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**RE: LETTER FROM USEITI**

**1 INTRODUCTION**

I refer to your e-mail of 6 March 2018, where you have asked me to review the legal situation regarding the letter from representatives of USEITI to Chair Reinfeldt of 7 February 2018 (“the USEITI Letter”).

The conclusion of the USEITI Letter is as follows:

*“In the absence of this, and in light of the ongoing circumstances outlined above, we recommend strongly that these companies be removed from the EITI Board for violating the EITI Code of Conduct, as well as the spirit of EITI, this endangering the EITI Standard.”*

The reference to “these companies” means ExxonMobil and Chevron, which are the subject of the USEITI Letter. The USEITI Letter addresses the reporting of tax payments by these companies in the United States in relation to the Dodd-Frank Wall Street Reform and Consumer Protection Act Section 1504.

The legal question arising from the conclusion of the USEITI Letter, which will be addressed in the following, is whether, and in case how, members of the EITI Board can be removed from the Board.

I clarify as a starting point that “companies” cannot be removed from the EITI Board as Board membership is personal by physical persons. Their responsibility as Board Members is personal and independent of the country, company or organization where they are employed. I will revert to his point as it is of relevance for the evaluations in this letter. However, I assume that this is the understanding meant in the conclusion of the USEITI Letter.

The EITI Association is governed by its Articles of Association. They will be the main legal basis when considering the recommendation in the conclusion of the USEITI Letter.

Article 3 (1) provides that it is a non-profit association organized under Norwegian law. The following legal evaluation is based on Norwegian law. It is limited to legal issues. However, the conclusion of the USEITI Letter may require a broader evaluation than only legal issues. This is addressed at the end of this letter.

I have been legal counsel to EITI since 2006. My evaluation in the following takes into account my understanding of the legal regulation of the EITI Association as from its establishment.

## **2 SUMMARY**

The EITI Board has no authority under the Articles of Association to remove a Board Member. The Board has, however, the authority to terminate a Member under certain qualified circumstances as provided in Article 5 (5) of the Articles of Association. If the membership is terminated for a Member who is also a Board Member, his or her Board membership will also cease. A new Board Member or Alternate nominated by the same Constituency will then have to be elected.

One basis for terminating a Member's Membership under Article 5 (5) is that the Member, or the country or the other entity the member represents, has conducted his/her/its affairs in a way considered prejudicial or contrary to the EITI Principles. A determination whether this is the case requires a broad evaluation which is not only legal. As termination of membership is a serious decision to make for an association, the evaluation has to be made in relation to the general objective of the EITI. I do not have sufficient information about the tax reporting by ExxonMobil and Chevron in the United States to form a conclusion on whether this could give basis for termination of membership of their representatives.

The treatment of a possible termination of membership requires due process in accordance with good governance principles. One such principle is equal treatment of equal cases. It seems to follow from information in the USEITI Letter that a number of eligible companies in addition to ExxonMobil and Chevron did not report their tax payments to the United States. It is then difficult to pick out two of several companies that all have the same conduct with regard to termination of membership without a particular and sufficient justification.

## **3 REMOVAL OF BOARD MEMBERS BY THE BOARD?**

The basis for the EITI Association is its Members. A member is a personal representative of a country (meaning state), company, organization or legal entity that is appointed by its Constituency (Article 5 (1)).

Prior to the establishment of the EITI Association, it was widely discussed whether the members should be countries, companies and organizations. It was finally concluded that in such a case, in particular with regard to states, decisions to become members would involve so heavy procedures, often with parliamentary approval, that it was unpractical. Hence, the members are physical persons being representatives of the country, company or organization.

The governing body of the EITI Association is the EITI Members' Meeting (Article 7 (1)). The EITI Members' Meeting elects the Members, and Alternates for each Member, of the EITI Board, on nomination from the Constituencies (Article 8 (1) (ii)). The Board is the executive body of the EITI Association.

