

Update on the Bribery Act - Impact on natural resources companies

The Ministry of Justice this week published its long overdue [final guidance](#) on anti-bribery compliance procedures. Consideration of this guidance is essential for any commercial organisations that want to maintain a defence to the new corporate criminal offence under the Bribery Act 2010 (the "Bribery Act" or the "Act") of failing to prevent bribery. At the same time, the Government has confirmed that the Bribery Act will be brought into force on 1 July 2011. [Joint guidance](#) by the Director of the Serious Fraud Office and the Director of Public Prosecutions (the "Joint Prosecutors' Guidance") was also published this week along with the Ministry of Justice's guidance.

Under section 7 of the Bribery Act, commercial organisations may commit an offence if they fail to prevent persons associated with them committing bribery on their behalf. It is a defence for the organisation to show that it has in place adequate procedures to prevent such bribery. The new guidance, 'Guidance about procedures which relevant commercial organisations can put in place to prevent persons associated with them from bribing (Section 9 of the Bribery Act 2010)' (the "Guidance"), which has been the subject of much press speculation in recent weeks, is intended to inform companies' efforts in this regard.

The final Guidance, originally expected in late January, but delayed to enable the Government to take on board the concerns of UK businesses, has corrected some issues of scope presented by previous draft guidance and provides some additional clarity in some areas. While the purport of the Guidance remains broadly similar, there are also some differences of tone, particularly in relation to corporate hospitality and facilitation payments, where a slightly softer approach is discernible. It also lays greater stress on proportionality, recognising, for example, that, in lower risk situations, commercial organisations may decide that there is "no need to conduct much in the way of due diligence."¹

The Guidance will be essential reading for anyone tasked with implementing anti-bribery procedures. Although "departure from the suggested procedures ... will not of itself give rise to a presumption that an organisation does not have adequate procedures"², prosecutors and courts will inevitably look at how corporate procedures stack up in relation to the principles outlined in the Guidance. What follows below is an update to [our briefing](#) on the Bribery Act and its impact on natural resources companies which we published last October. It provides an analysis of the Guidance including some case studies and examples which are particularly relevant to natural resources companies.

The Joint Prosecutors' Guidance offers an additional layer of colour by identifying the factors English prosecutors will take into account in deciding whether to prosecute in circumstances where they have decided there is sufficient evidence to justify a prosecution. It mitigates the severity of the Act by clarifying that conduct that is technically an offence may not always be prosecuted.

Key Issues

When is an organisation carrying on business in the UK?

Joint ventures, investments and liability for third parties

Corporate hospitality

Facilitation payments

Offsets/community advantages

Public procurement

The six principles

Conclusion

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¹ Paragraph 4.5 of the Guidance.

² Page 6 of the Guidance.

Even companies which have procedures in place designed to comply with the US Foreign Corrupt Practices Act will want to review these procedures and consider whether they need to be enhanced to address the wider scope of the Bribery Act, for example, in relation to facilitation payments, private sector bribery and promotional expenditure

When is an organisation carrying on business in the UK?

The section 7 offence (failing to prevent bribery) only applies to a commercial organisation which "carries on a business, or part of a business, in any part of the United Kingdom"³. Companies around the world have been urgently seeking clarification as to what this means, in the absence of any explanation in the Act, or in the draft guidance. The Guidance now gives some assistance, while deferring to the courts as "the final arbiter"⁴. The Government's view is that charitable, educational and public sector entities will all come within the scope of the offence, if they engage in commercial activities⁵. Previously there had been some doubt as to whether listing on the Official List of the UK Listing Authority would mean the company was caught by section 7, however, the recent Guidance also confirms indications given verbally during the public consultation that a simple listing would not have this effect. Rather, a "common sense approach"⁶ will be applied in determining whether a company falls within the scope of the Act. Similarly, it confirms that "having a UK subsidiary will not, in itself, mean that a parent company is carrying on a business in the UK, since a subsidiary may act independently of its parent or other group companies"⁷. This is certainly helpful though the reference to the courts as the final arbiter may fail to give companies the complete assurance they would like, and there remains a sizable grey area for the courts to colour in.

