



# Transparency and Accountability in Kenya's Extractives Sector

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## Introduction

Transparency denotes the principle that public officials, civil servants, managers and directors of companies and organizations have a duty to act visibly, predictably and understandably to promote participation and accountability; while accountability ensures that officials are answerable for their actions and that there is redress for failure to meet obligations (Bendell, 2006; TAI, 2017). Transparency enables governments and extractives companies to identify gaps and deal with potential corruption risks (OECD, 2015). It promotes accountability and good governance by ensuring that all stakeholders take responsibility for ensuring delivery of services due from the industry. This may be through disseminating information to help citizens understand how key decisions in the public interest are arrived at (Extractives Baraza, 2017). For proper accountability and disclosure in resource-rich countries, the following EITI principles should be considered (EITI Standard, 2019):

- (a) Prudent use of natural resource wealth towards sustainable economic growth, development and poverty reduction;
- (b) Management of natural resource wealth for the benefit of a country's citizens is in the domain of sovereign governments to be exercised in the interests of their national development;
- (c) Benefits of resource extraction occur as revenue streams over many years and can be highly price dependent;
- (d) Public understanding of government revenues and expenditure over time could help public debate and inform choice of realistic options for sustainable development;
- (e) The need to enhance public financial management and accountability;
- (f) Respect for contracts of law to achieve greater transparency
- (g) Accountability by government to all citizens for the stewardship of revenue streams and public expenditure; and
- (h) A broadly consistent and workable approach to the disclosure of payments and revenues is required, which is simple to undertake and to use.

Suffice it to say, Kenya committed to joining EITI and establishing a government focal point for EITI implementations within six months; and adopt a “transparent policy and legislative framework” for the oil and gas sector, including adoption of a transparent process for licensing (or awarding) oil and gas blocks as well as publication of contracts between oil companies and the government (Oxfam America, 2015). It is still not a member state of EITI to date.

There is however hope as the Kenya Civil Society Platform on Oil and Gas (KCSPOG), in November 2018, officially joined the Publish What You Pay (PWYP Kenya) initiative, a global movement aimed at ensuring that revenues from oil, gas and mining help improve people's lives (PWYP). PWYP Kenya works towards an equitable and sustainable oil and gas sector in Kenya by influencing policy and practice through pushing governments to “regulate natural resource extraction in an open and accountable way, for companies to operate within an effective governance framework, and for a civil society with the skills and freedom to drive natural resource extraction that benefits all.”(PWYP 2019)

Kenya also has an Open Government Partnership (OGP) policy which seeks to support the Sustainable Development Goals (SDGs) including improvement of public procurement practices and ensuring transparency in open contracting processes through adopting the Open Contracting Data Standard (OGP,

2019). This standard will also help in the fight against corruption and promote openness in procurement and award of contracts.

If a country lacks firm commitment to transparency and accountability, it prevents investors from entering the playing field as leading companies will be in fear of corruption and related scandals (DFID, 2013). Kenya fortunately has in place various laws, regulations and policies in support of transparency in extractives as further expounded below.

### **Legal Backing for Transparency and Accountability in Kenya**

Transparency in Kenya is derived from the Constitution of Kenya, 2010. Under Article 10 (1), the Constitution lays out the national values and principles of good governance, namely: patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; good governance, integrity, *transparency and accountability*; and sustainable development.

Furthermore, under Article 35(1), every citizen has the right to access information held by the state or another person if such information is required for the protection of a human right. The state is also directed to publish and publicize any information that affects the nation under Article 35(3). This provision is amplified by the Access to Information Act, 2016, section 3 which requires public and private entities (including extractives companies) to disclose information necessary to promote constitutional principles of accountability, transparency and public participation and access to information. The right to access to information is however limited under Article 24 of the Constitution as read with section 6 of the Act, to the effect that information which is likely to prejudice commercial interests, undermine security, impede due process of the law, affect matters under judicial consideration, cause harm to the Government's ability to manage the economy or infringe professional confidentiality as recognized in law need not be published (Extractives Baraza, 2017). Article 60 of the Constitution also goes on to state that land in Kenya should be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and in accordance with the principles of equitable access to land; security of land rights; sustainable and productive management of land resources; transparent and cost effective administration of land; sound conservation and protection of ecologically sensitive areas; elimination of gender discrimination in law, customs and practices related to land and property in land; and encouragement of communities to settle land disputes through recognised local community initiatives consistent with the Constitution.

