

# MSG Feedback

ON DRAFT VALIDATION REPORT AND INITIAL  
ASSESSMENT

## 0 Introduction

This document provides the feedback of the D-EITI MSG concerning the initial assessment and validation report of the D-EITI validation. As further outlined in the following pages, the D-EITI MSG disagrees with some findings of the initial assessment and draft validation report. Above all, the MSG dissents with the findings for the four requirements assessed as meaningful progress, namely Requirement 2.2 License Allocation, Requirement 2.3 License Registers, Requirement 4.1 Comprehensiveness and Requirement 4.5 State-owned Enterprises. The MSG has set out its reasoning as to why these requirements should be assessed as satisfactory progress. In this regard, the MSG kindly requests the Board to exercise its right to consider some supplementary information disclosed after the commencement of Validation as outlined below.

In addition, the MSG also wishes to comment on several requirements that were assessed as satisfactory progress, some of which the MSG believes the assessment should be upgraded to beyond. The document is structured into five chapters containing the relevant arguments and information that allow reconsideration of the initial assessment and validation report.

In the first chapter, the MSG wishes to outline the Oversight by the Multi-Stakeholder Group and emphasizes the tremendous efforts that all three stakeholder groups have made throughout the EITI implementation in Germany, which has led to an outstanding MSG governance and functioning. In this context the MSG also provides further information regarding the specific German federalist system which has a significant effect on how the EITI standard can be implemented in Germany.

The second chapter gives feedback to the Legal and Institutional Framework, including allocation of contracts and licenses. Particularly, this chapter rectifies some concerns raised about meeting Requirement 2.2 License Allocation and Requirement 2.3 License register. Following these arguments, an overview of supporting documents on licenses provides further information on some of the elements.

In the third chapter, the MSG presents further information on Revenue Collection. The focus here is to provide feedback on the Requirement 4.1 concerning the Comprehensiveness of reporting focusing on omissions by material companies and the list of non-reporting companies as well as on Requirement 4.5 State-owned enterprises. At the end of this chapter, a list of supporting documents on revenue collection is provided.

The fourth chapter gives feedback regarding Revenue Allocation. The argument provided here is that the MSG goes beyond the provisions of Requirement 5.3 Revenue management and expenditures by including relevant information in the report.

Finally, the fifth chapter shortly tackles the topic of Outcomes and Impact, in particular regarding Requirement 7.3 Lessons learned and follow-up on recommendations. In this context, the MSG believes that their efforts merit further acknowledgment.

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# I. Oversight by the multi-stakeholder group

## a) Government engagement in the EITI process (#1.1)

### *General comment*

As a preliminary remark we would like to highlight once more the specific German federalist system, which has a significant effect on the allocation of competences between the Federal Government and the independent governments of the 16 quite heterogeneous German federal states (hereinafter referred to as “Land“ or “Länder”).

In Germany, the exercise of public authority is divided between the Federal Government and the Länder, which have their own constitution, parliaments and administrative structures. As a result of this system and in comparison to centralized governed states, decision-making in the EITI context concerning both the Federal Government as well as the Länder was exceptionally challenging and took far more effort from all parties involved in the process when compared to a centralized setting. For instance, with regard to the question whether to implement the EITI-Standard in Germany and to secure political support for the EITI process, it was not sufficient to only have the Federal Government make a – non-binding – public statement regarding its intention to do so. It was also necessary for the Länder to promise publicly their support for the implementation as required and possible. Following the public commitment of both, the Federal Government and Länder-governments, substantial resources were spent, and huge efforts were made to reach the common goal of implementing the EITI-Standard.

As an example, a “Federal Government – State Government working group” (Bund-Länder AG) was constituted with stakeholders from both, the federal and the Länder-level in order to coordinate the government’s position within the MSG. The numerous representatives from all relevant ministries met before MSG meetings and had to find a prior consensus for each decision in the MSG, e.g. regarding the scope of reporting, bargaining leeway and red lines. In advance, the Länder had to coordinate their position with the relevant Länder-ministries, as well as explain and coordinate the implementation process on Länder-level, all of which bound a substantive amount of resources. These efforts have been documented in the protocols of the Bund-Länder AG.

From the EITI’s perspective, it is also particularly relevant to note in this context that as a result of the federalist concept, responsibility for enforcing tax laws to a very wide extent (with the sole exception of excise duties) lies with the Länder, which have their own finance authorities for this purpose. In Germany, supervising mining and enforcing the Federal Mining Act are also tasks of the Länder respectively the different Länder mining authorities.

Since the MSG decided to include trade tax into the reconciliation, it is also important to note the role of local authorities (11,200 cities, towns and municipalities and 295 rural districts) within the process. Although they do not constitute a separate third level in the federal structure but are part of the Länder, they have a constitutionally guaranteed right to govern themselves. With trade tax as their own source of revenue, it was therefore necessary to consider the local authorities as well.

### *Implementation of EITI-Standard*

As pointed out above, the Länder are enforcing the majority of laws with relevance to the EITI implementation (tax laws and Federal Mining Act) within their own independent institutions, namely the tax administrations and mining agencies. Based on the idea of federalism, the Länder within the scope of the laws are free to make their own choices regarding institutional set-up, administrative procedures, political priorities etc. These choices are, among others, based on the size of the respective federal state, its economic and geographic structure and its history. With regard to mining agencies, actual and past extractive activities are fundamental for institutional and administrative choices. Given the great diversity in resource endowment and related extractive activities, mining agencies are very heterogeneous in terms of institutional set-up and administrative practices (e.g. mining agency of Lower Saxony with 304 employees compared to mining agency of Mecklenburg-Vorpommern with 17 employees. However, in terms of geographical area, Lower Saxony only doubles Mecklenburg-Vorpommern in size).