Joint ventures, investments and liability for third parties

The final Guidance also makes it clear that a company will only be liable for the acts of persons "associated" with it, rather than suggesting (as did the draft guidance) that adequate procedures must be applied to the whole supply chain. It aims to provide assistance in determining who is an associated person. In this regard, the Guidance confirms that contractors, sub-contractors, suppliers, joint venture partners or a joint venture entity could all potentially be associated persons, but clarifies⁸ that where a joint venture entity pays a bribe, the members of the joint venture will not be liable "simply by virtue of them benefiting indirectly from the bribe through their investment in or ownership of the joint venture".

Where the joint venture is being conducted through a contractual arrangement and an employee of another participant in the joint venture pays a bribe, it will not necessarily be assumed that the bribe was intended to gain an advantage for any party other than the participant employing that individual.

A bribe on behalf of a subsidiary by one of its employees or agents will not automatically involve liability on the part of its parent company, or any other subsidiaries of the parent company, if it cannot be shown the employee or agent intended to obtain or retain business or a business advantage of a parent company or other subsidiaries – even where the parent company or subsidiaries may benefit indirectly from the bribe: "liability will not accrue through simply corporate ownership or investment, or through the payment of dividends or provision of loans by a subsidiary to its parent"⁹.

A Case Study¹⁰ (not officially part of the Guidance) illustrates the type of bribery prevention procedures which should be considered when setting up a joint venture by using the example of a company interested in foreign mineral deposits entering into a joint venture with a local mining company. For example, the following should be considered in such a negotiation:

- parity of representation on the board of the joint venture entity;
- putting in place measures to ensure compliance with all applicable bribery and corruption laws;
- establishment of an audit committee with one representative from each of the joint venture entities having the power to view accounts and certain expenditure and prepare reports;

³ Section 7(5), Bribery Act 2010.

⁴ Page 15 of the Guidance.

⁵ "[I]t does not matter if it pursues primarily charitable or educational aims or purely public functions. It will be caught if it engages in commercial activities, irrespective of the purpose for which profits are made." Paragraph 35 of the Guidance

⁶ Paragraph 36 of the Guidance.

⁷ Paragraph 36 of the Guidance.

⁸ Paragraph 40 of the Guidance

⁹ Paragraph 42 of the Guidance.

¹⁰ Appendix A, page 35 of the Guidance

- binding commitments by each of the entities to comply with all applicable bribery laws in relation to the operation of the joint venture entity, with a breach by either entity being a breach of the agreement between them.

Corporate hospitality

"An invitation to foreign clients to attend a Six Nations [rugby] Match at Twickenham as part of a public relations exercise designed to cement good relations or enhance knowledge in the organisation's field is extremely unlikely to engage Section 1 as there is unlikely to be evidence of an intention to induce improper performance of a relevant function."¹¹

Gifts and hospitality to private sector individuals, and to UK public officials, will only be an offence where there is some element of impropriety, e.g. an intention to influence the recipient improperly. Gifts and hospitality to foreign public officials remain problematic because this offence does not include any element of impropriety.

However, the Guidance recognises¹² that the section 6 offence (bribery of a foreign public official) has been drafted very broadly, and says "it is not the Government's intention to criminalise behaviour where no such mischief [i.e. some improper act] occurs, but merely to formulate the offence to take account of the evidential difficulties".

It stresses that the prosecution must show that "there is a sufficient connection between the advantage and the intention to influence and secure business or a business advantage", and says "the more lavish the hospitality or the higher the expenditure in relation to travel, accommodation or other similar business expenditure provided to a foreign public official, then, generally, the greater the inference that it is intended to influence the official to grant business or a business advantage in return".¹³ Adhering to market practice or business sector norms will not, the Guidance specifies, be sufficient.

