

Unofficial English translation

To the Ministry of Finance
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Recommendation to place the company Eni Sp.A under observation

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1 Summary

The Council on Ethics recommends that the Italian energy company Eni Sp.A (Eni) be placed under observation for a period of up to four years due to serious environmental damage caused by oil production in the Niger Delta, Nigeria. As at 31 December 2012, the Government Pension Fund Global (GPF) owned shares in Eni with a market value of NOK 9,137 million, equivalent to 1.87 per cent of the shares in the company.

Eni has produced oil in Nigeria since 1962. Its wholly owned subsidiary Nigerian Agip Oil Company Ltd. (NAOC) is the operator for a *joint venture* (JV) that consists of the state-owned oil company Nigerian National Petroleum Corporation (NNPC) as the majority shareholder (60%) and NAOC and Phillips Oil Company Nigeria Ltd. (a subsidiary of ConocoPhillips), each with a 20 per cent interest in the JV.

Oil production in the Niger Delta has among other things been criticised for oil-spill pollution and air pollution caused by the flaring of associated gas, as well as for breaches of human rights. The Council on Ethics has assessed oil spills from onshore oil production and their consequences. The Council's assessments have included the NAOC JV and others. The Council has assessed the extent of oil spills and environmental damage, whether oil spills and environmental damage have major consequences for human life and health, whether oil spills and damage are a result of breaches of national legislation or various standards, the company's responsibility, whether the company has implemented adequate measures to prevent and if relevant rectify damage, and whether the company's practice is likely to continue.

The Council on Ethics' assessments have shown that NAOC's oil production has for a long time led to frequent and, in total, extensive oil spills. The frequency and volume of the reported oil spills are minimum figures but are far higher than those which are normal in an international perspective and those which Eni experiences in other operations. This applies to oil spills resulting from both operational failure and sabotage. Sabotage includes both destructive actions and the theft of crude oil, often referred to as "bunkering". Oil theft has developed into a billion-dollar industry in the Niger Delta and results in frequent, but to a large extent unquantified, oil spills. The scope of, and technology for, oil thefts vary from the most primitive and polluting small-scale methods to professional and well-equipped operations that tap large volumes of oil from pipelines or wellheads and transport the crude oil to tankers for "export". These at times well-organised crimes take place relatively openly.

Oil spills resulting from operational failures are due, for example, to corrosion, equipment failure or human error by the operator. It is a known fact that parts of the infrastructure in the Niger Delta are old or weak and that the replacement of infrastructure is taking longer than is desirable due to the lack of financing in the JV, primarily because NNPC is not given sufficient resources by the state.

From 2000-2010, Eni reported a large number of oil spills. The number of oil spills, especially those caused by sabotage, increased during the period. More than two-thirds of the oil spills during the period were caused by sabotage. Preliminary figures for oil spills in 2011 and parts of 2012 show that the numbers are on a level with the highest annual figures during the 2000-2010 period.

The reported volume of oil spills varies greatly from year to year and is dominated by a few large oil spills, while most of the oil spills are small in volume. The annual oil-spill volume was on average at around the same level in the 2006-2010 period as in the 2000-2005 period. While the oil-spill volume caused by sabotage fell between the 2000-2005 and 2006-2010

periods, the oil-spill volume caused by operational failure increased. Sabotage caused more than 80 per cent of the oil-spill volume during the 2000-2010 period. Preliminary oil-spill figures for 2011 and parts of 2012 show that the total oil-spill volume has fallen from the high figures for 2009 and 2010 and is at around the average for the 2000-2010 period.

The reported oil spills per produced barrel of oil equivalent (boe) fell slightly (<5%) from the 2000-2005 period to the 2006-2010 period. Eni's oil spills per produced boe are much less outside Nigeria.

Oil spills in the Niger Delta affect in part ecologically sensitive and valuable areas and in part densely populated areas. While minor oil spills often have local or short-term consequences, major oil spills that are not properly cleaned up and rehabilitated often cause extensive and long-term damage to land areas, rain forests, wetlands, fresh water, mangroves and coastal zones. This also causes serious harm to the local population's livelihoods.

Eni's control over and responsibility for the operation are regulated by the JV Agreement and the way in which it is practised. In the JV, decisions on standards, guidelines, investment and operations budgets, plans, etc., are reached by consensus. Each participant has in principle a right of veto. All the participants are responsible for the decisions and their implementation. The right of veto has been practiced by NNPC but does not seem to have been used by the other companies, either individually or jointly. The oil industry is the Nigerian state's most important source of income and investment costs in *joint ventures* compete with other expenses in the national budget. In practice, this has for a number of years reduced the investments in oil infrastructure. This contributes to the operator being left with the responsibility for the day-to-day operations without the means to ensure the proper operation of the infrastructure.

The Council on Ethics and Eni have had a dialogue from 2010-2012 in which the company allowed access to a lot of information and made its views known. Eni states that it bases its operations in Nigeria on the same standards as in other countries but underlines the unusually complex conditions under which NAOC operates. The company acknowledges the extensive oil spills and their negative effects on the ecosystem and poverty-stricken local population. Eni stresses that this is a highly undesirable situation for all parties concerned. The company believes that oil spills and pollution are primarily caused by unauthorised third parties through oil thefts and sabotage and that this lies outside the company's control. Eni emphasises that there are on the whole sufficient resources available for the operations, and that oil spills are cleaned up and rehabilitated as quickly as possible. Eni states that it invests a lot of resources in preventive measures, in monitoring pipelines to prevent oil spills and in testing out new methods in several areas to handle the unusual conditions in the Delta.

Eni acknowledges that the current JV Agreement and the way in which it is practised restrict the freedom to act and that persistent underfunding makes major investments difficult. Despite the enormous challenges involved in producing oil in the Niger Delta, Eni sees opportunities for positive change.

The Council on Ethics has considered recommending exclusion or observation. The Council finds that the frequency and volume of oil spills, both those caused by operational failure and those caused by sabotage, are extremely high for the NAOC JV, despite the fact that the reported figures are minimum figures in relation to the actual oil spills that can be linked to NAOC's oil production and infrastructure, whether caused by operational failure or sabotage. Many ecologically sensitive and very valuable areas have been damaged by large, repeated or inadequately cleaned up and rehabilitated oil spills. The Niger Delta is one of the most oil-influenced large ecosystems in the world and the damage is large and long-lasting in many areas. The local population's livelihoods are also very negatively affected by oil spills. The

local people are often poor and have few alternatives other than to utilise the local environment's natural resources that have been damaged or destroyed by oil spills, such as fresh water, fish and agricultural land, to obtain food, drinking water and work. The Council on Ethics believes that this makes the consequences of oil spills very severe in many areas.

There is a clear link between NAOC's operations and the serious damage to the environment. The company has a responsibility for the NAOC JV's unanimous decisions and the implementation and follow-up of these as the operator. The operator also has a special responsibility to propose and implement measures to prevent or reduce damage. The Council on Ethics thus believes that the company has a responsibility for the serious damage to the environment and the local people's livelihoods.

In a situation where the authorities do not sufficiently enforce the national laws, the company must be expected to implement extraordinary measures to ensure that the activities do not breach legislation, norms or standards. Eni tries to base its operations in the Delta on international standards and invests considerable resources in this. As an operator, the company has nevertheless not managed to secure and monitor the infrastructure to a sufficient extent, or to prevent damage to the environment and the local people's livelihoods. The Council on Ethics finds that national legislation, international standards and Eni's own standards have not been followed.