The EITI Board shall consist of 21 Board Members, whereof a specific number should be Members from each Constituency (Article 9 (2)). Each Board Member is elected for the time period until the next Members' Meeting, and has the right and obligation to serve in this period. Thereafter, the Board Member retires unless

re-elected (Article 9 (3)). In case of a vacancy by a Board Member, the elected Alternate shall fill the vacancy (Article 9 (6)). This is necessary in order that the specified number of Board Members is maintained as well as the relative balance between the Board Members from the three Constituencies.

If a Board Member should fail to attend three consecutive Board meetings, the Board may, after consultation with his or her Constituency, require the Constituency to replace the Board Member (Article 9 (5)). It should be noted that the Board does not in this case have the authority to remove the Board Member, it is the Constituency that replaces the Board Member.

There is only one provision in the Articles of Association that provides the Board with authority in relation to Board membership, which is Article 9 (8). Under this provision the EITI Board may suspend a Board Member representing an implementing country. Such a suspension is not a removal of the Board Member. However, should the suspension be in force for more than a year, the EITI Board may decide that the Board membership should be terminated.

Can this provision be applied similarly to Board Members representing companies? I cannot see that there is a basis for this. The provision specifies that it concerns “*a Board Member representing an implementing country*”. For countries it is limited to implementing countries, supporting countries are not included. The background for the provision was that validation of implementing countries is a main function of the EITI Association and a main responsibility of the Board, where particular conflicts of interest may exist for the Board Member representing that implementing country. Supporting countries, companies and organizations are not validated. They are therefore not included in the provision.

There is then no provision in the Articles of Association that provides the Board with the authority to remove a Board Member. This in accordance with general governing principles for associations and companies both in Norway as well as internationally. The basic principle is that when a superior organizational body has the authority to elect the members of a subordinate body, only the superior body may remove such members. Otherwise, the subordinate body may undermine the authority of the superior body as well as the legitimacy of both bodies and the association.

This implies that the provisions of the Articles of Association, as formulated, do not open for the Board to remove a Board Member (except for Article 9 (8)).

In case a Board Members acts in conflict with the objective of the EITI Association or breaches to Code of Conduct, the question of termination of the Board membership comes in focus. It could be asked whether the Board has a right to act in such cases for temporary solutions until the next Members’ Meeting. However, 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.

It is on this background our opinion that the Board does not have the authority to decide to terminate a Board Member from ExxonMobil or Chevron on the basis of the conduct by these companies as described in the USEITI Letter.

As it is the Members’ Meeting that elects the Board Members, the USEITI may pursue their recommendation to remove Board Members towards a next Members’ Meeting within the framework of Article 9 (2), which regulates the number of Board Members from each Constituency.

#### 4 REMOVAL BY THE BOARD OF MEMBERS

The conclusion of the USEITI letter recommends “*the exclusion of these companies from the EITI Board*”. It has already been pointed out that companies are not members of the Board and cannot be excluded as such. Even if it has not been raised in the USEITI Letter, the Articles of Association provide for a possibility that the memberships of the Members representing these companies can be terminated. I address also this possibility here as it may lead to termination of Board membership.

Article 5 (5) provides:

*“The EITI Board may terminate any Member’s Membership of the EITI Association if:*

- i) The Member, or the country or other entity the Member represents, does not comply with these Articles of Association; or*
- ii) The Member, or the country or other entity the Member represents, has conducted his/her/its affairs in a way considered prejudicial or contrary to the EITI Principles.”*

If the Board would decide to terminate the membership of the personal representatives of ExxonMobil or Chevron that are Members in accordance with this provision, the consequence can be that these persons cannot be Board Members as it is a condition for being a Board Member that the person is a Member (Article 9 (2)).

The authority to terminate membership in accordance with Article 5 (5) lies with the Board. The Board will then have to deal with such a matter in accordance with the provisions of Article 14 “EITI Board Operations and Procedures”, including the voting rules.

A first point to note here is that Article 5 regulates “Membership and Constituencies”. Sub-paragraph (5) addresses the conduct of Members, which are the personal representatives of the countries, companies or organizations. Hence, the conduct of Board Members in this capacity is not the relevant criterion in relation to this provision.