"Simply providing hospitality or promotional, or other similar business expenditure which is commensurate with [standards or norms applying in a particular sector] is not of itself evidence that no bribe was paid if there is other evidence to the contrary; particularly if the norms in question are extravagant."¹⁴

The Guidance repeats the statement in the draft guidance that in some circumstances hospitality to a foreign public official may not amount to "a financial or other advantage" to the relevant official because it is "a cost that would otherwise be borne by the relevant foreign Government rather than the official him or herself"¹⁵. This seems at odds with the text of the section 6 offence which says that the advantage may be given to another person (in the example given the other person would be the government) rather than directly to the official.

The Guidance gives other examples which, it says, will fall outside the scope of section 6:

- A UK mining company providing "reasonable travel and accommodation to allow foreign public officials to visit their distant mining operations so that those officials may be satisfied of the high standard and safety of the company's installations and operating systems"¹⁶.
- "Flights and accommodation to allow foreign public officials to meet with senior executives of a UK commercial organisation in New York as a matter of genuine mutual convenience, and some reasonable hospitality for the individual and his or her partner, such as fine dining and attendance at a baseball match."¹⁷ This, the Guidance says, would be unlikely to be caught by section 6, unless there was another, less expensive, venue, which would have been more convenient.

¹¹ Page 10 of the Guidance.

¹² Page 11 of the Guidance

¹³ Paragraph 28 of the Guidance.

¹⁴ Paragraph 29 of the Guidance.

¹⁵ Paragraph 27 of the Guidance.

¹⁶ Paragraph 31 of the Guidance.

¹⁷ Paragraph 31 of the Guidance.

- "[O]rdinary travel and lodgings to enable a visit by a foreign public official to a hospital run by the commercial organisation" in order to provide information on the organisation's background, track record and expertise in providing private healthcare"¹⁸.

On the other hand, a five-star holiday unrelated to a demonstration of the organisation's services is "far more likely" to raise the inference that it was offered with the intention of influencing the official to grant business or a business advantage in return¹⁹.

On closer reading, the comforting statement that the prosecutor will need to **show** that hospitality was intended to influence the foreign public official (section 6) or to induce improper conduct (section 1) is undermined by the references to prosecutors considering whether these matters can be **inferred** (for example, from the lavishness of hospitality).

Facilitation payments

The Guidance continues to describe facilitation payments as "small bribes"²⁰ and says that "exemptions in this context create artificial distinctions that are difficult to enforce ..."²¹.

Nevertheless, the line the Guidance takes is slightly softer than in the draft guidance and the Government recognises "the problems that commercial organisations face in some parts of the world and in certain sectors"²². The Guidance refers readers to the Joint Prosecutors' Guidance, also published this week. This sets out the factors a prosecutor will take into account when deciding whether or not to prosecute facilitation payments. A prosecution is **more likely** where there are large or repeated payments, where facilitation payments are "planned for or accepted as part of a standard way of conducting business" and where "a commercial organisation has a clear and appropriate policy setting out procedures an individual should follow if facilitation payments are requested and these have not been correctly followed"²³.

A Case Study sets out a number of steps a business should consider in dealing with hidden or overt facilitation payments. These include: building in extra time in project planning to cover potential delays as a result of non-payment; questioning the legitimacy of the payments; raising the matter with superior officials and/or the UK embassy; and the use of UK diplomatic channels or participating in "locally active non-governmental organisations" to apply pressure on the relevant governmental authorities²⁴.

Offsets/community advantages

The Guidance is not helpful on the position of offsets or community advantages where there is no specific provision for these in the relevant written local law. Where there is no such local law, the Guidance says "prosecutors will consider the public interest in prosecuting. This will provide an appropriate backstop in circumstances where the evidence suggests that the offer of additional investment is a legitimate part of a tender exercise"²⁵. Very few would regard providing free medical help, or other community services in developing (or developed) countries as a criminal enterprise, yet UK companies (and others within the scope of the Bribery Act) will, from June, have the added headache of being forced to check whether there is a "written law" requiring or permitting such advantages to be given. This will also apply to any form of royalty or other fee that oil, gas or mining companies pay to the government, and will mean that companies will first need to check that providing such benefits is permitted by local written law.