As regards the future risk of damage to the environment and the local people's livelihoods, the Council on Ethics finds that it is unlikely that major changes will take place in the short or medium term unless one or more of the following factors change significantly: A) Eni's willingness and ability to use the tools it has in the JV (such as voting on budgets, plans and operations which experience has shown lead to extensive oil spills, and more frequently shutting down production/infrastructure when the situation in the field indicates that this is necessary). B) The form of management within the JV and the financing of important investments in the JV operations. C) The ability and willingness of the Nigerian authorities and Eni to monitor and reduce oil thefts and sabotage.

Despite the serious circumstances, the Council on Ethics does not recommend excluding the company because it believes there is unusually great uncertainty about future developments. Among other things, the long process of revising the legislation (*Petroleum Industry Bill*) is also expected to be completed soon and this may change the form of management and other conditions within the JV. In addition, the new government in Nigeria is indicating it will take measures to change the unusually problematic situation in the Niger Delta and weaknesses in the authorities' regulation of the petroleum sector. This has the potential to change factors referred to above. The Council on Ethics thus recommends that the company is put under observation for a period of up to four years. The Council will monitor the situation in the Niger Delta and regularly assess developments in key conditions, with the emphasis on the company's actions and utilisation of its freedom to act in a complex situation. During the observation, the Council will place particular emphasis on whether the extent of the oil spill from Eni's operations and the unacceptable harmful effects have been significantly reduced. The way in which the JV is managed, and in particular Eni's role as the JV operator, are another main issue, together with the authorities' handling of the oil-spill issue and especially Eni's actions in relation to this.

2 Introduction

In March 2010, the Council on Ethics decided to assess the GPFG's investment in Italian energy company Eni Sp.A (Eni)¹ based on the guidelines for the observation and exclusion of companies from the GPFG's investment universe (the Ethical Guidelines).² The Council on Ethics has monitored the situation related to pollution from oil production in the Niger Delta for several years and started a more thorough assessment of onshore oil production in 2010. This assessment included Eni and its wholly owned subsidiary Nigerian Agip Oil Company Ltd. (NAOC), which is the operator for the NAOC joint venture (the NAOC JV).

2.1 What the Council has assessed

The Council on Ethics has considered whether there is an unacceptable risk that Eni is responsible for or contributes to serious damage to the environment according to §2, paragraph three, letter c of the Ethical Guidelines. There has been extensive local, national and international criticism of several circumstances of the company's operations in the Niger Delta. This criticism relates to such things as frequent oil spills leading to major consequences for the environment and local community; the destruction of habitats caused by the building of physical infrastructure or greater access to quite untouched or vulnerable areas due to the creation of, for example, roads, pipelines and channels; various types of pollution from exploration and production activities; the flaring of associated gas which leads to local and global pollution; and complicity in various breaches of human rights. To start off with, the Council assessed the diverse environmental damage in the Niger Delta based on the Ethical Guidelines. The Council then decided to concentrate its detailed investigations on local environmental damage from oil spills due to onshore oil production.³ The Council on Ethics considered that the frequency and extent of oil spills were the most serious risk with regard to the Ethical Guidelines. In some areas, other consequences of oil production (such as the building of infrastructure, greater access to untouched areas and cumulative consequences) may nonetheless be more serious than small oil spills.

The Council on Ethics assesses what is serious environmental damage in each individual company report and based on an overall assessment of specific operations and activities. Among other things, the Council places emphasis on whether:

- the damage is great,
- the damage entails irreversible or long-term negative effects,
- the damage has major negative consequences for human life and health,
- the damage is a result of a breach of national legislation or international norms,
- the company has failed to act to prevent damage,
- the company has implemented measures to rectify the damage to a sufficient extent, and whether
- it is likely that the company's practice will continue.

¹ The company's ISIN is "IT0003132476" and the company's ticker is "ENIIM".

² http://www.regjeringen.no/en/sub/styrer-rad-utvalg/ethics_council/ethical-guidelines.html?id=425277

³ NB: some of the onshore operations also have some activity in offshore coastal areas.

2.2 Sources

The Council has obtained information and documentation⁴ from the company, researchers, authorities, voluntary organisations and the media that is mainly in the public domain. The company has given the Council access to a lot of documentation. The quality of the available information varies greatly but has been considered sufficient or good for key parts of the recommendation. However, there is significant uncertainty linked to the extent of the oil spills, especially the volume. The assessments are primarily based on the material which the company has made available and other publicly available information from various reports and sources. Discussions with company employees and others have been useful in interpreting the material. The assessments in the recommendation concentrate on the frequency and volume of oil spills caused by sabotage⁵ and operational failure,⁶ factors which lead to oil spills, the cleaning up of oil spills and the management structures for the oil-production operation (NAOC JV), including the responsibilities and controls within the JV operation.

The Council on Ethics has obtained and assessed information and documentation through a step-by-step assessment process. Following introductory investigations, the Council on Ethics had extensive contact with the company in 2010, 2011 and 2012. During the Council on Ethics' contact with Eni, the company was very open and replied in writing to several rounds of extensive questions from the Council.

Representatives of the Council on Ethics visited the Niger Delta in February 2011. They have had meetings with Eni in Milan and Abuja. The Council has also had meetings and other contact with various interest groups and experts.

3 Background

3.1 Eni

Eni is an integrated energy company with activities in 85 countries and around 79,000 employees. It has extensive activities in the oil and gas sectors and is an important international player in the oil-exploration and -production sector, especially in Africa. The company is listed on the Milan and New York Stock Exchanges. As at 31 December 2012, the GPFG owned shares in Eni with a market value of NOK 9,137 million, equal to 1.87 per cent of the shares in the company. The GPFG also owned an interest-bearing instrument in Eni worth NOK 306 million.

Eni has been involved in oil production in Nigeria since 1962. Nigerian Agip Oil Company Ltd. (NAOC) is the operator for the NAOC joint venture (NAOC JV).

⁴ Key documentation is referred to in footnotes. Websites that are referred to were available on 20 March 2013.

⁵ Sabotage: sabotage comprises various acts by unauthorised third parties, such as the illegal tapping of oil from pipelines and other infrastructure on a large or small scale using various methods and technologies (the theft of crude oil, often called "bunkering") and direct vandalism (such as blowing up pipelines).

⁶ Operational failure: oil spills due to operational failure are caused by failures in equipment (such as corrosion, faults in valves or gaskets) or human error by the operator.

3.2 The Niger Delta

3.2.1 Natural conditions

The Niger Delta covers a large area in the south of Nigeria (refer to figure 1). The exact size of the delta depends on the political, ecological or hydrological definition used. The authorities' Niger Delta Development Commission (NNDC) has defined the Niger Delta as an area of around 112,000 km² with a population of over 30 million.



Figure 1 Location of Nigeria and the Niger Delta.

The Niger Delta is exceptionally rich in natural resources and contains many important and sensitive ecosystems and unique biodiversity values in various types of forests (such as mangroves, swamp forests and rain forests), wetlands, fresh water and a productive coastal zone. The delta also has important spawning and nursery areas for fish populations in both Nigeria and along other parts of the coast of West Africa. Productive agricultural areas and rich fishing areas have led to the delta having one of the densest populations in Africa in many places. The areas with the densest populations have lost a lot of their natural value. The delta is supplied with water and food from the large Niger Basin, the ninth-largest area of precipitation in the world and the third-largest in Africa. The Niger Delta is considered to be one of the ten most important wetland and coastal marine ecosystems in the world⁷ and has among other things a mangrove forest that is the third-largest in the world and the largest in Africa.

The Niger Delta also contains huge petroleum resources. The Niger Delta has been and will probably continue to be a globally very important area for oil and gas production.