The two alternatives i) and ii) providing basis for termination under Article 5 (5) address the conduct not only of the Member, but also of “*the country or other entity the Member represents*”. In the present case this implies that the conduct by ExxonMobil or Chevron is relevant in relation to the provision.

It is submitted in the conclusion of the USEITI Letter that ExxonMobil and Chevron are “*violating the EITI Code of Conduct, as well as the spirit of EITI, thus endangering the EITI Standard*”.

With regard to the submission of violation of the EITI Code of Conduct, the USEITI Letter gives no explanation on how the reporting by ExxonMobil and Chevron should represent such a violation. The EITI Association Code of Conduct article 1 “Scope” provides as follows:

*“All EITI Board Members, their alternates, Members of the EITI Association, secretariat staff (national and international), and members of multi-stakeholder groups (below referred to as the “EITI Office Holders”) shall abide by this Code of Conduct.”*

This scope addresses persons. It does not address the countries, companies or organizations that Members represent. The Code of Conduct provides rules for personal conduct of the EITI Office Holders. It is difficult on this basis to see how the Code of Conduct could apply to the reporting by ExxonMobil and Chevron being the issue of the USEITI Letter.

With regard to the submission of violation of “*the spirit of EITP*”, it is uncertain what the content is. If it is meant to be a reference to the EITI Articles of Association, it is relevant in relation to Article 5 (5) as discussed below. The similar comment is made to the submission of “*endangering the EITI Standard*”. The EITI Standard includes the Articles of Association.

In the second paragraph of the USEITI Letter it is in addition submitted that ExxonMobil and Chevron are in “*repeated and willful violation of ... the EITI Constituency Guidelines [and] the Terms of Reference*”. These documents are, however, of limited relevance for the recommendation of termination of membership in relation to the Articles of Association.

In the Articles of Association Article 5 (5) alternative i) gives a right of termination of membership in case a company “*does not comply with these Articles of Association*”. Although not directly expressed in the USEITI Letter, the objective of the EITI Association as laid down in the Articles of Association can then be of relevance.

The objective of EITI is stated as follows in Article 2 (2):

*“The objective of the EITI Association is to make the EITI Principles and the EITI requirements and internationally accepted standard for transparency in the oil, gas and mining sectors, recognizing that strengthened transparency of natural resource revenues can reduce corruption, and the revenue from extractive industries can transform economies, reduce poverty, and raise the living standards of entire populations in resource-rich countries.”*

One main part of this is to make the EITI Principles an accepted standard. By referring to the EITI Principles with the objective to make them a “*standard*” instead of directly stating them in the Articles of Association implies that they should be applied more as general objectives rather than literal rules. In relation to the present case it can be noted that it is not formulated as a direct objective that the countries, companies and organizations of the Members should implement all of the EITI Principles. However, a non-implementation can contribute to a less degree of effort to achieve the EITI Principles becoming an international standard. It can therefore be argued that such a non-implementation implies non-compliance with the Articles of Association in relation to Article 5 (5) (i).

Alternative (ii) of Article 5 (5) refers directly to the EITI Principles. I assume that the EITI Principles are the most relevant in relation to the tax reporting by ExxonMobil and Chevron being the subject of the USEITI Letter. Alternative (ii) is then the most relevant provision.

Principles 9 and 11 of the EITI Principles may be the most relevant in this case. They state:

*“9. We are committed to encouraging high standards of transparency and accountability in public life, government operations and public expenditure.”*

“11. *We believe that payments’ disclosure in a given country should involve all extractive industry companies operating in that country.*”

The EITI Principles are formulated in this way as “*we are committed to encouraging*”, “*we believe*” etc. This implies that they will have to be applied on this basis of being general principles rather than being absolute requirements. However, the material content of each Principle may be more precise, such as “*involve all extractive industry companies operating in that country*” in Principle 9.