To meet the EITI-Standard in a federal state like Germany, the MSG had to consider the federal structure and the particular preconditions in the Länder. Therefore, much effort was taken to highlight the conditions in every single Land and to implement necessary steps to comply with the EITI-Standard. Due to very different levels of relevance of the natural resource sector in the different Länder, the responsible institutions had to cope with very different demands for public services, negotiations between governmental, non-governmental and economic stakeholders as well as participation and communication tools. Following this, tailor-made solutions for the compliance with the EITI-Standard were necessary to be set up for each of the Länder. To assess the progress according to the EITI-Requirements, those individual federal solutions must be considered.

Against this background, implementing the EITI-Standard was a major challenge for Germany. However, due to the outstanding commitment of the Länder and the Federal Government it was possible to coordinate in total 17 independent governments and to agree on the implementation of the EITI-Standard within the required time. Thus, we would very much appreciate if the independence and heterogeneity of the Länder is taken into account when assessing Requirements that entail collaboration with the sub-national level. The demanding challenges of implementing the EITI in a federal state and the huge efforts of both, the Federal Government and the Länder governments, which are illustrating the comprehensive commitment to the EITI, should be reconsidered accordingly.

## b) Industry engagement in the EITI process (#1.2)

### *General comment*

The initial assessment singles out an alleged “lack of company participation” as being the biggest challenge for industry participation. The basis for this analysis is limited to the absolute number of participants (14 out of 48 companies). However, the fact that the participating companies make up a total of 89% to 99.7% of the entire volumes extracted in each resource sector in Germany is only mentioned very vaguely. Additionally, the company participation should not be assessed with regard to the 48 companies initially identified by the IA. The IA identified the 48 companies as “potentially compliant” with the reporting requirements. However, only 22 companies published a mandatory payments report for 2016. 12 (small- and medium-sized companies) out these 22 companies belong to the quarrying sector and thus have not been in the focus of the MSG in terms of “coverage”. Of the remaining 10 companies, 8 participated in the D-EITI reporting. An additional 4 companies participated voluntarily, among them two companies belonging to the quarrying sector. All MSG members expressed their satisfaction with the level of participation by companies when referenced by the coverage. The company representatives contributed extensively in outreach and are committed to do so in the future.

As industry representatives outlined in the interview during the validation, the MSG expects the level of participation to increase over time due to the maturing of the entire process and the synchronization of the reporting deadlines of D-EITI and the compulsory reporting under BilRUG. Since the participation in D-EITI remains voluntary, the MSG believes that the successful first D-EITI report will help to engage additional companies for future reports.

### *Conclusion*

We would kindly ask to review the assessment. In doing so, the overall industry engagement in the work of the MSG and the high coverage of companies participating in the D-EITI should be taken into account. In the opinion of the D-EITI, these facts merit an assessment of “beyond”.

## c) Civil society engagement in the EITI process (#1.3)

### *General comment*

The civil society was responsible for addressing environmental issues, subsidies and the linkage to renewable energies related to the extractive industry in Germany in the 2016 Report. The MSG believes that in particular these supplementary chapters have helped the EITI to be relevant in the public discussion. All stakeholders agree that the civil society engagement in discussing and including the aforementioned topics was outstanding. Since corruption is not a problem in the German extractive sector, the linkage to other topics is the MSG's and particularly the civil society's contribution to make sure that the EITI adds value in Germany.

### *Conclusion*

The civil society therefore merits special acknowledgement for its engagement in the EITI process.

## **d) MSG governance and functioning (#1.4)**

### *General comment*

The initial assessment and draft validation report states that Germany has made satisfactory progress towards meeting this requirement. The only shortcoming mentioned in this section is the supposed failure to include the discussion on the phasing out of the use of lignite. Regarding public debate in general, the MSG discussed very intensively and thoroughly options to address actual public debate including the general debate on lignite extraction in Germany. Based on these discussions the MSG (on initiative of the civil society) has included a wide range of new and innovative topics in the report such as subsidies, renewable energy, and dealing with human intervention in nature addressing these debates and is committed to continue doing so in future reports. This commitment is well documented. The numerous “positive” aspects seem to be mitigated by the omission of one current public discussion. In light of this, the D-EITI would like to point out, that the actual specific discussions on the phasing out of the use of lignite peaked only in 2018 when the first report was already published and decisions about the second report were almost finished. Furthermore, the issue itself is not a mere extractive topic but highly political and more related to general questions about climate policy and management of structural change. To address related aspects to the phasing out of lignite, the Federal Cabinet has decided to establish the coal exit commission. This commission among others drafted recommendations for the closure of hard coal power plans, running on imported coal as well. The numerous “positive” aspects seem to be mitigated by the omission of one current public discussion.

### *Conclusion*

We feel that the assessment should heed the numerous positive aspects highlighted in the validation report.