3.2.2 Socioeconomic conditions and conflicts

Nigeria and the Niger Delta have a turbulent history that has at times been full of conflict. Since the end of the 1990s, the country has taken important steps towards democracy. Nigeria is now a developing democracy but has major challenges relating to both its form of governance and economic development (such as corruption, the abuse of power and differences in the material standards of living of various groups).⁸ The petroleum sector faces particularly large challenges related to corruption and other problems concerning its form of governance,⁹ something that is also acknowledged by Nigeria's top politicians.

In 1980, 28 per cent of Nigeria's population were categorised as poor. More than 20 years later, 71 per cent were considered to be poor. According to many development indicators, the Niger Delta is below average in Nigeria.¹⁰ Much of the population lacks access to fundamental services such as clean water, electricity and medical assistance. More than 70 per cent of the population of the Niger Delta lives in more or less a subsistence economy in which the local nature comprises the basis for their existence in the form of agricultural areas, fishing resources, fresh water, forests, etc.

⁷ Nigerian Federal Ministry of Environment, Nigeria Conservation Foundation, World Wide Fund for Nature & The World Conservation Union (2006). Niger Delta Natural Resource Damage Assessment and Restoration Project - Phase 1 – Scoping Report. Available at: http://www.google.no/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=1&cad=rja&sqi=2&ved=0CB4QFjAA&url=http%3A%2F%2Fcmsdata.iucn.org%2Fdownloads%2Fniger_delta_natural_resource_damage_assessment_and_restoration_project_recommendation.doc&ei=uQedUM28LqaN4gSo8YDgBw&usg=AFQjCNGAsqQCmU5qiwXPbLlgYnfrBzd2HQ&sig2=IsNUzjac5_2tFCzn8bM5Wg.

⁸ Refer, for example, to: Transparency International (2012). *Corruption perception index*. Transparency International, Berlin. Nigeria is ranked as country no. 139 out of 174 countries/territories. Available at: http://cpi.transparency.org/cpi2012/in_detail/.

⁹ Refer, for example, to: Transparency International & Revenue Watch Institute (2011). *Promoting revenue transparency 2011 – report on oil and gas companies*. Transparency International, Berlin. State-owned company Nigerian National Petroleum Corporation (NNPC) is ranked last of all the companies considered. Available at: http://www.transparency.org/whatwedo/pub/promoting_revenue_transparency_2011_report_on_oil_and_gas_companies.

¹⁰ United Nations Development Programme (2006). *Niger Delta Human Development Report*. United Nations Development Programme (UNDP), Abuja.

Nigeria is extremely dependent on the capital-intensive petroleum sector. Petroleum accounts for around 95 per cent of the country's export revenues.¹¹ In 2010, Nigeria was ranked as no. 182 of the world's 190 countries measured by GDP per person (USD 2,400).

It is a common opinion among the local population that they live in extreme poverty while enormous revenues from the delta do not benefit them. Paradoxically, the poverty in the Niger Delta has increased during the period when huge volumes of oil and gas have been produced.¹² The Niger Delta is characterised by exceptional distrust between various groups and players. The local population feel to a large extent let down by the authorities and oil companies and often have a deep-rooted distrust of these. Distrust and conflicts also exist between various population groups in the delta.

There is a lot of power at federal level and revenues from both the petroleum sector and taxes and duties are to a large extent passed on to the states and local level through the federal level. The forms of government at federal level, state level and local level, in which traditional government structures are still important, are all of importance to problems linked to the oil industry.

3.2.3 Oil production

Commercial crude-oil production has taken place for more than 50 years since Shell British Petroleum (now Royal Dutch Shell) found oil at Oloibiri in 1956 and started production in 1958. The oil company started production on land and has since moved out into the swampland and shallow areas on the continental shelf and later also to deeper sea areas outside the continental shelf. A number of international oil companies have taken part in these developments and operate in the Niger Delta.

International oil companies are directly involved in exploration and production activities through three main arrangements, of which the oldest and from a production viewpoint clearly biggest is joint-venture agreements with the state-owned oil company Nigerian National Petroleum Corporation (NNPC). NNPC is the majority partner in each JV. However, the operator is always an international oil company. Each JV has an Operating Committee (OPCOM) which decides on the frameworks for the JV's operations, such as its budget, work schedules, standards, etc. NNPC usually has six representatives while the operator usually has four. Any other partners usually have one representative each. Decisions by the OPCOM must be unanimous.¹³ Gradually, two other types of agreement have also been developed and these do not require the state to contribute direct financing in cash, as a JV does: Production Sharing Contracts (PSCs) and Service Contracts (SCs). The international oil companies have stronger rights to the oil resources in a JV than in a PSC or SC. In Nigeria, a JV covers many oil fields and in part very large areas, while in other parts of the world a JV often only covers one oil field.

Over the past 50 years, the oil and gas industry has developed into by far the most important sector for the state's revenues and the country's export revenues. More than 25 billion barrels of oil have been produced in the Niger Delta. The crude oil is of high quality for refinement purposes and is in demand. The oil industry currently has a large physical presence in the

¹¹ Energy Information Administration (2012). Country Analysis Briefs. Nigeria. Energy Information Administration (EIA), U.S. Department of Energy, Washington, D.C. Available at: <http://www.eia.gov/countries/cab.cfm?fips=NI>.

¹² UNDP (2006). *Op.cit.*

¹³ Ariweriokuma, S. (2009). The political economy of oil and gas in Africa. The case of Nigeria. Routledge, New York.

delta, with thousands of kilometres of pipeline, several thousand wells¹⁴ and a large number of flow stations and other physical infrastructure. The land directly used by these installations is limited when measured as part of the delta, probably less than one per cent, but the area that is directly and indirectly affected is many times greater than this.

Onshore oil and gas production in the Niger Delta often consists of a large number of production wells that, through an extensive network of pipelines, are linked to flow stations that collect oil from a number of wells and separate water and gas from the crude oil. From the flow stations, the crude oil is transported in fewer and larger pipelines to an export terminal (see figure 2). A small volume of oil is refined in Nigeria.

In 2010, Nigeria was ranked no. 12 of the world's oil producers measured in production, no. 5 measured in exports and no. 10 measured in proven reserves. The corresponding figures for natural gas are 26, 11 and 9.¹⁵ Nigeria imports refined petroleum products, partly due to its limited refining capacity but not least due to the low utilisation of its refining capacity. Nigeria has a chronic shortage of fuel, which makes it lucrative to both import fuel and sell locally refined fuel from illegally tapped oil in the black market.

The Niger Delta is an unusually challenging and complicated place in which to produce oil. The natural conditions mean that access to parts of the river delta and wetlands is difficult. Even more important are complicated and sophisticated mechanisms to make individuals or groups wealthier, corruption, political and economic power struggles and ethnic and historical conflicts.

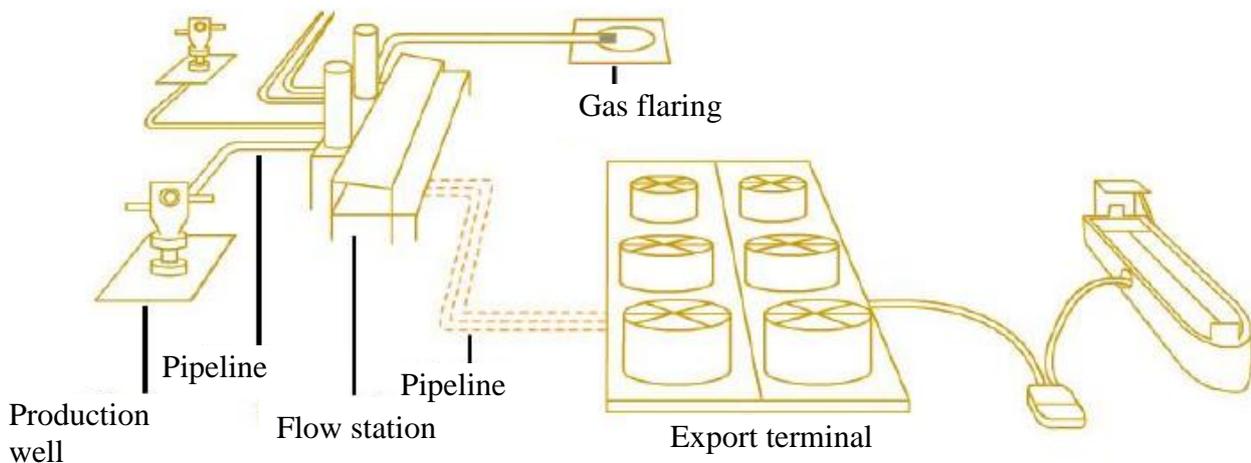


Figure 2 Simplified sketch of typical onshore oil production in the Niger Delta.