Principle 9 refers to “*high standards of transparency*”. A determination of what the specific content of such a general term implies, will have to be made in relation to the transparency issue in each case. Legislation and internationally adopted standard, rules and guidelines will then be relevant.

But “*standards*” may go beyond legislative requirements and guidelines. The standards adopted by the EITI Association will be of main significance.

The USEITI Letter then raises the question whether country-by-country tax reporting is such a standard. In order to conclude on this in relation to Principle 9, a further analysis than the framework of this letter allows, is needed. I still mention that there is substantial basis in favor of country-by-country tax reporting having developed to such a “*high standard*”.

With regard to Principle 11, the USEITI Letter mentions that 12 of the 38 eligible companies disclosed their tax payments in the U.S. as reported by USEITI in 2016. On the one hand, this implies that Principle 11 above is not fulfilled by many companies. On the other hand, it indicates that reporting of U.S. tax payments is allowed.

Termination of membership in accordance with Article 5 (5) is one of the most serious decisions an association can make. Such a decision requires thorough preparation and an objective evaluation of the proposed basis for termination. In case of one specific issue being the basis for the proposed termination, the issue should be evaluated in context of the total conduct of the Member, or the country or other entity the Member represent.

Good governance requires that the Member in question normally is given a warning and a reasonable time limit to correct the conduct that is considered to be basis for termination. The Member should also be given the right to contradiction and fair treatment of objections.

Equal treatment of members is another important governance principle. The information in the USEITI Letter mentions that 12 of the 38 eligible companies disclosed their tax payments in the U.S. seems to imply that more than 20 other companies in addition to ExxonMobil and Chevron did not report their tax payments to the U.S. It is not informed whether any of these other companies have Members in the EITI Association. If several of them have Members, it is difficult in relation to the equal treatment requirement to pick out two companies of several that all have the same conduct with regard to the issue submitted to be basis for termination. In such a case, a particular justification will be necessary if EITI should not be in breach of the equal treatment governance principle.

Under Article 5 (5), it is only conduct “*in a way considered prejudicial or contrary to the EITI Principles*” that may qualify to termination of membership. A non-fulfilment of a Principle is in itself not sufficient. The conduct would have to be of a serious and manifest character against the Principle.

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. The nature of the EITI objectives, the EITI Principles and the EITI requirements, how they were agreed and how they have been applied must also be taken into consideration. The Principles and objectives are general and it would appear unlikely that they were intended by the stakeholders to result in for example exclusion if they were deemed not to be adhered to. I am also not aware of that the EITI Principles hitherto have formed the basis for excluding or otherwise take significant concrete actions against EITI Members and stakeholders.

As a summary, subject to a broader analysis, there are substantial reasons in favor of country-by-country tax reporting being a “*high standard*” in relation to Principle 9. It is probable that not to report taxes paid in the U.S. will not meet this standard. Lacking information about ExxonMobil’s and Chevron’s specific reporting I am not in a position to conclude whether their reporting is against the standard. In relation to the question of possible termination of membership, a broader evaluation in relation to Article 5 (5) will have to be made. If there are more Members representing companies that are doing the same tax reporting as ExxonMobil and Chevron, a particular and sufficient justification for deviating from the principle of equal treatment would be necessary.

Whether such a non-reporting of taxes paid in the U.S. can give basis for termination in accordance with Article 5 (5) of the Articles of Association, requires a broad evaluation and application of good governance principles. Termination will generally require a significant, manifest and individual breach of Article 5 (5). A non-fulfilment of the EITI Principles, which are formulated as general objectives, would not in itself suffice. As termination of membership is a serious decision to make for an association, it should be considered whether alternative steps may serve the same purpose. This could be adoption of resolutions addressing the issue and expressing norms or requirements. In case termination is relevant, due process respecting governance principles should be met.

This letter is written on the basis of limited information, primarily the USEITI Letter. To the extent other information is relevant, I shall appreciate to undertake further evaluation.

Yours sincerely,  
Michelet & Co Advokatfirma AS



Christian Fredrik Michelet