## II. Legal and institutional framework, including allocation of contracts and licenses

### a) License Allocation (#2.2)

#### *Initial assessment and draft validation report*

The International Secretariat's initial assessment is that Germany has made meaningful progress towards meeting this Requirement. In accordance with Requirement 2.2.a.iii, Germany is obliged to publish information about mining licenses awarded or transferred in the period covered by the EITI Report. The procedure for awarding and transferring licenses, including the technical and financial criteria for assessing applications is directed by law. Despite, the International Secretariat was not able to locate information about mining licenses awarded or transferred during the period covered by the EITI Report. In their view, there is no indication that information about licenses awarded or transferred in 2016 is available in a centralized manner or even published on state-level. The information appears to be available upon request from state-level mining agencies. D-EITI is encouraged to add a link to the report containing awards and transfers of oil and gas licenses in future EITI Reports. In his draft validation report, the validator agrees with the initial assessment.

#### *Comments*

- As described in our preliminary remark, the German federalist concept has an extensive effect on how the EITI-Standard is implemented. As recognized in the initial assessment report, licenses are awarded by mining authorities on Länder-level. Therefore, the Länder, respectively the competent mining authorities, are responsible for information on the allocation of licenses. In order to satisfy the EITI-Requirement 2.2 – which requires granting access to information regarding the allocation of licenses – both the Federal Government and the Länder made a great effort up to amending the mining law. However, in the end, it is up to the Länder how they grant access to such information. **A majority of the requested information is already available online especially for economically relevant licenses.** In the oil and gas sector, information required by the EITI-Standard on licenses awarded or transferred per year is publicly available online based on a comprehensive list in a public government report. Said list is now linked to the D-EITI report. With that list, the requested information is available online for the economically most important sector in terms of the total worth of extracted volumes and covers more than 99% of all royalties. Moreover, it is the sector where virtually all changes to licenses happen. In all other relevant sectors (lignite, salt, kali),

there are only a very few big mines/production sites/projects with almost no changes to the sites. The production sites have been active for decades and for this reasons, no changes or new licenses have been granted. Instead, activities are based on so-called “old rights” or licenses granted under the law of the former German Democratic Republic that do not expire nor need a prolongation. Yet, the licensing information on the sectors lignite, salt and kali is available online in 11 out of 16 Länder, in most cases in form of a user-friendly and comprehensive geo mapping system showing all existing licenses. The 11 Länder mentioned before are the Länder with significant extraction.

- **In addition, there is the option to get any information from the competent authority upon request.** The mining agencies confirmed to provide all required information, without additional costs. In cases where not all requested information (e.g. application dates for old licenses) is available in open digital format at the agency but has to be generated from paper based archives the processing of a request may take a respective amount of time. As the change of the mining law was only passed in 2017 and/or requests for license information are not familiar to all mining agencies, requests might require additional communication for further clarification. However, this neither qualifies the general entitlement to access this information nor the readiness of the mining agencies to provide this information. The MSG therefore sees no general constraints to receive the relevant information based on the law. Besides the federalist concept, there is another fact, which in the opinion of the MSG, needs to be taken into account. **As the initial assessment report itself clearly states based on the intensive consultation with stakeholders, the interest in the licenses awarded in Germany is generally very low.** If there is a request, it is often related to single licenses or specific geographic regions but not to German wide comprehensive lists or specific licensing years. In this regard the licensing information on the remaining sectors (lignite, salt, kali) available online in 11 out of 16 Länder, in most cases in form of a user friendly and comprehensive geo mapping system showing all licenses, are considered by the MSG to be sufficient with regard to the broader objective of the Requirement. The information, which is made accessible online, covers almost all possible cases of potential public interest. If an interested party does not understand the information provided online or feels that there is a need for additional information, there is still the option to get any information from the competent authority upon request (cf. above).
- The MSG discussed the topic of licensing/ license register in its 3<sup>rd</sup>, 6<sup>th</sup> and 9<sup>th</sup> meeting as well as in the 2<sup>nd</sup> special meeting. Experts involved in licensing procedures on the federal ministry, state ministry and mining agency level took part in these discussions, presented the relevant aspects to the MSG, and were able to answer all questions. The MSG drafted the chapter on licensing in the first D-EITI report and extensively discussed the award or transfer of licenses regarding provisions of the mining law and related administrative procedures. **The MSG did not identify any reasons or facts hinting to non-trivial deviations from the applicable legal and regulatory framework governing license transfers and awards neither in general nor for the reporting year 2016.** A legal entitlement to the granting of a permit exists, unless there are grounds for refusal. Generally, there is no economic interest or conflict of interests that would incentivize a deviation from the procedure. As there are no questionable

deviations, there was no need for the MSG to discuss particular cases. All stakeholders confirmed during validation that there is no interest in licenses or licensing procedure.

#### *Additional actions following commencement of Validation*

- With effect of the 08.02.2019, the D-EITI published a [comprehensive list in open format containing all licenses awarded or transferred in 2015-2017](#) online on the D-EITI web portal. The list includes the requested information for companies in scope of the D-EITI and generally allows searching for companies. The information provided per license differs between Länder. The distinction between awarded and transferred licenses is not possible for all Länder. This information can be requested from the mining agency (contacts are provided in the report) without additional costs. For petroleum licenses, this information is publicly available for all Länder (see next point).
- With effect of the 08.02.2019, the D-EITI included a [direct reference](#) (see <http://rohstofftransparenz.de/rohstoffgewinnung/lizenzregister-und-vertraege/>) to the government report that contains a comprehensive list of all petroleum licenses awarded or transferred in 2016.
- The MSG kindly requests the board to take this information into account when assessing Requirement 2.2.

#### *Conclusion*

Taking the above into account, the D-EITI sees satisfactory progress for Requirement 2.2.