Extensive organised crime in the form of oil thefts for billions of dollars, often taking place openly and apparently without consequences, is remarkably common. The delta is characterised by massive distrust between many of the players, a great deal of frustration and at times direct aggression towards the state and petroleum industry, making the security

¹⁴ There are probably fewer than 2,000 wells in production today.

¹⁵ Refer, for example, to: BP (2011). BP Statistical Review of World Energy June 2011. BP, London. Available at: http://www.bp.com/assets/bp_internet/globalbp/globalbp_uk_english/reports_and_publications/statistical_energy_review_2011/STAGING/local_assets/pdf/statistical_review_of_world_energy_full_report_2011.pdf

situation in the delta difficult (for example attacks on oil installations, sabotage and kidnapping). Many local people feel that the state and oil industry have taken most of the enormous oil-production revenues and in many cases weakened their already vulnerable and marginal livelihoods.

The petroleum-sector legislation in Nigeria has been under revision for a long time and been discussed in the national assembly several times. After several lengthy postponements, there is still a great deal of uncertainty about the content of the new legislation (Petroleum Industry Bill), but many people expect changes to primarily affect offshore operations in deep waters. It is unclear when new legislation will be in place.

3.3 The NAOC joint venture

The NAOC JV has three partners (refer to figure 3). NNPC is the majority partner, while Nigeria Agip Oil Company Ltd. (a subsidiary of Eni) and Phillips Oil Company Nigeria Ltd. (a subsidiary of ConocoPhillips) each have a 20 per cent stake. The NAOC JV is an important oil-production player in the Niger Delta and holds licences which cover an area of around 5,324 km². This area lies in four states (Bayelsa, Delta, Imo and Rivers), contains around 30 producing oil fields, a network of around 800 km of pipeline, more than 200 producing wells and 12 stations for gathering oil and gas from wells before separation and transfer to export terminals or gas-fired power stations. The large licence area and extensive infrastructure mean that NAOC is in contact with around 350 local communities in the delta. The NAOC JV still has large oil and gas resources that are of high quality and relatively easily accessible.

In addition, NAOC is also a partner in another JV in the Niger Delta, namely the Shell Petroleum Development Company of Nigeria Ltd. (SPDC) JV. Shell is the operator for this JV, while NNPC and Total Exploration and Production Nigeria Ltd. are the other partners. NAOC has a 5 per cent economic interest in this JV, while NNPC, SPDC and Total have a 55, 30 and 10 per cent interest respectively.

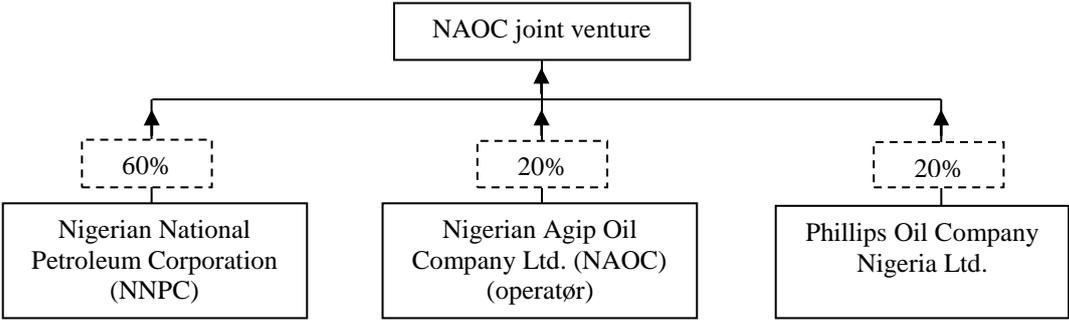


Figure 3 Economic interests in the joint venture for which NAOC (Eni) is the operator.

The relationship between the partners in the JV is governed by a Joint Operating Agreement (JOA). The JV’s operations and investments are financed by cash contributions from the partners in proportion to their economic interest in the JV. The JV is not a registered company with limited liability that raises loans and finances its operations and investments with the flexibility that such a company has. The federal authorities in Nigeria do not allocate enough resources to ensure that NNPC contributes its share of the financing in order to safeguard the optimal operation of the JV. In practice, capital-intensive investments in the petroleum sector compete with other social measures for limited resources in the annual state budget. There

have been too small annual contributions and too much unpredictability and underfinancing in Nigerian JVs for a number of years, this does not apply only to the NAOC JV.¹⁶

In exceptional cases, the JV has made large investments (such as in a production plant) without NNPC's contribution. The other partners have in such case paid NNPC's share in advance under separate agreements (modified carry agreements). The oil companies want to minimise the use of this model in so far as possible because it in practice deviates from the JOA without other parts of this agreement having been reassessed, and because it is economically risky.

The JV's most important decision-making forum is its Operating Committee (OPCOM), which among other things approves and revises budgets and work schedules and determines the JV's guidelines, standards, procedures and investigations, etc. Various sub-committees provide advice. The OPCOM checks that decisions are carried out. The Council on Ethics assumes that the composition of NAOC JV's OPCOM is as shown in table 1.

Table 1 The number of representatives of, and key tasks for, the members of the NAOC JV's OPCOM.

JV partner	No. of representatives	Key tasks
Nigerian National Petroleum Corporation (NNPC)	6	Appoints the chair. Provides financing equal to its 60 per cent stake.
Nigerian Agip Oil Company (NAOC)	4	Responsible for the day-to-day operation of the JV as the operator. Provides financing equal to its 20 per cent stake.
Phillips Oil Company Nigeria Ltd.	1	Provides financing equal to its 20 per cent stake.

OPCOM decisions are made based on consensus. Frequent contact between the JV's partners seems to ensure that proposals which are submitted to the OPCOM are agreed to by all the partners. A partner can in principle unilaterally block a proposal with which the partner disagrees. In practice, NNPC seems to be the one that blocks proposals regarding, for example, major investments that cost more than the state can contribute, or measures that sharply reduce the flow of income (such as shutting down production for lengthy periods). Eni has stated that there are usually sufficient resources in the operating budget, including for cleaning up, rehabilitation and compensation for oil spills. Questions linked to oil spills are regularly discussed by the OPCOM and various sub-committees.

The operator is responsible for the day-to-day running of JV operations within the budget, schedules, standards, etc. that the OPCOM has agreed on. The operator cannot make unilateral decisions without the acceptance of the OPCOM. This reduces the operator's freedom of action. In an emergency, the operator may implement measures it believes are necessary to safeguard life and property and prevent pollution without the permission of the OPCOM.

¹⁶ Refer, for example, to: Ariweriokuma, S. (2009). *Op.cit.*

Along the pipelines, it is primarily the local population that have contracts with the operator to monitor irregularities and maintain a corridor along the pipelines (a right-of-way), among other things to prevent high vegetation growing in the pipe trenches. The operator also has an infrastructure-monitoring system to discover such things as the illegal tapping of oil or damage which leads to oil spills. The Nigerian authorities are responsible for safety at strategically important installations (such as production plants, export terminals and power stations).

