploaded to Companies House, to a separate pdf report, comprising statutory and some voluntary disclosures, available from the reporting entities website. There were also evident variations in the types of payments disclosed (Table 1). Our preliminary analysis of the 23 companies (at the time of writing) which had produced a pdf report showed that payment types of 'taxes levied' and 'fees' were reported most frequently. However, payments to governments in the form of dividends and bonuses are scarcely disclosed, although they may arguably be codified as different payment types (e.g. payments in kind).

In depth analysis of two companies indicated areas of non-compliance. Glencore disclosed that they make payments in kind but they have not complied with requirements to elaborate on explanation, valuation and volumes. Glencore also offered non-mandated disclosure of 'customs, import and export duties', and, although reconciled their total payments to governments to the amount disclosed in their Sustainability Report for 2015, there was no such reconciliation to disclosures made in their annual report and accounts. BP, while complying with many of the formal requirements of the law, relies on the IOGP guidance in stating: 'Payments made to governments in connection with joint ventures are included in the report and to the extent that BP makes the relevant payment. Typically...where BP is the operator of the joint venture'. A further quote from the BP report is: 'Where a state owned enterprise undertakes activities outside of its home jurisdiction, then it is not considered to be a government'. Further, it is not possible to reconcile the (non-audited) figures of the Report to Governments (although BP refers to its production of a 'limited independent assurance report') to the (audited) annual financial statements.

In their 'voluntary disclosures' BP and Glencore indicate that the Directive and Law could be increased in scope and cover more things. In their annual reports and accounts and sustainability reports they narrate a broader contribution to the socio-economic environments of the countries in which they operate. And specifically in its Report of Payments to Governments, BP states that they make a 'broader socio-economic contribution to countries in which we operate in addition to the payments that are required to be reported under the Regulations'. And the following quote from the BP Report is of interest in this regard: 'Payments made to governments that relate to trading, export (pipelines), refining and processing activities are not included in this Report as they are not within the scope of extractive industries as defined by the Regulations'. It is possible that consultation with the operations teams of these companies may give further insights into what might be reported (or how regulations might be better specified).

FURTHER DISCUSSION AND ANALYSIS (INCLUDING PRELIMINARY RECOMMENDATIONS)

Our preliminary analysis appears to be consistent with many of our prior positions. We regard the law to be reflecting a worthy aim. And we find that after the analysis we are seeking to enhance and improve the law. This is what we anticipated. Our priors were that it would be very difficult to introduce a substantive workable law that would reflect the aims of civil society. The arguments raised against the law by industry are reflective of the context of globalisation and of strong economic interests that might be perceived by influential actors to be key interests of corporates - and indeed governments. In respect of governments, the arguments are powerful at the level of the Nation State and the level of the European Union. So our initial question was why the EU had been persuaded to introduce the law. And, we also wondered why the UK had transposed the law early (earlier than much of industry had wanted if the comment letters are taken as evidence). The introduction of the law itself, for us, reflects good intentions – and enormous efforts - on the part of civil society lobbyists. And it also arguably reflects that these good intentions are to some extent shared by the key regulatory bodies involved. The international co-ordination (the initial provision in the Dodd-Frank legislation of the United States) was helpful here. It also reflected the substantive efforts of the civil society organizations. Perhaps the governments found some of the claims of industry exaggerated. Perhaps the UK government introduced the Law early (facilitating its own review later in 2017) so as to position itself for an input into the main review (the review at the EU level, expected in 2018).