Both the German Federal Government and the Länder have shown their willingness to grant public access to the information on licensing by changing the mining law according to Requirement 2.2. and 2.3 of the EITI-Standard. Changing the mining act to fulfill the Requirements of the EITI-Standard was a big issue causing lots of discussions, not only within the Government but also with 16 Länder, which had to approve the amendment in the Bundesrat (Federal Council), the second legislative authority in Germany. The amendment of the mining law was explicitly made (see justification provided) with regard to the EITI implementation and has been regarded as a major success by all stakeholders.

Due to the EITI implementation (especially the amendment to the mining law), there is now public access to all information related to the awarding or transferring of licenses in the relevant sectors. In accordance with the EITI-Standard, the D-EITI report references and/or links the sources for desired information (cf. Requirement 2.2 d). Information for the economically most important sector in terms of total worth of extracted volumes and in terms of more than 99% of all royalties (petroleum licenses) is even available online. By that means all companies making material payments according to the scope defined by the MSG are covered to the understanding of the MSG and the D-EITI.

The same applies for information on the sectors lignite, salt and kali, which is available online in the 11 Länder with significant extraction. Therefore, public as well as business interests and

needs are fully met, which, in turn, leads to the fulfillment of the broader objective of this requirement.

Moreover, with material companies/sectors and the majority of Länder covered, the MSG interprets “available upon request”, as guaranteed by the change to the mining law, to be a sufficient interpretation of “publicly available” for the remaining sectors and/or Länder. The MSG further regards this as the optimal and most efficient solution to address Requirement 2.2 against the heterogeneity of the Länder and low general interest in licensing procedure. Alternative options, namely to exclude sectors and /or Länder via adapted implementation, are considered to be leading to a less comprehensive D-EITI report.

Additionally, with effect of the 08.02.2019, the D-EITI published a comprehensive list in open format containing all licenses awarded or transferred in 2015-2017 on the D-EITI web portal. The MSG kindly requests this action to be considered by the board.

## b) License registers (#2.3)

### *Initial assessment and draft validation report*

The International Secretariat’s initial assessment is that Germany has made meaningful progress towards meeting this Requirement. The Secretariat found the Requirement challenging to assess. While an amendment to the Federal Mining Act requires that the Länder grant access to the data points listed in the Requirement (2.3.b.i-iv), the Secretariat could not locate evidence that the register or cadaster systems, or a public interface with the required information, are publicly available in all Länder. While information regarding individual licenses is available upon request, the current systems do not enable access to an overview. The Secretariat’s interpretation of the Standard is that access to license information upon request does not constitute a publicly available license register or cadaster and therefore does not meet Requirement 2.3.b.

The Validator confirms the Secretariat’s findings and the initial assessment of meaningful progress.

### *Comments*

- Mining has quite a long history in Germany and so do licenses for mining. Licenses awarded before the present mining law are still active without any limitation (see D-EITI report pp. 28-29 for further details). The total number of active licenses in Germany is 12,028. Consequently, in many Länder with only a few extractive activities there is still a high number of licenses. In Bavaria, for example, there are 484 active licenses. Of these 484 only 12 licenses for petroleum or mining have been awarded in the last 20 years. Following this, the majority of licenses does not concern actual or recent extraction and has no relation to any economic activity. **Hence, there is no public interest, which would justify the cost for making this information public** as in

some cases part of the information requested by the standard (application dates for old licenses and coordinates) is not digitalized yet, but only available from paper based archives.

- **On the other hand, a majority of Länder (11 out of 16) that account for 98% of the total royalty payments have information on licenses available online.** In the majority of cases, information on licenses is displayed online in mapping systems like the NIBIS server that is highlighted in the report. This presentation of information meets the public interest in local extractive activities rather than in comprehensive lists. The mapping systems in some cases allow for a download of the data in open data format. In other cases such downloads are available upon request.
- As explained before, **the different forms of publication do not represent different levels of transparency (all information is publicly accessible upon request) but reflect the relevance of the sector and the related public interest for that information in each Land.** Based on the intensive consultation with stakeholders the initial assessment report clearly states that this interest in the licensing process, the licenses awarded and the existing licenses in Germany is generally very low. If there is an interest, such interest is often related to single licenses or specific regions but not to German wide comprehensive lists or specific years. Furthermore, extraction and exploration in sectors like salt and lignite is based on licenses (in some cases so called “old rights” s. updated D-EITI report pp. 28-29) that had been awarded decades ago. Low interest is reflected by a very limited number of requests to mining agencies with regard to licenses.
- Taking this into account, the MSG decided that there is no basis and no justification in terms of a cost-benefit ratio to introduce online registers in those Länder with almost no recent or active extraction or even a central register. Spending resources on such a project would contradict the government’s general commitment to reduce red tape, the general idea of federalism allowing federal states to choose freely the most rational option in the given circumstances and even on the idea of mainstreaming. Instead, the MSG found it more appropriate to focus its work on issues of general interest to the public.
- In addition, there is the option to get any information not available online yet, from the competent authority upon request. The mining agencies confirmed to provide all required information, without additional costs. In cases where not all requested information (e.g. application dates for old licenses) is available in open digital format at the agency but has to be generated from paper based archives the processing of a request may take a respective amount of time. As the change of the mining law was only passed in 2017 and/or requests for license information are not familiar to all mining agencies, requests might require additional communication for further clarification. However, this neither qualifies the general entitlement to access this information nor the readiness of the mining agencies to provide this information. The MSG therefore sees no general constraints to receive the relevant information based on the law.