The JV Agreement (JOA) is different from normal JV agreements in the industry in several areas. For instance, it is not normal in other countries for the state-owned oil company to make decisions alone, even where the state-owned company has the majority interest. In practice, NNPC makes some decisions alone by not providing sufficient financing to ensure that certain investments are carried out. Normally, a JV partner loses rights if it does not fulfill its duties according to the agreement (such as in the form of financial contributions), and may for example lose its right to vote. In the most extreme situations, a partner may lose its stake in the JV in return for financial compensation. In Nigeria, NNPC's failure to provide contributions and make payments does not seem to have significant consequences for NNPC's role in a JV.

4 The main issues and the Council on Ethics' findings

4.1 The extent of the oil spills

The Niger Delta has been subject to many thousands of oil spills over the past few decades, especially from onshore production. There are no exact figures for oil spills and estimates from various sources vary widely. The figures for and volumes of oil spills are disputed and subject to a great deal of uncertainty. Civil-society groups claim the companies' and state's reports are incomplete, present far-too-low figures and lack independent verification. The Nigerian authorities do not publish complete statistics and figures issued by the authorities also do not always seem to be consistent. The Council on Ethics has reviewed the statistics showing the frequency and volume of the NAOC JV's oil spills to which Eni has given the Council access. The main trends during the 2000-2010 period are explained in further detail below. Preliminary figures for 2011 and parts of 2012 were available during the Council's final discussions on this case and are referred to briefly.

The Council on Ethics has used NAOC's data as a minimum estimate.¹⁷ Various studies point out that the reported figures are minimum estimates, and some claim that the actual oil spills are many times larger than the reported figures.¹⁸ The Council on Ethics has no good

¹⁷ The oil-spill volume is usually calculated at the site of the oil spill by a so-called joint investigation team (JIT), also referred to as a joint investigation visit (JIV). The JIT consists of representatives of the authorities, operator and affected local communities. Possible sources of error in such calculations include: problems in calculating the volume of a liquid that has spread over a land area and/or water, and where some of the oil may have been carried away by rain, rivers or tides; relatively quick evaporation of some of the relatively "light" and volatile crude oil in the Niger Delta; the burning of oil in a fire; delay in the arrival of the JIT at the site (for example, for logistical reasons or because the local community refuses to allow the JIT access); the JIT is prevented from getting to the site of the oil spill (for example, due to reasons of security) so that no estimate of the volume is prepared; or the oil spill is not discovered or reported.

¹⁸ Refer, for example, to: World Bank (1995). Defining an environmental development strategy for the Niger Delta. World Bank, Washington, D.C.; United National Environment Programme (2011). Environmental assessment of Ogoniland. United National Environment Programme (UNEP), Nairobi. Available at:

indications of the extent of unreported or incorrectly reported oil spills but assumes that the reporting is on the whole incomplete for various reasons.

4.1.1 Number of oil spills

From 2000-2010, Eni reported a large number of oil spills in the Niger Delta that were larger than one barrel of oil. The number of oil spills increased during this period, especially after 2006 and especially oil spills caused by sabotage. The annual number of oil spills caused by operational failure almost doubled from the 2000-2005 period to the 2006-2010 period, while the number of oil spills caused by sabotage almost tripled. Around 72 per cent of the oil spills during the 2000-2010 period were caused by sabotage. The preliminary figures for oil spills in 2011 and parts of 2012 show that these figures are on a level with the highest annual figures during the 2000-2010 period, which means that the number is higher than the average for the 2006-2010 period.

4.1.2 Volume of oil spills

The total volume of oil spills varies widely from year to year and is dominated by a few large oil spills, while most oil spills are small in volume. The major contribution from a few large oil spills leads to there being no clear trend in the volume of oil spills over time, either for the total oil-spill volume or the volume of oil spills divided into those caused by sabotage and those caused by operational failure.

The annual reported oil-spill volume was on average at around the same level in the 2006-2010 period as in the 2000-2005 period. While the annual volume of oil spills caused by sabotage fell from the 2000-2005 period to the 2006-2010 period, the volume of oil spills caused by operational failure increased. Sabotage caused more than 80 per cent of the oil-spill volume in the 2000-2010 period. Preliminary oil-spill figures for 2011 and parts of 2012 show that the total oil-spill volume has fallen from the high figures for 2009 and 2010 and is around the average for the 2000-2010 period.

The reported oil spills per produced barrel of oil equivalent (boe) also varied widely during the 2000-2010 period. The variation has roughly been the same as for the oil-spill volume. The oil spill per produced boe fell slightly (<5%) from the 2000-2005 period to the 2006-2010 period. Eni's oil-spill figures per produced boe are much lower outside Nigeria.

4.2 Causes of oil spills

The causes of oil spills in the Niger Delta are normally classified as either sabotage or operational failure. The cause of an oil spill is normally determined by a so-called joint investigation team (JIT). Such a JIT is established after an oil spill and consists of representatives of the authorities, operator and local communities that are affected, each of which chooses its own representatives. The JIT tries to achieve consensus on the cause. In the case of disagreement, the authorities will report their conclusions. Eni believes the cause of oil spills is in most cases easy to determine. The operator and authorities seem to agree on the cause in almost all cases.

The classification of cause is at times disputed. According to Nigerian law, compensation is to be paid for damage when the cause is operational failure, but not if it is sabotage. While the local community is interested in classifying the cause as operational failure so that it will

receive compensation, the oil companies are interested in classifying oil spills as sabotage in order to avoid paying compensation. Civil-society groups often claim that companies and authorities under-report operational-failure causes and often erroneously classify causes as sabotage. At a local level, frustration about the lack of benefits from the oil production, many destructive oil spills, etc., may also lead to compensation for oil spills being seen as one of the few mechanisms that can be used to obtain revenues from the oil production, irrespective of the cause of the oil spill.

The information that the Council on Ethics has received from the company indicates that it is often easy to prove the direct cause of an oil spill. Therefore, allegations of significant wrong categorisation seem to be rather unlikely. The Council assumes that the reported ratio of sabotage causes to operational-failure causes is reasonably correct.

4.2.1 Sabotage

Sabotage may contain an element of protest against the authorities or the oil company and be an attempt to draw attention to political or other views and demands. During the 2005-2007 period, the number of very destructive sabotage actions, such as the use of explosives to blow up pipelines and other infrastructure, increased. The frequency of such actions declined after the authorities introduced an amnesty for militant groups that carried out such operations in 2009.¹⁹

The theft of crude oil, sometimes referred to as “bunkering”, has developed into a billion-dollar industry in the Niger Delta and results in frequent oil spills that are to a large extent not reported. SPDC estimates that more than 150,000 barrels of oil disappear each day from the JV operations.²⁰ With an oil price of USD 100 per barrel, this represents a value of USD 5.5 billion annually. The figure is probably much higher than that which the company can calculate based on measurements in limited parts of the pipeline network. Others believe the thefts are much greater and increasing sharply.²¹ The scope of, and technology used for, thefts vary from small-scale, primitive and polluting methods to make a hole in pipelines and transport small volumes of oil in open containers for “local refining” to professional and well-equipped operations that tap large volumes of oil from pipelines or wellheads and transport the crude oil to tankers for “export”. These at times well-organised crimes take place relatively openly, indicating that they are directly or indirectly, through protection or acceptance, linked to persons or groups with enough influence to prevent the extensive and prolonged thefts from being stopped. It is striking that these take place in this way and to this extent.