Transparency and accountability are recognised in Article 201 of the Constitution as key principles of public finance (which includes natural resource revenues). Additionally, Article 225 requires Parliament to enact legislation to ensure transparency and accountability in all government expenditure. In line with this, the National Treasury is required, under section 12 of the Public Finance Management Act, 2012, to “promote transparency, effective management and accountability with regard to public finances,” and to “design and prescribe an efficient financial management system...to ensure transparent financial management and standard financial reporting.”

Under the Mining Act, 2016, the Cabinet Secretary, Principal Secretary and any person with administrative powers under the Act should be guided by the values and principles enshrined in the Constitution and in particular Articles 10, 66(2), 201 (c) and (d), and 232 of the Constitution and the principles of leadership and integrity set out under Chapter Six of the Constitution (s. 5). Further, in order to allow for public scrutiny, the Act requires all mineral agreements and the status thereof to be made public, for instance through the

Ministry's official website (s. 119(1) and (2)). The Cabinet Secretary responsible for mining is required to make separate regulations that stipulate transparency and accountability mechanisms regarding the reporting of *mining activities*, including *revenues* collected by the Government and *production volumes* under each license or permit (s.119(3)). However, this subsidiary legislation is not currently in place.

The Mining Act is also governed by a number of Regulations that promote transparency in various ways. In particular, under the *Mining (Licence and Permit) Regulations, 2017*, all applications or reports relating to mineral rights and dealings in minerals are to be submitted through the Online Mining Cadastre (OMC), which may be accessed through the website of the Ministry (reg 4). Section 192(4) of the Act provides that the "cadastre shall be a public document and may be inspected by an interested person upon the payment of a prescribed fee." Only non-confidential information is accessible to the public through Cadastre (reg 5). The *Mining (Dealings in Minerals) Regulations, 2017* also underscore that applications for licenses or permits should be made through the OMC (reg 4), although traders still manage to carry out illegal dealings (Muigua, 2019, p.14). Such a system, together with the computerised registry system created under the Act, helps promote transparency as there is open monitoring of the application process and register of mineral rights.

The Mining (State Participation) Regulations 2017 Regulations provide for State participation in prospecting or mining operations carried out by a holder of a mineral right (Regulation 3). Where the state is directly involved, mining companies are encouraged to declare all the deposits and profits made. Where the government has its own watchdog, in this case the National Mining Corporation, to monitor activities of mining companies, many cases of corruption will be a thing of the past.

The *Mining (Work Programmes and Exploration Reports) Guidelines, 2017* which provide guidance to applicants for prospecting, reconnaissance, and retention licenses or permits on preparation of work programmes and exploration reports. These Reports are meant to be published as a means of openness, accountability and access to information concerning mining companies however, no such reports have been published since 2017 (Muigua, 2019, p.15).

The *Mining (Use of Local Goods and Services) Regulations, 2017* promote job creation through use of local expertise, goods and services, businesses and financing in the mining industry value chain and their retention in the country and provide for a robust, transparent monitoring and reporting system in relation to the use of goods and services (Regulation 3). The Regulations also provide for a robust, transparent monitoring and reporting system in relation to the use of goods and services as well as prioritizing Kenyan suppliers upon submission of a procurement plan (Regulation 7). Under Regulation 16, the holder of a license is required to submit to the Director of Mines an annual report detailing Kenyan content including the use of local goods and services. This aims at ensuring that the mining industry economically empowers the livelihoods of Kenyans through priority employment and job creation and such employment is open and transparent.