### *Additional actions following commencement of Validation*

- In addition to the information already being available, the D-EITI decided to publish a [comprehensive list of all existing licenses per Land](#) allowing for a comprehensive overview in open format online on the D-EITI web portal. In some areas, the list does not include all data points required under 2.3 for all licenses/Länder. For very old licenses and in some Länder the date of application was not recorded and/or is not available in digital format. The coordinates of the licenses are not included in the list, but the names and codes of the license field. However, based on the change to the mining law, both the dates of the application as well as the coordinates of the licenses can be obtained without additional costs or requirements at the mining agency in charge of the license. For the Länder with an online mapping system coordinates of licenses can be obtained by searching for the field in the mapping system. The MSG kindly requests to take this information into account when assessing Requirement 2.3

### *Conclusion*

The D-EITI sees satisfactory progress for Requirement 2.3.

**Both D-EITI and the German Government have proven their willingness and ability to ensure access to all relevant information and even change federal law.** Additionally, 11 out of 16 Länder provide online information on licenses to the public, in some cases in a very advanced and comprehensive format, as explained in the D-EITI report. The different forms of presentation of that information do reflect on the one hand the federal system of Germany that transfers the implementation of the mining law and the general resource governance to the Länder. On the other hand, the format of presentation reflects the relevance of extraction in each Land and the general public interest, the public demand for a specific kind of information which is rather related to regional and local extractive activities than in German wide comprehensive lists. In case such an interest may occur, the mining law guarantees the access to such information.

Moreover, with majority of information for the most relevant cases available online, the EITI MSG interprets “available on request”, as guaranteed by the change to the mining law, to be a sufficient interpretation of “publicly available” for the remaining sectors and/or Länder. The MSG further regards this as viable solution to address the Requirement 2.2 under existing political and administrative circumstances and against generally low interest in licensing procedure. Alternative options, namely to exclude sectors and /or Länder via adapted implementation, are considered to be leading to a less comprehensive D-EITI report.

Additionally, the D-EITI has invested a lot of resources and efforts in topics identified as relevant by the stakeholders in the MSG.

## c) Supporting Documents on licenses

- Feedback on EITI-Standard Requirements 2.2 and 2.3 implementation in Germany (sent on 17 December 2018)
  - *Explanation of the EITI-compliant amendment to the BBergG*
  - *Feedback by the mining authorities*
- Comprehensive list containing all licenses awarded or transferred in 2015-2017
- Overview licenses in Germany by states
- Justification on amending the Mining Law



## III. Revenue collection

### a) Comprehensiveness (#4.1) – Omissions by material companies

#### *Initial assessment and draft validation report*

The International Secretariat's initial assessment is that Germany has made meaningful progress towards meeting Requirement 4.1. The validator agrees with this assessment.

A review of the mandatory payment reports demonstrates that payments made by two non-reporting companies in material revenue streams represent 6.1% of revenue reconciled in the EITI Report. The figure excludes the dividend payments by one company, which are not included in the mandatory payment report. With these included, the figure rises to 10.2%. The International Secretariat's assessment is that the omission of these companies making payments of over € 10 million affects the comprehensiveness of the EITI Report. On balance, the data is publicly available, and stakeholders largely consider company data reliable. However, the Secretariat is concerned that this analysis is missing in the updated EITI Report. Data in mandatory payment reports is in most cases less disaggregated than EITI data.

In order to comply with Requirement 4.1, Germany is obliged to ensure that companies making material payments to the government participate in EITI reporting. It is recommended that the D-EITI concentrates on engaging companies where mandatory payment reports demonstrate the largest payments. If companies refuse to participate despite efforts made by the D-EITI and the company constituency, the D-EITI should disclose material omissions in the EITI Report and refer to data published in mandatory payment reports.

#### *Comments*

- **First of all, the D-EITI would like to highlight that the MSG set a clear focus on royalty payments as an indicator for the comprehensiveness of the D-EITI report in combination with production volumes in Germany (see chapter 9c).** Royalties are the only payment stream being specific to the extraction sector. For non-specific payments in the reporting scope, such as corporate and trade tax a definite assignment to extractive activities is technically not possible for mixed companies. Although nonspecific payment streams are included completely in the reporting scope, they should not be taken as indicators for comprehensiveness. Especially large mixed companies or company groups with minor extractive activities but large overall tax payments would distort the overall picture of comprehensiveness, in positive as in negative terms. On the contrary, production volumes and royalties are very good



indicators as there is a direct correlation to the company's relevance for the extractive sector / material extractive activities. For tax payments, such correlation is not given.