¹⁹ The amnesty has reduced the number of sabotage actions drastically and has led to increased oil production. The effect of the amnesty may be short-lived, among other things because there is no long-term solution to the underlying political and social problems. It can be questioned whether alternative work can be obtained for all those who have given up their militant activities. New fractions of militant groups also seem to pop up once the previous groups have surrendered their weapons (refer, for example, to: RiskIntelligence (2010). Nigeria – Review of 2010 and Outlook for 2011. RiskIntelligence, Vedbaek). There are also indications that once the level of militant activity falls, oil thefts increase, possibly because people change their “job” from militant activity to oil thefts.

²⁰ Shell (2012). Shell in Nigeria. The operating environment. Fact sheet, Shell companies in Nigeria. Available at: <http://s00.static-shell.com/content/dam/shell/static/nga/downloads/pdfs/briefing-notes/operating-environment2012.pdf>.

²¹ Refer, for example, to statements by Nigeria’s finance minister, who refers to 400,000 barrels a day: <http://www.ft.com/cms/s/0/61fb070e-bf90-11e1-a476-00144feabdc0.html#axzz2Bdgehf99>.

At times, sabotage may also be a purely speculative act by groups seeking either compensation for damage from oil spills that they themselves or their accomplices have caused or revenues through local contracts for cleaning up and rehabilitating oil spills.

4.2.2 Operational failure

Oil spills caused by operational failure are due, for example, to corrosion, equipment failure or human error on the part of the operator. It is known that some of the infrastructure in the Niger Delta is old or weak for other reasons and that the infrastructure has been replaced more slowly than is desirable due to the lack of financing in the JV, primarily because NNPC is not given sufficient resources by the state. The at times limited access to areas in the delta due to the security situation can weaken the monitoring and maintenance work and thus increase the risk of oil spills caused by operational failure. Recurring sabotage and repairs can also help to weaken the infrastructure, weaken the monitoring (for example because pigs²² cannot be used) and as a result increase the risk of later operational failure.

4.3 Consequences of oil spills

The consequences of oil spills vary depending on factors such as where the oil spill takes place, the size of the oil spill, what natural values are affected, whether the spread of oil is prevented, whether the cleaning-up and rehabilitation work starts quickly and whether the work is done efficiently and to a high standard.

Many oil spills affect relatively small areas. Some major oil spills and oil spills where the oil is spread by streams, rivers or tides can affect much larger areas. The delta is a relatively flat area and oil spills will often be spread over a large area rather than aggregate in lower land. The Council on Ethics has not found any figures showing how much of the delta has been or is affected by oil spills, either in total or in relation to the NAOC JV. The Council assumes that large areas of the delta are affected, even though most of the large Niger Delta is not affected or only affected to a slight extent.

Oil spills have serious consequences for the areas that are affected during the period when the oil pollution exists. Vegetation is destroyed, water is polluted and fish and game withdraw from the area or die. Oil spills can also go deep into the ground and down to the ground water even if this is not visible on the surface. Local communities whose livelihoods are based on these natural resources and who have few or no alternatives can experience very serious consequences due to damage to agricultural land, their drinking-water supply, forests, fish and other aquatic resources. This affects the food security, incomes and health of the local population.

Oil which is spilled will gradually decompose over time. This takes place when it is exposed to sunlight (photolysis) and biological decomposition by microorganisms which break down hydrocarbons. The extent of biological decomposition depends on such things as access to nutrients and oxygen, the temperature and the microorganisms that are present. Since the crude oil in the delta is relatively “light”, some parts (such as volatile organic compounds)

²² Pigs (“pipeline inspection gauges”) are a name for various tools that are placed inside pipelines and move through the pipe with the aim of, for example, cleaning its interior or measuring thickness or corrosion, mapping cracks, etc. Such technology cannot normally be used if the pipeline is deformed or has tapping equipment for stealing oil installed on it as this can stop the pig.

will to a certain extent evaporate and leave behind the “heavier” and more solid components of the crude oil.

The duration of the consequences of an oil spill varies from days and weeks for small spills that have been handled efficiently to months and years for large spills that have not been handled well or recurring oil spills. Remedial measures to reduce the extent of the damage include firstly removing oil that can be collected and then rehabilitating affected areas, often by encouraging (adding oxygen and nutrients) growth in microorganisms that decompose oil (remediation by enhanced natural attenuation, RENA).

In the case of oil spills caused by operational failures, Nigerian law states that compensation is to be paid. In some cases, short-term alternatives are also given to the local population in the form of drinking water and food as part of the remedial measures. Quick and sufficient cleaning up and rehabilitation, combined with rapid and fair compensation, reduce the oil spill’s consequences for both the local population and ecosystem.

Insufficient remediation has been a problem and a source of conflict for many years. At times, the company cannot enter the affected area quickly due to the security situation. The local opposition to NAOC has at times led to oil spills not being cleaned up and rehabilitated as quickly as is desirable. In several cases, local contractors and groups that Eni has hired to carry out the cleaning up and rehabilitation seem to have done work that is not good enough or to have left the area before the work was finished. Both Eni and in the end the authorities must in principle approve the cleaning-up and rehabilitation work when the limit value for the permitted content of hydrocarbons in the soil has been reached. There is reason to believe that at times neither the oil company’s nor the authorities’ follow-up is good enough, among other things because of vagueness about the division of roles between departments and different interpretations of the regulations.²³

There is very little publicly available documentation of the effects of oil spills on specific areas in the Niger Delta. A lot of resources must have been utilised on studies and assessments in connection with the building or upgrading of infrastructure and probably also before the authorities have approved the cleaning up and rehabilitation of many oil spills. This information seems on the whole to be only available to the authorities and companies, with the exception of some impact analyses in connection with the creation of more modern infrastructure. Eni does not seem to have considered cumulative consequences – either the cumulative consequences of recurring oil spills, the consequences of oil spills and other effects of oil production or the consequences of oil production and other effects on the natural environment or local population.

There is very little information available from the monitoring of the consequences of oil spills for the local population and the ecosystem. In many, perhaps most, cases, there seems to be no information on parameters other than hydrocarbons in the soil. But even this limited information is only published to a slight extent. In such a rich and productive area as the Niger Delta, it is natural to expect a number of biological and socioeconomic conditions to be monitored, verified and published. Without documentation of the extent of consequences, the authorities and oil companies, which are to respectively regulate and implement efficient measures, will not really know what measures are necessary and effective to minimise the extent of the damage. The lack of publicly available and credible documentation has also led to a lot of more or less justified accusations against the company and authorities and an at times very high level of conflict.

²³ Refer, for example, to: UNEP (2011). *Op.cit.*

4.4 National legislation

Nigeria has several laws that are relevant to the environmental conditions while oil is being produced. The perhaps most important instrument is the Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN).²⁴ In principle, the standards defined in EGASPIN and other parts of the regulations are high. For example, Nigeria's Petroleum Act of 1969 states that oil and gas production must be in accordance with that which is generally accepted practice on oil fields, as defined in US standards.

The limits when it comes to standards seem primarily to lie in the authorities' and companies' follow-up of the regulations. The environmental and other authorities have limited resources. Vagueness about roles and responsibilities also weakens the follow-up (for example between the Department of Petroleum Resources, DPR and National Oil Spill Detection and Response Agency, NOSDRA), and the situation is problematic when the authorities that follow up the most important instrument on the environmental side (EGASPIN) are the petroleum authorities (DPR) which are to regulate the state's own oil company and oil is by far the most important source of revenue for the state. These challenges due to the form of governance are also illustrated by the fact that environmentally harmful and resource-wasting flaring of associated gas has taken place on a large scale for over 25 years after it was prohibited in Nigeria.²⁵ During the ongoing revision of the petroleum-sector legislation (Petroleum Industry Bill), it has been proposed to split the state players into more institutions in order to separate and focus their respective roles, reduce in-built conflicts and improve effectiveness.