Similarly, under *the Mining (Employment and Training) Regulations, 2017*, a holder of a licence is required to submit to the Director of Mines an annual requirements performance report that deals with all activities related to the specific employment, training, research and development (Regulation 10). These reporting requirements promote transparency and accountability as they act as a monitoring tool for the licence holder.

The *Mining (Use of Assets) Regulations, 2017* apply to holders of mining licences for maintaining a complete, up to date and accurate register of all the holder's immovable and movable assets (Regulations 3&4). The

register monitors income and expenses of the license holder and prevents non-declaration or under-declaration of profits.

Oil and Gas activities in Kenya are governed by the Petroleum Act, 2019. The Act governs upstream, midstream and downstream operations (Preamble). Section 17(1) of the Act requires the national government to ensure the execution of petroleum agreements is *fair, equitable, transparent, competitive and cost-effective*. Section 18 of the Act also seeks to ensure transparency in the contract negotiation process. Under section 45 of the Act, the contractor is required to submit to the Energy and Petroleum Regulatory Authority (EPRA), reports on geological, geochemical, geophysical surveys, drilling, completion and production data and any other information in accordance with the petroleum agreement and regulations made thereunder. There is a restriction however under section 46, to publishing this information to a third party without prior consent in writing from the person from whom the information is obtained.

The Petroleum Act also provides under Clause 49(5) of the Model Production Sharing Contract, that the petroleum contract is a public document and the Government has the right to publish and keep it publicly available. Information concerning the dealings within the contract may also be published for example, for purposes of ratification of the contract by Parliament, but this is yet to become a reality (Kidunduhu-Business Daily, 2019). It remains to be seen how this clause will be implemented in the context of section 46 of the Act, bearing in mind that companies are also keen on protecting information of ‘commercial value’ reflected in the contracts. Nevertheless, section 16 of the Access to Information Act, 2016, provides that even when there is an imperative as to confidentiality, as long as the information is a matter of public interest, disclosure has to take place and the person making the disclosure is protected.

Importantly, section 119 of the Petroleum Act requires the Cabinet Secretary to formulate a framework for reporting, transparency and accountability in the upstream petroleum sector, requiring the publication of all annual accounts and reports of revenues, fees, taxes, royalties and other charges; as well any other relevant data and information that support payments made by petroleum contractors and payments received by the national government, county government, and local communities. It suffices to note that the said framework is already in place, pending official launching by the Government.

In addition, the Natural Resources (Classes of Transaction Subject to Ratification by Parliament) Act 2016 gives effect to Article 71 of the Constitution of Kenya, 2010, to the effect that any transaction which involves the grant of a right to another person for exploitation of any natural resource in Kenya must be ratified by Parliament. The Act however does not apply to the grant of a concession or right by a private person to exploit a natural resource through an agreement or a contract, among other transactions under section 4(2) thereof. The Mining Act, 2016, seems to affirm this assertion, under section 120(2), which expressly provides for ratification by Parliament of agreements relating only to large scale mining activities. Nonetheless, ratification by Parliament is important in identifying anomalies in the agreements, which may potentially lead to corruption.

Despite the many legal frameworks dealing with extractives in Kenya, those that particularly deal with revenue allocation and collection fail to deal with openness, accountability and transparency as a whole (Kidunduhu-Business Daily, 2019). Also, merely having strong laws, regulations and policies is not enough to avoid the resource curse. Nigeria for example continues to grapple with corruption and impunity within its Petroleum Sector despite enacting various legislations (Poncian & Kigodi, 2018). This is true even with Nigeria being an implementing country of EITI. It is therefore prudent for governments to promote equal

participation of stakeholders within the extractives sector and ensure effective implementation of existing laws, regulations and policies.

Our next series will delve into Kenya's progress and challenges with transparency and accountability as well as provide recommendations for better openness and accountability within the extractives sector.

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