

The following statement was made available on the EITI website on 2018.

1. The EITI Chair Fredrik Reinfeldt received a letter on 7 February ([attached](#)).
2. The EITI Chair Fredrik Reinfeldt makes the following statement:

“Companies supporting the EITI commit to the EITI Principles and to support EITI implementation. Reporting taxes is a fundamental requirement of EITI implementation. (See further EITI Standard [Requirement 4.1](#) headed “Comprehensive disclosure of taxes and revenues.”)

*From March 2014 - November 2017, the United States implemented the EITI. A number of US companies refused to report in accordance with the procedures developed by the US EITI, including several EITI supporting companies (**Chevron, ConocoPhillips, ExxonMobil, Hess and Noble Energy**).*

While it is not uncommon for companies to occasionally miss reporting deadlines, it is unprecedented that EITI supporting companies made a conscious decision not to report. It is serious when supporters of the EITI as a group undermine EITI implementation.

*The EITI does not have separate rules for countries, companies and civil society organisations represented on the EITI Board. The Articles of Association states that “The Board shall act in the best interest of the EITI Association at all times” (Article 12). It is disappointing that **Chevron and ExxonMobil**, represented on the Board, did not provide the leadership expected from them by EITI stakeholders.*

I intend to report to the Board and discuss this matter at the upcoming meeting on 28 June. I will not be recommending further action in addition to this statement. It has been suggested that the EITI Board should consider terminating these companies’ membership of the EITI Association.

I consider it to be better for the realisation of the EITI Principles that they remain supporters and members of the EITI Association. Jonas Moberg, EITI Executive Director, and I have been in contact with representatives for Chevron and ExxonMobil, the other companies that did not report and a number of those that signed the letter to me of 12 February. In those discussions, the commitment to support the EITI was reaffirmed. These companies have reported and participated actively and strongly in support of the EITI implementation in other countries. I note that events in the United States have not been repeated elsewhere.

I hope that all stakeholders can draw lessons from this situation and make sure that it does not happen again. The EITI Board recently [reaffirmed](#) that project level reporting is required for all EITI reports covering fiscal years ending on or after 31 December 2018. The EITI Standard emphasizes consistency with the United States Securities and Exchange Commission rules and the European Union requirements. The reaffirmation of this commitment highlights the importance of constructive dialogue between government, industry and civil society organisations. I urge all stakeholders to continue this work and to support the adoption of project level reporting globally.”

3. Fredrik based the above statement on the following background submitted by the Secretariat and by Jonas, acting in his capacity as Board Secretary.

Procedure

1. The EITI website states on the page “EITI grievance procedures - how to voice your concern”: “The EITI’s [governance](#) structure provides stakeholders with a number of ways to address possible grievances or raise concerns. The EITI takes decisions in

many different ways. Different decisions can be appealed in different ways.” Under the heading “Implementation and EITI multi-stakeholder groups”:

“The EITI requires effective multi-stakeholder oversight, including a functioning multi-stakeholder group ([overview to EITI Standard Requirement 1](#)). Issues related to implementation should therefore first be addressed to the multi-stakeholder group. “In summary, issues related to EITI implementation in a country should in the first instance be brought to the attention of the multi-stakeholder group of that country.”

In summary, in this case the failure to report taxes in the US was discussed on several occasions by the US-EITI multi-stakeholder group. Representatives for US-EITI expressed concerns that it would be demonstrated that the US-EITI would not be deemed to meet the EITI Standard’s reporting requirements to satisfactory level due to that a number of companies did not report their taxes.

Following the withdrawal from implementing the EITI, a number of civil society representatives wrote to Fredrik on 12 February.

Fredrik shared the letter with the Board and it was discussed at its meeting on 14 February. The Board’s Governance and Oversight Committee has sought to provide input, views and comments to Fredrik.

The EITI Secretariat has obtained a legal opinion from its legal counsel, ([attached](#)). This legal opinion was shared with all concerned and made public.

Fredrik and Jonas Moberg has met with both ExxonMobil and Chevron and with a number of those that signed the letter.

The Chair of the EITI can act on behalf of the EITI and its Board if he/she has obtained a mandate or can assume to have the mandate to do so. The Secretariat recommended Fredrik to make a statement and suggested that he did not propose to the Board that the supporting companies have their membership terminated. Should the Board wish to take further actions, it can do so. Should a stakeholder wish that the Members’ Meeting consider the matter, the procedures for submitting such a request are spelled out in Article 8.1(iv) of the EITI Articles of Association.