5 Information from the company

The Council on Ethics and the company exchanged several letters and held many meetings in 2010, 2011 and 2012. The company has also commented on the draft recommendation. The company has given the Council on Ethics access to extensive documentation and made key personnel in Eni worldwide and NAOC in Nigeria available to the Council on Ethics.

Eni states that the same standards as in other countries form the basis of its operations in Nigeria. The company underlines the unusually complex conditions and unique challenges in the Niger Delta and Nigeria, conditions which are very difficult to understand without having spent time in Nigeria and the delta. Conditions in the Niger Delta are very challenging for all onshore oil production, not only for NAOC. The operational frameworks in the delta are also very different from operations in other parts of West Africa which also take place in river deltas with similar natural conditions but much fewer oil spills. The company has implemented extraordinary measures due to the difficult operating conditions in the Niger Delta.

Eni acknowledges that there are many oil spills and that these have negative effects on the ecosystem and poverty-stricken local population. The company points out that today's oil-spill situation is very undesirable for all parties for economic, operational, environmental and

²⁴ Department of Petroleum Resources (2002). Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN). Department of Petroleum Resources (DPR), Lagos.

²⁵ To reduce flaring and take care of a valuable resource, the Nigerian authorities announced the Associated Gas Reinjection Decree in 1979, which demanded that companies were to stop flaring in 1984. Nigeria and Russia are the countries in the world that flare off most gas.

social reasons. For the company and JV, oil spills mean a loss of oil and revenues, extra costs, the shutdown of production and reputational harm. Eni emphasises that oil thefts and sabotage are a huge problem and the reason for most of the oil spills. Eni believes this is outside its control and that NAOC has a good monitoring system.

Eni states that there are on the whole enough resources available for operations and for the cleaning up and rehabilitation of oil spills and this work is done as quickly as possible. Eni states that it invests a large amount in preventive maintenance and monitoring pipelines to prevent oil spills (such as replacing old or damaged pipelines and shutting down production if there is any indication of an oil spill). The company also tests out new methods for dealing with the unusual conditions in the delta (such as various ways of monitoring infrastructure and laying pipelines deeper). There are also restrictions on NAOC as an operator since NAOC cannot make unilateral decisions in the JV when it comes to preventing oil spills (with the exception of declaring an emergency).

Eni acknowledges that today's JV Agreement and the way in which it is practised restricts the operator's freedom of action and that persistent underfunding is a challenge when it comes to large investments. Despite major challenges, the company sees opportunities for positive change, among other things linked to the new political leadership in Nigeria and the amnesty.

6 The Council on Ethics' assessment

The Council on Ethics has assessed selected aspects of the NAOC JV's oil production where Eni is the operator, based on the Ethical Guidelines' criterion of serious damage to the environment, with the aim of recommending exclusion or observation. The Council has focused on the extent of the oil spills and the damage caused by these, the company's control over and responsibility for the environmental damage, whether the company has implemented sufficient measures to prevent and rectify damage, as well as the future risk of serious environmental damage.

6.1 The extent and duration of the oil spills

The Council on Ethics' investigations have shown that the onshore oil production in the Niger Delta has for many years led to frequent and, in total, extensive oil spills. The reported frequency and volume of oil spills, which the Council considers to be minimum figures, are far higher than those which are normal worldwide and those which Eni experiences in other operations in relation to oil spills caused by both sabotage and operational failure. The Council finds that oil spills to which access is delayed or lacking, oil spills that are not discovered, oil spills due to extensive thefts of oil and oil spills caused by the transport and refining of illegally tapped oil are factors which contribute to the actual oil-spill volume in the delta being much larger than that which is reported.

Many ecologically sensitive and very valuable areas in the Niger Delta have been damaged by large, recurring or insufficiently cleaned-up and rehabilitated oil spills. There is little doubt that the delta is one of the most oil-influenced large ecosystems in the world. In many areas, the damage to agricultural areas, forest areas, wetlands, fresh water and mangroves is severe and long-lasting. Many people also live in areas where there is extensive oil pollution and their livelihoods and health are very negatively affected. These are often poor people who are especially vulnerable because they have few or no other alternative ways of obtaining food, clean water and work. The Council therefore considers the consequences of oil spills to be very serious, even though many of the small oil spills probably have few or no long-term

consequences. The Council on Ethics finds it very unfortunate that there are so few studies and little monitoring of the actual consequences of the extensive oil spills in the Niger Delta. This weakens the basis for effectively remedying the damage caused.

6.2 Responsibility and control

An important element in the Council on Ethics' assessment is the extent to which Eni can be held responsible for oil spills that the company in many cases believes is outside its control. It is relevant to consider several factors, from the JV's decision-making processes to the implementation and follow-up of various measures in a complex operational context. The Council finds that there are a number of situations in which Eni as the operator can and should implement extra measures to reduce the risk of damage and the extent of the damage.

In the JV, decisions regarding standards, guidelines, investment and operations budgets, schedules, etc., are reached through consensus. In principle, all the JV partners have a right of veto. By their agreement, the partners are co-responsible for the decisions that are made. The Council on Ethics registers that the company does not often use its veto right and that Eni agrees to activities which will very likely lead to oil spills.

The operator is responsible for implementing measures to prevent oil spills, including monitoring and safeguarding physical infrastructure. It is likely that the lack of financing for major investments which has existed for a number of years has negatively affected several important, long-term measures, while measures to maintain the operations and flow of revenue have been prioritised. Extensive upgrades, for example by replacing old or weak pipelines, are expensive, both directly in the form of costs and indirectly in the form of the loss of revenue due to a production stoppage. Such investments seem to be difficult to prioritise in the JV, primarily due to the Nigerian state's persistent underfunding and secondly because the JV partners are not very willing to pay the NNPC's contributions in advance. Over time, the standard of the infrastructure has fallen for natural reasons (such as corrosion) and because of the external influence of unauthorised third parties (such as oil thefts). Parts of the current physical infrastructure of the JV operations are probably not up to the standard they should be or the standard that Eni wants them to be. In many places, it will also be impossible to use important technology such as "pigs" for maintenance and monitoring purposes. The Council believes these are factors that increase the risk of oil spills. There is thus an exceptionally great need for the operator to implement effective measures.

Thefts of crude oil and sabotage are undoubtedly important causes of oil spills and serious damage. Inadequate monitoring, insufficient measures implemented by the operator and a lack of follow-up by the authorities to deal with illegal activities are important reasons for the thefts continuing on a strikingly large and growing scale. Various measures over the past decade to reduce thefts have on the whole not reduced the number of thefts or the volume of oil spills. The authorities in the petroleum sector, including NNPC, also face major challenges in relation to bureaucracy, corruption and inefficiency in a number of important areas.²⁶ The sector is in various ways a system governed just as much by the interests of individuals and groups as by consideration of the best interests of the Niger Delta and Nigeria.²⁷ The weak

²⁶ Refer, for example, to: Gboyega, A., Søreide, T., Minh Le, T. & Shukla, G.P. (2011). Political economy of the Petroleum Sector in Nigeria. Policy Research Working Paper. World Bank, Washington, D.C. Available at: http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2011/08/24/000158349_20110824134316/Rendered/PDF/WPS5779.pdf.

²⁷ Refer, for example, to: Thurber, M.C., Emelife, I.M. & Heller, P.R.P. (2010). NNPC and Nigeria's oil patronage ecosystem. Working Paper #95. Program on Energy and Sustainable Development, Stanford University,

form of governance is an important factor in the extensive oil spills and the billion-dollar industry based on the theft of oil. The Council places emphasis on the operator having a responsibility to implement special measures to monitor infrastructure and to respond sufficiently to the risks relating to the actual operating conditions.

