Validation of Germany
Response to MSG Feedback
CowaterSogema Independent Validator
17th March 2019

The Validator wishes to thank the MSG for their helpful feedback, including the initial general comment regarding the huge efforts the MSG has made to accommodate the diverse institutional structure regulating the mining sector across the Länder in Germany. What follows is the Validator's response to the feedback from the MSG.

Requirement 1.2: Industry engagement

The Validator notes the comments from the MSG and the request to upgrade the assessement to "beyond". The Validator appreciates 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. From an EITI perspective, the key issue is the percentage of the participating companies revenue to government vs. the total revenue to government, rather than the volumes comparison. Given that the level of participation of companies is not 100% and that in the words of the MSG feedback, "the MSG expects the level of participation to increase over time", the Validator is not persuaded that the assessment for this requirement be upgraded from Satisfactory.

Requirement 1.3: Civil Society engagement

The Validator notes the comments from the MSG regarding the outstanding efforts of civil society to include environmental issues, subsidies and linkages to renewable energies. There is no request to alter the assessment, in which case, the score remains Satisfactory for this requirement.

Requirement 1.4: MSG Governance

The Validator notes the comments from the MSG that a wide range of innovative topics have been introduced into the discussion at meetings, alongside the highly political issue regarding discussions of lignite and its phasing out. The Validator notes that the initial assessment from the International Secretariat of this requirement is entirely positive. The assessment for this requirement remains Satisfactory.

Requirement 2.2: Licence Allocations

The Validator notes the comments from the MSG, specifically that the majority of licence allocation information is already available online especially for economically significant licences in the mining sector, that allocations and transfers seldom take place in the mining sector due to its maturity, and also that there is now a link to a report containting a comprehensive list of allocations and transfers in the petroleum sector added to the D-EITI report. The Validator also notes the subsequent publication of all licence allocations on the D-EITI website following on from the commencement of validation and the great efforts expended to amend the law. The Validator also notes that the interest in the award of licences in Germany is generally very low, and that all licence allocation information that is in the public interest is already available. The Validator also notes the comments from the MSG meetings which conclude that there were no non-trivial deviations from the applicable legal and regulatory framework governing licence transfers and awards in the reporting year of 2016. However, the Validator disagrees with the interpretation that “available upon request” equates to “publicly available”, based on precedent across EITI implementing countries.

The Validator also notes that subsequent to the commencement of Validation, a comprehensive list of all licences transferred or awarded between 2015 and 2017 was published in open data format on the D-EITI portal.

The Validator there still views the correct assessment to be meaningful progress as at the time of the Validation assessment, notwithstanding subsequent efforts. However, the Validation sub-committee may wish to take subsequent actions by D-EITI into account in assessing this file.

Requirement 2.3: Licence Register

The Validator notes the comments from the MSG that there is little or no public interest in accessing this information, and that the associated costs (for either sub-national or a central register) are not justifiable. The Validator also notes the MSG’s comments that licence information for 98% of total royalty payments to government are available online, mostly via mapping applications. The Validator also notes that subsequent to the commencement of Validation, D-EITI published a comprehensive list of all existing licences per Land on their portal, noting that in some cases, not all information required can be captured, for example not all dates of application are recorded.

As with requirement 2.2, the MSG interprets “available upon request” to equte to “publicly available”, which is not the precedent across EITI implementing countries. There is also no precedent in EITI for national public interest arguments to outweigh EITI requirements. For these reasons, the Validator recommends that the assessment remains Meaningful progress. However, the Validation sub-committee may wish to take subsequent actions by D-EITI into account in assessing this file.

Requirement 4.1: Comprehensiveness

The Validator notes the response from MSG about comprehensiveness of material and non-reporting companies. Comprehensiveness under requirement 4.1 includes identification of material and non-reporting companies and reporting by them.

Comparing the facts in the initial assessment and clarifications with MSG with requirements under 4.1, it is noted that although D-EITI is on right track (companies agreeing to participate in the process from 2017 onwards, overcoming legal impediments to publish the list of material payments), however, the implementation still falls short of completion of the requirements. For example, consideration of non-reporting of material payments by two companies, non-reconciliation, consideration of revenue streams including corporate and trade profit taxes, non-existence of reliable mechanism to ensure that three participating companies complied with requirements.

Corporate and trade tax payment streams are one of the indicators of comprehensiveness to be viewed broadly under this requirement, although MSG doesn’t agree with this. Participation of both companies Quarzwerke and SWS from 2017 with efforts of MSG will be considered in the next validation exercise..

Considering only EITI Provision 4.1, mandatory payments need to be disclosed, which was not done. If these disclosures pose legal conflicts/impediments then these need to be resolved.

In view of above points, the original assessment of Meaningful progress is retained.

Requirement 4.5: SOE transactions

The Validator notes points made in its response. However SWS did not report material payments, dividends were not included in mandatory payment report. It is reported that SWS has agreed to participate in the EITI 2017 and provide data for 2016 which will be added to payment/reconciliation table (which will be considered in the next validation exercise).

Under this requirement 4.5, validator is expected to describe role of SOEs, document financial transactions between SOEs and Government entities and their disclosures. Data relating to dividend being available and linking that to report may not be "full disclosure" as is the intent of requirement 4.5.

The MSG response doesn't address these points in full. To be qualified as "satisfactory progress" it needs to be demonstrated that ALL aspects of the requirement have been implemented and that the broader objective of the requirement has been fulfilled which doesn't seem to be the case and thus the original assessment "Meaningful progress" is retained.

Requirement 5.3: Revenue Management and Expenditures

Comments from MSG are noted and considering these points it is considered to leave the assessment as mentioned earlier in the validation of initial assessment and there is no change required.

Requirement 7.3: Follow-up on Recommendations

The Validator notes the comments from the MSG and the recommendation to upgrade the assessment to Beyond based on the overall positive assessment. However, the MSG provides no additional information to suggest that D-EITI has gone beyond the minimum requirements for this requirement, therefore, the Validator suggests the assessment remain Satisfactory.