But were the laws introduced modified by attempts at regulatory capture? Was it not the case that industry lobbying did impact the law? Is there a case for arguing that aspects of the law were more in the nature of token gestures? We do think that industry was concerned to influence the law (and in a way that reflected an interest that was different from openness and transparency, however much it was important economic interest and/or *realpolitik*) and that government was concerned to listen to the views of industry. Moreover, civil society was scarcely involved in a substantive and dialogic way in the consultation process. Yet while the laws could be written more clearly, we agree with Counsel that substantively they reflected the intended aims of enhancing transparency and accountability in the name of a significant number of the world's poor. Further, the BIS pulled back from a full endorsement of the industry guidelines. The latter guidelines, as we have suggested and as Counsel also suggests, do pave the way for practices that may be regarded as against the spirit of the law or against a reasonable interpretation of the law. We find that some early company adopting practices are worthy of further investigation in this respect (with some investigations in this respect being difficult). In this context, perhaps a key question is what happens in the case of non-compliance? Looking at the UK law it is of note that the Secretary of State or the Director of Public Prosecutions must agree to any prosecution brought. The Company Registrar can take action but again needs the support of the Secretary of State or the Director of Public Prosecutions. Here, we should also point out that many comments from industry stressed that the proposed penalties were too harsh and also appealed for leniency in the early days of the law's operation (and of course most commentaries from the industry had sought that the law be introduced in 2016, not as early as 2015). It is an offence to 'knowingly or recklessly' make a false report. The defence of arguing that the IOGP guidelines are being followed is clearly not the soundest but it may help in relation to 'knowingly and recklessly'. Another option for

civil society is, rather than trying to bring prosecution (or as well as this), seek to engage in dialogue more especially with those in government (at the EU level – especially the European Commission - and at the UK level) to indicate concerns about what is happening or what might happen. This might help add weight to any comments made by civil society and supporters in relation to the coming reviews. But here we may see indications of why practice is and will be disappointing in this area. Civil society are forewarned about these issues but will seek to use the transparency achieved to further their aims.

The following recommendations should be given consideration to strengthen the EU Directive and the UK Law.

- The notion of substantially interconnected should be clarified. The UK law should reflect the clarified meaning and not take something from the Directive's pre-amble into the main law. The clarified meaning of the law should ensure that practices that companies might be tempted to follow currently (as indicated above) should be explicitly outlawed.
- Companies falling under the UK law must disclose in-scope payments made on their behalf (by operators or other agents). When an in-scope payment is made by an operator on behalf of participants in the joint venture, participating companies in the joint venture should disclose at least their share of the relevant payment. Companies should have regard to underlying liability for the payment under local law.
- Proper legal provision should be made for an independent professional audit of the Report as part of the regulations.
- The size of payments criteria should be dropped as it may make evasion of the spirit of the law more feasible.
- In respect of payments the suggestion that they be distinguishable from other costs is an unreasonable interpretation but a revision of the Directive and the Law can make the position very explicitly clear.
- To clear up any doubt it should be clarified that there is no 'primary listing' exemption per se.
- There should be a clear procedure for challenging non-compliance that does not depend on the permission of the relevant Secretary of State or Director of Public Prosecutions and ideally a system of automatic penalties for non-compliance as reported by audit.
- It may be possible to expand the disclosures required (e.g. employee income taxes) and perform social audits of the impacts of the companies on their hosts. This should be considered.

CONCLUDING COMMENTS

Reflecting critical appreciation of practical manifestations of accounting and auditing, we were concerned here to understand better and assess the early operation of the accounting law transposed into the UK from the EU concerning reporting by companies on a country by country basis of payments to governments. We explored and assessed processes of construction of this accounting law and its early operation by focusing on its implementation in the UK (an early adopter). We were concerned to

better understand and assess this particular law in practice so that it might be strengthened and better function in line with its intended aims.

In a preliminary analysis, we elaborated how interpretations of the Law within the Extractives Industry run counter to the spirit or substance of the law. And we began to indicate how such interpretations give rise to different and apparently problematic translations of the Law into practice. Reflecting on our analysis, we make some recommendations as to ways forward in terms of advancing the Law..

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Table 1: Analysis of 23 companies' payments to governments

Mandatory Requirement	Have paid	Not paid any	Not mentioned	Aggregated with other items
Government to which payments made	19		4	
Total amount paid to each government	21		2	
Project level payments	17		6	
Production entitlements	8	12	3	
Taxes levied	22		1	
Royalties	TBC	TBC	TBC	
Dividends	1	12	10	
Bonuses	3	13	7	
Fees	19	1	1	2
Infrastructure improvements	12	8	2	1
Substance over form	Only one company used the term 'Substance', and detailed how this had been interpreted in line with JV payments to an operator (BP)			
Payments in kind	Two companies state value, volume and explanation (BP and ?) One company gives explanation but no value or volume (Glencore)			