- **Both companies identified in the initial assessment as allegedly missing with regard to the Requirement of comprehensiveness of the D-EITI report, have not paid royalties in the year of interest.**
- The International Secretariat further states that comprehensive disclosure of material payments to government was not achieved due to omissions of these two companies with payments to the government of more than € 10 million. **The MSG would like to point out that both companies have disclosed the payments. Information on payments is publicly available online and linked with their report.** It is only the reconciliation, leading to no discrepancies for all other companies, which is missing. However, in calculating the omissions the materiality threshold of € 2 million per recipient for the trade tax was not applied. In doing so the payments in the reconciled EITI material revenue streams for both companies are significantly lower than € 10 million. This information was provided already during validation.
- **Corporate and trade tax are not an adequate indicator for the comprehensiveness of reporting in Germany** (cf. above and chapter 9 c. of the report). The economic activities of both Quarzwerke and Südwestdeutsche Salzwerke ("SWS") are covering not only mining/ extraction but also high end refining and further processing. For SWS, additional material activities include waste disposal, logistics and tourism. For Quarzwerke, it is trading of raw materials and products.
- According to the financial reporting of the SWS for 2016, the EBIT of the salt activities (including non-extractive activities of refining and processing) was € 15.2 million; an EBIT of € 10.8 million was generated with waste disposal activities and another € 1.0 million with other activities. Even if not taking into account the value generation due to refining and processing, only 56% of the corporate tax and the trade tax, both being calculated on the EBIT, relate to extractive activities. Quarzwerke's own production (including extractive activities but also based on non-self-extracted raw materials from the market as well as high-end refinery and production) only accounts for 62% of the annual turnover in 2016. Taking into account non-material payments and payments resulting from non-extractive activities as based on the quite conservative calculation above the material/relevant amounts for EITI reporting are € 4.95 million instead of € 10.8 million for Quarzwerke and € 6.15 million instead of € 14.61 million for SWS. Those kinds of calculations are generally not made for all companies involved in reporting but when these numbers are the basis for a serious assessment, the above-mentioned qualifications need to be considered.
- As such, corporate and trade tax payments are inaccurate to determine the value creation by the extractive part of the business. The D-EITI is convinced that there are no particular concerns in terms of comprehensiveness of reporting with regard to the companies named above. Regardless, the MSG has made a tremendous effort to convince both companies to participation in the voluntary initiative as can be seen in the supporting documentation.
- **More generally concerning the statement in the initial assessment report that only 14 out of 48 companies took part, a qualification of numbers of non-reporting companies is needed.** In 2016, a total of only 22 companies have published

payments to governments report and hence only 22 companies fall under D-EITI reporting requirements. 12 out of these 22 companies belong to the quarrying sector and thus have not been in the focus of the MSG in terms of “coverage”. Of the remaining 10 companies, 8 participated in the D-EITI reporting, which results in an 80% coverage. An additional 4 companies participated voluntarily. The initial assessment of 48 companies was a first and general estimate of the companies that would possibly need to report. The estimate was based on the IA’s own research.

- **In this context we would like to point out, that a companies' independent auditor is obliged to report in the long-form auditor's report violations about facts that indicate serious violations of law.** This would include the question of whether or not a company complied with its obligation to prepare a mandatory payment report. The Federal Office of Justice may – in accordance with the German Commercial Code – initiate enforcement proceedings against a company if the company did not disclose a mandatory payment report in time. In addition, if a company does not comply with its mandatory reporting obligations content-wise both the company as well as its organs may be fined. Both the possibility of enforcement proceedings as well as the possibility of sanctions has great preventative character. In addition, it should be noted that payment reports from capital market-oriented (in particular listed) companies may be subject to control by the Financial Reporting Enforcement Panel and/or the Federal Financial Supervisory Authority.

#### *Additional actions following commencement of Validation*

- SWS, one of the two non-reporting companies listed in the initial assessment regarding material omissions allegedly effecting the comprehensiveness of the reporting, confirmed to participate in the reporting period for the second D-EITI report (2017). SWS also confirmed to hand in data for 2016. The IA for the second D-EITI report agreed to include 2016 data in the actual reconciliation.
- Upon submission, data for 2016 will be added to reconciliation/payments tables for 2016 online on [www.rohstofftransparenz.de](http://www.rohstofftransparenz.de)
- Quarzwerke, the second of the two non-reporting companies listed in the initial assessment regarding material omissions allegedly effecting the comprehensiveness of the reporting, confirmed to participate in the reporting period for the second D-EITI report (2017) and to hand in data for 2016. The IA for the second report agreed to include 2016 data in the ongoing reconciliation.
- Upon submission, data for 2016 will be added to reconciliation/payments tables for 2016 online on [www.rohstofftransparenz.de](http://www.rohstofftransparenz.de). We kindly request to consider the additional actions described above in the validation assessment.
- To help make the public information on mandatory payment reports more accessible, the D-EITI MSG agreed to publish a comprehensive list in open format on the D-EITI web portal containing all information on payments made public by companies in mandatory payments reports for 2016 with the effect of 08.02.2019. The document further includes a comparison of the total sum of payments made public in mandatory payment reports and the total sum of reconciled payments in the D-EITI report. The

Federal Ministry of Justice and Consumer Protection subsequently assessed the legitimacy of this list and concluded that there were serious legal impediments of publishing said list. In addition, serious legal impediments for the D-EITI Secretariat to publish the list as administrator of the website are still under assessment. Therefore, the list was removed from the online portal with effect of 14.02.2019. The D-EITI is currently assessing possibilities to overcome the legal impediments and to subsequently republish the list on the online portal.

### *Conclusion*

Against the background of the above-said, the D-EITI report does not show any material omissions and meets the Requirement of comprehensiveness as set out in Requirement 4.1. If one includes the reconciled payments of the above mentioned two companies the effect of the omission of non-reporting companies totals to 2.5 % of the reconciled payments. The MSG considers this as being not material to the comprehensiveness of the reconciliation.

## **b) Comprehensiveness (#4.1) – List of non-reporting companies**

### *Initial assessment and draft validation report*

The initial assessment criticizes that the report does not identify the companies that failed to participate in reporting. The report acknowledges that the scope of EITI reporting was aligned with the Accounting Directive, with the purpose that companies reporting for the EITI would be those required to disclose mandatory payment reports. Non-reporting material companies could thus be identified by comparing the list of companies publishing mandatory payment reports with the list of companies reporting under D-EITI. However, the mandatory payment reports are not available in open format and to assess the materiality of payments made by non-reporting companies. The user must open each report separately. In addition, three companies that participated in EITI reporting do not appear to have disclosed mandatory payment reports. Moreover, no reliable mechanism exists for ensuring that all companies within the scope of the Accounting Directive complied with the Requirements. The comparison between companies in the scope of EITI and those publishing mandatory payment reports cannot be considered definitive. The validation report confirmed this alleged shortcoming.