The Issue

2. In its counsel to the Chair and Board, the Secretariat and Jonas acting in his capacity as Board Secretary, agrees with the conclusions by its legal counsel:
The issue at stake is whether a number of EITI supporting companies – Chevron, ConocoPhillips, ExxonMobil, Hess and Noble Energy have conducted themselves “...in a way considered prejudicial or contrary to the EITI Principles.” (EITI Articles of Association 5(5). Such actions may qualify to termination of membership of the Association. The legal counsel continues:
“A decision to exclude a Member should be based on a broader basis than only a legal evaluation. Other relevant factors for consideration can be the seriousness of the issue giving possible basis for termination, precedence effects, and the need for balance, engagement and participation by all the three Constituencies.”
3. **The Secretariat concludes that the concerned supporting companies and members of the EITI Association, Chevron, ConocoPhillips, ExxonMobil, Hess and Noble Energy did not comply with the Principles and not in support of the implementation of the EITI Standard. With this established, the more complicated**

issue to make a recommendation about is what the consequences of this behaviour ought to be.

4. It is therefore necessary to consider whether the Board should terminate these members' membership in the Association. The legal counsel provides a non-exhaustive list with factors for consideration: seriousness, precedence effects, balance, engagement and participation by all the three Constituencies. He refers to a broader basis than what he describes as only a legal evaluation.

The Secretariat begins with commenting on the notion of broader basis than a legal evaluation, then on seriousness, precedence effects, engagement and stakeholder participation.

In understanding the nature of the EITI Standard and Principles, it is necessary to consider the history and context of the various governing documents of the EITI including the Principles, Articles of Association and the Standard. of the EITI. The EITI and its provisions have evolved and continue to evolve. It began with some meetings, stakeholders agreed some general commitments, principles, criteria, rules and Standard followed. It has over time become increasingly clear what is expected by implementing countries, in that the Standard contains a wide range of detailed provisions. The Standard also sets out the consequences if these are not adhered to. For supporting countries, it is still only vaguely set out what is required of them. There are some more rules for supporting companies, at least in that they are now required to make an annual financial contribution to the EITI International Management. As has been concluded above, Article 5.5 (ii) makes it clear that members can be removed if they act in a way that is considered prejudicial or contrary to with the EITI Principles. This provision suggests that it is not necessary with further detailed provisions, such as those in the Standard, for them to take direct effect on members. Still, this has rarely been tested. Indeed, many of the provisions in the Principles are of a general nature, suggesting that they are not intended to have precise consequences unless further detailed provisions were agreed. Applying them directly other than in extreme circumstances is likely to lead to a lack of predictability and equity. **Overall, it would appear unlikely that it was the intention of EITI stakeholders that the Principles were of such nature that they other than in exceptional circumstances would be applied directly.**

It appears serious to not have reported taxes. This for several reasons. Firstly, reporting taxes is core to the EITI. Secondly, it is beyond doubt that it was deliberate, the companies were aware of that they acted in contravention with their EITI commitments. Thirdly, the US implementation of the EITI is hugely significant, both domestically and internationally. Somewhat mitigating this seriousness is the fact that there are aspects related to this failure to report taxes that makes it an isolated event. The companies involved have throughout been engaged and reported taxes elsewhere. It is also regrettable, although not unusual, for companies not to report in any given implementing country and this is usually addressed by the EITI Board through EITI Validation.

The Secretariat's counsel lastly refers to engagement and stakeholder participation. The Secretariat understands this to imply that it is necessary to consider the aims of the EITI. Again, these are reflected in the EITI Principles. Principle 5, for example, holds that "We underline the importance of transparency by governments and companies in the extractive industries and the need to enhance public financial management and accountability." To achieve this, the EITI needs to continue to work for wide support and implementation. There is a risk that excluding companies would undermine this. It is particularly important to note that there are significant risks with excluding companies

without prior warning that this would be the consequence for a failure to report taxes. In fact, there are several examples of how companies have failed to report previously in other implementing countries without there having been calls for exclusion or indeed resulted in any company having been excluded.

5. **As for the consequences, while the Secretariat concludes that it was serious to not report taxes under US implementation, the Secretariat does not recommend that the concerned companies are removed from the Association. Even if it was serious not to report, it was isolated and it could not have been anticipated based on previous practice that it would result in termination of Membership of the Association. It must also be taken into account that these companies have reported and provided strong support of the implementation of the EITI elsewhere. Applying the Principles and Articles in a way that would have resulted in removal would also not have been aligned with the overall aims of the EITI as reflected in the Principles. For these reasons the Secretariat recommends that the Chair concludes that the companies did not comply with the EITI Principles and Standard.**

The integrity of the EITI hinges on its stakeholders acting in accordance with the EITI's various provisions. It is important that lessons are learnt. Further efforts need to be made to communicate what is expected of the EITI's stakeholders. The expectations on supporting companies currently being reviewed are therefore important in this context.

6. For the sake of completeness: the letter Fredrik received refers to "...actions by EITI Board members that we believe constitute violations of the EITI Code of Conduct and, as such, are grounds for their immediate removal from the Board." In reference to the Code of Conduct the legal counsel writes: "...this concerns the personal conduct of the Board Member, not the conduct by the country, company or organization that he or she represents. As this is not the case here, it is not further discussed." In any case, there are no provisions in the EITI's governance documents for removing Board Members in case of violations of the Code of Conduct.
7. For a further discussion of the matter, we refer to the legal opinion mentioned above.