Public procurement

The Guidance makes no reference to the issue of whether a conviction for the corporate offence of failing to prevent bribery will lead to an automatic debarment from public procurement contracts. The Joint Prosecutors' Guidance, however, states that the section 7 corporate offence "is not a substantive bribery offence", which suggests that it would not automatically lead to debarment (this may, however, depend on agreement amongst EU member states). The Government has promised to clarify this before the Bribery Act comes into force.

The six principles

¹⁸ Paragraph 31 of the Guidance.

¹⁹ Paragraph 31 of the Guidance.

²⁰ Paragraph 44 of the Guidance.

²¹ Paragraph 45 of the Guidance.

²² Paragraph 46 of the Guidance.

²³ Page 9 of the Joint Prosecutors' Guidance.

²⁴ Appendix A, page 33 of the Guidance

²⁵ Page 12 of the Guidance.

The six principles set out in the Guidance are essentially the same as those set out in the draft guidance, though they are set out in a different order and the text elucidating the principles has been in some cases extensively expanded or amended (see Appendix). The table below shows how the principles are to be effected in an organisation's policies and procedures.

Policies should cover:	Procedures should cover:
<ul style="list-style-type: none"> • Commitment to bribery prevention • Approach to bribery risks e.g. <ul style="list-style-type: none"> – conduct of intermediaries and agents – hospitality and promotional expenditure – facilitation payments – political donations – charitable donations • Strategy to implement bribery prevention policies 	<ul style="list-style-type: none"> • Top-level commitment • Risk assessment procedures • Due diligence of associated persons • Gifts, hospitality, promotional expenditure, charitable and political donations, facilitation payments • Employment (recruitment, terms and conditions, disciplinary actions and remuneration) • Relations with associated persons • Financial controls • Transparency of transactions and disclosure of information • Decision-making (e.g. delegation of authority, conflicts of interest) • Enforcement/disciplinary processes • Reporting/whistle blowing • Application to projects and to different parts of the organisation • Communication and training • Monitoring, review and evaluation

Conclusion

It is certainly time that the UK had new anti-corruption laws, and the publication of this Guidance takes us one step nearer to implementation of the Bribery Act, which will be in three months' time. There will be teething problems, some of which have already been signposted, and it is not yet clear whether the Guidance will be genuinely helpful for commercial organisations, or not. No doubt case law will quickly develop which will establish more authoritative guidance on what the less well defined elements of the Bribery Act mean. It will also be interesting to see whether the courts agree with the Government's interpretation of the Act on some of the more difficult questions.

Appendix

Principle 1: Proportionate procedures

A commercial organisation's procedures to prevent bribery by persons associated with it are proportionate to the bribery risks it faces and to the nature, scale and complexity of the commercial organisation's activities. They are also clear, practical, accessible, effectively implemented and enforced.

Principle 2: Top level commitment

The top level management of a commercial organisation (be it a board of directors, the owners or any other equivalent body or person) are committed to preventing bribery by persons associated with it. They foster a culture within the organisation in which bribery is never acceptable.

Principle 3: Risk assessment

The commercial organisation assesses the nature and extent of its exposure to the potential external and internal risks of bribery on its behalf by persons associated with it. The assessment is periodic, informed and documented.

Principle 4: Due diligence

The commercial organisation applies due diligence procedures, taking a proportionate and risk based approach, in respect of persons who perform or will perform services for or on behalf of the organisation, in order to mitigate identified bribery risks.

Principle 5: Communication (including training)

The commercial organisation seeks to ensure that its bribery prevention policies and procedures are embedded and understood throughout the organisation through internal and external communication, including training, that is proportionate to the risks it faces.

Principle 6: Monitoring and review

The commercial organisation monitors and reviews procedures designed to prevent bribery by persons associated with it and makes improvements where necessary.

This Client briefing does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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