### *Comments*

- As required by the standard ToR for the IA, the list of non-reporting companies and a comparison of mandatory and D-EITI reporting was included in the IAs draft report to the MSG.
- The D-EITI MSG discussed the publication of the internal list of non-reporting companies several times and could not agree to publish such a list. This was largely

based on legal impediments that are extensively documented in the report (see updated report p. 93f.). **These legal impediments do not allow the government stakeholder group within the MSG to name non-reporting companies in the report.**

- Regarding the legal impediments, the D-EITI report explained that a publication of the companies' names by the D-EITI would violate the German constitution (see updated report p. 93f.) as it would interfere with the constitutional right to freely exercise a trade or profession. This alone is an insurmountable obstacle for the government stakeholder group. Additionally, in cases where the respective company's name allows for the identification of personal (or family) owners, German data protection legislation hinders the naming of the company (there are at least two company names concerned for the present reporting period).
- **In addition, the discussion in the MSG led to the conclusion that a publication of company names in the German case would be an impediment to convincing more companies to participate.**
- Furthermore, the MSG decided early on that the participation by companies in D-EITI is voluntary and members of the MSG have repeatedly expressed the view that this is a cornerstone of the entire process.
- Finally, information on company payments is publicly available.

#### *Additional actions following commencement of Validation*

- To help make the public information on mandatory payment reports more accessible, the D-EITI MSG agreed to publish a comprehensive list in open format on the D-EITI web portal containing all information on payments made public by companies in mandatory payments reports for 2016 with the effect of 08.02.2019. The document further includes a comparison of the total sum of payments made public in mandatory payment reports and the total sum of reconciled payments in the D-EITI report. The Federal Ministry of Justice and Consumer Protection subsequently assessed the legitimacy of this list and concluded that there were serious legal impediments of publishing said list. In addition, serious legal impediments for the D-EITI Secretariat to publish the list as administrator of the website are still under assessment. Therefore, the list was removed from the online portal with effect of 14.02.2019. The D-EITI is currently assessing possibilities to overcome the legal impediments and to subsequently republish the list on the online portal.

#### *Conclusion*

The D-EITI sees satisfactory progress for Requirement 4.1

The MSG considers its agreed on solution, to allow for an identification of non-reporting companies by comparison, to be a non-material deviation from Requirement 4.9.b.iii. Further, the MSG sees no limitation on the comprehensiveness of the EITI report as the relevant information is publicly available in the mandatory payment reports.

Against the unique challenges in terms of severe legal impediments, the MSG is convinced to have identified the best possible way to address the EITI-Standard Requirements and to provide the relevant information to the public.

## c) State-owned enterprises (#4.5)

### *Initial assessment and draft validation report*

The International Secretariat's initial assessment is that Germany has made meaningful progress towards meeting this Requirement. While the MSG's decision not to reconcile dividends is reasonable, it is problematic that Südwestdeutsche Salzwerke AG ("SWS) did not report payments in other material revenue streams. Total dividends paid by the company are available in the reports of the City of Heilbronn and the State of Baden-Württemberg. However, accessibility to this information is weakened by the fact that dividend payments were not included in the company's mandatory payment report.

In order to comply with Requirement 4.5, Germany is obliged to ensure that SWS participates in future EITI Reports. Germany is encouraged to ensure that the company provides comprehensive disclosures through its mandatory payment reports. The validator confirmed these findings.

### *Comments*

- **SWS did not disclose dividend payments in its mandatory payment reports but in its annual company report (publicly available online).** The updated version of the first D-EITI report (see p. 84) refers to this particular annual company report. Dividends are not listed in the payments to government report as dividend payments are the same for all shares whether owned by the government (98%) or free float (2%). Further, there is no dividend payment in relation to production fees. The law on mandatory payment reports explicitly refers to these cases and excludes reporting of dividends under named conditions. Mandatory reporting of dividends is provided by law via annual company reporting (audited) and data is available and linked to the report. On this basis, there is no justification for asking or encouraging the company to report dividends in the mandatory payment reports.
- **Additionally, corporate and trade tax for several reasons are not an adequate indicator for the comprehensiveness of reporting in Germany (cf. above and chapter 9c).** The economic activities of SWS are covering not only mining/ extraction but also high end refining and further processing but additionally material activities include waste disposal, logistics and tourism. According to financial reporting of the SWS for 2016, the EBIT of the salt activities (including non-extractive activities of refining and processing) was € 15.2 million; an EBIT of € 10.8 million was generated with waste disposal activities and another € 1.0 million with other activities. Even if the generation of value due to refining and

processing is not taken into account, only 56% of the corporate tax and the trade tax, both being calculated based on the EBIT, relate to extractive activities.

Taking into account non-material payments and payments resulting from non-extractive activities as based on the quite conservative calculation above the material/relevant amounts for EITI reporting amount to € 6.15 million instead of € 14.61 million. Such calculations are generally not made for all companies involved in reporting but when these numbers are the basis for a serious assessment, the above-mentioned qualifications need be taken into account.