The operator may declare an emergency and shut down the production or transportation through pipelines without the approval of its JV partners if there is a danger to human life or a risk of serious damage to the operations or of severe pollution. The Council on Ethics finds very few examples of the operator making use of an emergency to prevent an oil spill even when the risk is great. This contributes to the huge amount of oil spills and environmental damage.

The operator's access to parts of the delta is at times restricted out of consideration for the safety of the operator's own staff and contractors. This weakens the maintenance and monitoring of the infrastructure and comes in addition to the challenges which lie in operating in a huge area and in a river delta with, in some locations, a poorly developed infrastructure. The risk of oil spills increases and the Council believes this also means that the company should implement extra and more effective measures to deal with risks (such as better monitoring and the shutdown of the production operations/infrastructure if there is a high risk of an oil spill).

Following an oil spill, the operator must make sure that the clean up work starts immediately and that the best available methods and procedures are utilised.²⁸ Rapid start-up and competent cleaning-up and rehabilitation work are important for reducing the extent of the damage. The relatively recent UNEP study from Ogoniland (where SPDC, not NAOC, is the operator) documents that it is not unusual for cleaning up and rehabilitation not to be carried out in accordance with Nigeria's own standards despite the fact that the authorities visit areas with oil spills and also approve the cleaning-up and rehabilitation work. The Council on Ethics has not seen documentation of the response time, quality and extent of the risk assessments and sampling (such as of the soil, water and biological materials) in order to consider the quality of the cleaning-up and rehabilitation work in the NAOC JV's area. The Council registers that, in the case that is well documented (Ogoniland), defects have been found in the way that the authorities deal with the cleaning-up and rehabilitation work and finds that this is a risk element the operator should deal with.

The Council believes that, in accordance with the United Nations Guiding Principles on Business and Human Rights, which do not directly apply to the environmental area but apply to breaches of human rights as a result of environmental damage, the company must be required to implement appropriate action to prevent breaches of human rights.

Regarding this, article 19 of the Guiding Principles states the following, among other things:

“Appropriate action will vary according to:

(i) Whether the business enterprise causes or contributes to an adverse impact, or whether it is involved solely because the impact is directly linked to its operations, products or services by a business relationship;

(ii) The extent of its leverage in addressing the adverse impact.”

Palo Alto. Available at: http://iis-db.stanford.edu/pubs/22995/WP_95_Thurber_Emelife_Heller_NNPC_16_September_2010.pdf.

²⁸ Cf. Nigeria's federal environmental legislation: “Environment Protection Agency Act” (1998).

The official commentary on the principle also states: “*There are situations in which the enterprise lacks the leverage to prevent or mitigate adverse impacts and is unable to increase its leverage. Here, the enterprise should consider ending the relationship, taking into account credible assessments of potential adverse human rights impacts of doing so.*”²⁹

Eni must conduct similar assessments regarding its situation in the Niger Delta.

When it comes to responsibility and control, the Council of Ethics finds that Eni is to a large extent responsible and can and should exercise significant control in relation to all the elements referred to above, especially in the form of prevention where the risk is great but also in the form of more effective measures when damage has occurred. The company is not the only party responsible and does not have full control, but its' very good insight into the operating conditions and the risks indicate, in the Council's view, that the company should do more, especially to prevent serious damage in advance. In a situation where the authorities do not sufficiently enforce the national legislation, the company must be expected to implement extraordinary measures to ensure that its activities do not contravene national laws or international standards.

6.3 Future risk

The Niger Delta is an unusually complex area for an oil company to operate in and several decades of oil production without a good form of governance by the authorities and oil companies have resulted in unusual mechanisms which are both very destructive and difficult to change. When it comes to oil spills, there have on the whole been few positive trends and the reported number of oil spills has increased while the annual oil-spill volume is at around the same level as before. Without drastic changes in important factors, the Council on Ethics believes that the major risk of serious environmental damage in the future will not be significantly reduced in the short or medium term. However, as described below, there is great uncertainty regarding some of these factors.

The company's utilisation of its freedom to act in a complex situation is a key element, including Eni's willingness and ability to actually use the tools the company has in the JV (such as voting in the JV, declaring an emergency and shutting down production/infrastructure), when experience shows that operations will lead to an unacceptably high level of oil spills caused by either operational failures or sabotage. The company's willingness to use these tools seems at present to be outweighed by the company's fear of risking its position in the JV and in the worst case losing rights in what for many years to come will probably be one of the world's most important areas for conventional oil production.

The JV's form of governance, the insufficient financing of important investments and, not least, Eni's role in the JV as the operator in this context are also important aspects. Any changes to the JV Agreement that reduce NNPC's power or in any other way improve Eni's and the JV's ability and willingness to make important investments and implement other measures to prevent oil spills may reduce the future risk and damage. Nigeria is discussing reforms in the petroleum sector and an extensive new law (Petroleum Industry Bill) has been proposed. The new legislation's effect on the JV and on the operator's opportunity to exercise greater influence is unclear.

²⁹ Cf. the UN's "Protect, Respect and Remedy" Framework for Business and Human Rights. Available at: <http://198.170.85.29/Ruggie-protect-respect-remedy-framework.pdf>, pp. 18-19.

A third important factor is the ability and willingness of the Nigerian authorities and Eni to monitor and control unauthorised third parties, especially the oil-theft industry but also sabotage actions. Oil thefts require among other things drastic measures by the authorities, better monitoring by the operator and that the operator shuts down production or transport when there are major problems or a high risk involved.

The new government elected in 2011, with a president from the Niger Delta (Goodluck Jonathan), is signalling various moves to change the situation in the Niger Delta. Thus, various players, not least the oil companies, are optimistic about political changes that may extend the freedom of action of Eni and the other companies.

6.4 Overall assessment

The Council on Ethics sees that oil spills are very undesirable for Eni, the JV and the government. Spilt oil is lost oil, lost revenues and increased costs. There is no reason to doubt that the company does a lot to reduce the extent of the oil spills, irrespective of whether the risk is of an operational nature or relates to unauthorised third parties. Nevertheless, oil spills are very large in extent and result in a situation which is environmentally and socioeconomically unacceptable.

Eni has a clear responsibility for the unacceptable damage situation, but the company is not solely responsible for this situation. The company can be said to be co-responsible for unanimous votes in the JV and for implementing and following these up as the operator. The company has considerable control over key conditions in the matter and is responsible for implementing measures if there is a great risk of an oil spill. The link between the operations and oil spills and the likelihood of a large number of oil spills under the present conditions mean that the company should implement extraordinary and effective measures to a much greater extent than has been the case up to now.

However, the Council on Ethics believes that there is currently an exceptional amount of uncertainty about future developments. Among other things, changes may occur in the JV's form of governance and framework and Nigeria has a new government that is clearly indicating it wants to change the unacceptable conditions in the Niger Delta. As an operator, Eni has good qualifications for driving change.

On this basis, the Council does not recommend excluding Eni but recommends putting the company under observation. This observation must especially be of how Eni utilises its changing freedom of action in the complex situation in the Niger Delta. Specifically what freedom of action the company will have depends, among other things, on political developments. The starting point is that the extent of oil spills from NAOC's operations is too large at present and that the subsequent damage is unacceptable. The way in which Eni carries out its role as an operator, its right to vote in the joint venture and its overall investment in Nigeria will be key elements in this observation.

7 Recommendation

The Council on Ethics finds that Eni Sp.A has a responsibility for serious environmental damage in the Niger Delta but that there is exceptional uncertainty linked to future developments. The Council on Ethics therefore recommends that Eni be put under observation for a period of up to four years.

Ola Mestad
Chair

(signature)

Dag Olav Hessen

(signature)

Ylva Lindberg

(signature)

Bente Rathe

(signature)