### *Additional actions following commencement of Validation*

SWS confirmed to participate in the reporting period for the second D-EITI report (2017) and confirmed to hand in data for 2016 as well.

The IA for the second report agreed to include 2016 data in the actual reconciliation.

Upon submission data for 2016 will be added to reconciliation/payments tables for 2016 online on [www.rohstofftransparenz.de](http://www.rohstofftransparenz.de)

### *Conclusion*

The D-EITI regards Requirement 4.5 to be implemented with satisfactory progress.

There is extensive information available online on the SWS including the information from the mandatory payment reports and the annual financial reporting. In combination with the reports from government side disclosing all financial aspects (among others this includes the salary of the management) on the relationship with SWS, the information available goes beyond the Requirement of the EITI-Standard. The D-EITI report refers to this information. The receipt of the dividend payments (stated in the audited financial reporting of the company, which is linked in the D-EITI report) is confirmed in governmental reporting (linked to the EITI report). The only aspect that is missing is the reconciliation of further payments made. The additional facts provided show that relevant payments are of a smaller size than calculated in the initial assessment.

We kindly ask to consider the additional actions described above in the validation assessment.

## **d) Supporting Documents on Revenue Collection**

- Chapter 9c
- Feedback on two non-reporting companies (sent on 15<sup>th</sup> December 2018)
  - *Calculation of disaggregated tax payments of Südwestdeutsche Salzwerte and Quarzwerke*
  - *Discussion in the MSG including, but not limited to:*

- *Focus on royalty payments*
- *Explanation why income tax is not a good indicator to measure the comprehensiveness of reporting (also refer to Beschlussvorlage Salz)*
- *Efforts to convince companies to participate in the D-EITI*
- Beschlussvorlage Abdeckung Salz
  - *Addition to D-EITI report explaining why the coverage of salt is sufficient and background information*
- Documentation of effort to convince SWS to participate and letter by EITI champion
- Documentation of MSG discussions regarding the reconciliation of payments and the publication of names of companies that declined to participate in EITI reporting



## IV. Revenue allocations

### a) Revenue management and expenditures (#5.3)

#### *Initial assessment and draft validation report*

The D-EITI Report includes links to publicly available sources of information on budgeting, expenditures and audit reports. The report also includes information about state subsidies and tax concessions to the extractive sector. In many aspects, the D-EITI Report is forward-looking. For example, it addresses the phasing out of hard coal production and includes projections about the minerals required for the production of renewable energy. Extractive revenues are not earmarked for specific programs or revenues in Germany.

The report summarizes that stakeholders, especially from civil society and the government considered that the information provided in the D-EITI Report concerning renewable energy, environmental compensation and subsidies was important for understanding the implications of extractive industries to public finances. As decommissioning of mines and subsidies for production entail significant costs, many civil society representatives considered it crucial that the EITI Report covers these topics. Company representatives were more reserved about broadening the scope of the EITI but considered it positive that the industry's contribution to environmental damage management was recognized and documented.

The initial assessment concludes that the provisions of this requirement are encouraged. It is commendable that the EITI Report includes information about state subsidies and tax concessions for extractive companies, as well as environmental compensation. This provides citizens with a more complete view about the fiscal contribution of the extractive sector.

#### *General Comment*

**The MSG extensively discussed generally how to address the most relevant financial and economic aspects of the German extractive sector and its governance in EITI reporting.** It turned out that some aspects/implications of economic relevance could not be explained or made transparent in terms of financial flows (payments, income and expenditures). The compensatory measures implemented by extractive companies, for example, are an obvious case in this regard. These measures are of great economic relevance and key to an understanding of the sector (e.g. future compensation costs for the existing lignite mines are estimated to reach € 10 billion) but do not result in financial flows between companies and government. The material contributions of companies are in kind and are therefore not reflected in payments. From the government's point of view these contributions may be interpreted as saved government expenditures, e.g. for necessary renaturations, but are not reflected in public finances or revenue management. **For this reason (cf. MSG protocols), the MSG (on initiative of the civil society) decided to include information about compensatory measures and payments made by extractive sector companies in**



**the contextual part of the D-EITI report.** Further relevant implications in the German extractive sector, which could not be explained and made transparent in terms of financial flows, are state subsidies and tax concessions.

At the international level, there is great interest in these topics and their (national) context, as government and other stakeholders confirmed. Especially environmental compensation is a frequently discussed topic, both in terms of technical aspects but especially in terms of governance and fiscal implications. By addressing those topics, the MSG not only aims to contribute to national debate but to the international discussion on the integration of these aspects into the EITI.

### *Conclusion*

Against the assumption that Requirement 5.3 is not applicable for Germany, the D-EITI MSG is convinced that the D-EITI report contains relevant information that will further public understanding and debate around issues of revenue sustainability, expenditures and economic aspects of resource extraction in general (5.3.c). To allow for this understanding the MSG decided to go beyond the requirements of the standard in its first report. As the provisions of this requirement are encouraged, the contribution of the D-EITI in this regard merits further recognition. A positive recognition would further support the D-EITI in its ambitions to intensify the dialogue concerning these topics on the international level. The MSG would thus appreciate a review of the assessment.

## V. Outcomes and impact

### a) Lessons learned and follow-up on recommendations (#7.3)

#### *General comment*

The final assessment of this Requirement does not fully correspond to the explanation. Though it is stated that the recommendations were followed-up and decisions were made in the MSG, the assessment is merely satisfactory.

#### *Conclusion*

The MSG believes that the overall positive assessment of the progress in this Requirement merits an overall assessment of “beyond”.