

'Adequate Procedures'

Supreme Court Regulation Nomor 13 (2016)

Article 4

In preferring charges against a corporation, the judges shall assess its fault, due (amongst others) to:

- a. whether or not the corporation benefited or profited from the criminal act, or that the benefit or that it was performed for the benefit of the corporation;
- b. whether or not the corporation allowed the crime to take place;
- c. whether or not the corporation took necessary measures to prevent the events and ensure adherence to the law.

Bribery Act 2010

S. 7 Failure of commercial organisations to prevent bribery

(1) A relevant commercial organisation (“C”) is guilty of an offence under this section if a person (“A”) associated with C bribes another person intending—

(a) to obtain or retain business for C, or

(b) to obtain or retain an advantage in the conduct of business for C.

(2) But it is a defence for C to prove that C had in place adequate procedures designed to prevent persons associated with C from undertaking such conduct.

(3) For the purposes of this section, A bribes another person if, and only if, A—

(a) is, or would be, guilty of an offence under section 1 or 6 (whether or not A has been prosecuted for such an offence), or

(b) would be guilty of such an offence if section 12(2)(c) and (4) were omitted.

(4) See section 8 for the meaning of a person associated with C and see section 9 for a duty on the Secretary of State to publish guidance.

(5) In this section—

“partnership” means—

(a) a partnership within the Partnership Act 1890, or

(b) a limited partnership registered under the Limited Partnerships Act 1907,

or a firm or entity of a similar character formed under the law of a country or territory outside the United Kingdom,

“relevant commercial organisation” means—

(a) a body which is incorporated under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere),

(b) any other body corporate (wherever incorporated) which carries on a business, or part of a business, in any part of the United Kingdom,

(c) a partnership which is formed under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere), or

(d) any other partnership (wherever formed) which carries on a business, or part of a business, in any part of the United Kingdom, and, for the purposes of this section, a trade or profession is a business.

A choice

EITHER

Say what will amount to adequate procedures

RISK: adequacy becomes the maximum anyone does

OR

Do not say

RISK: Company can never know it has done enough. Will it try harder or less hard?

S. 9

Guidance about commercial organisations preventing bribery

(1) The Secretary of State must publish guidance about procedures that relevant commercial organisations can put in place to prevent persons associated with them from bribing as mentioned in section 7(1).

(2) The Secretary of State may, from time to time, publish revisions to guidance under this section or revised guidance.

(3) The Secretary of State must consult the Scottish Ministers [[F1](#) and the Department of Justice in Northern Ireland] before publishing anything under this section.

(4) Publication under this section is to be in such manner as the Secretary of State considers appropriate.

(5) Expressions used in this section have the same meaning as in section 7.

The substance of the Guidance

Principle 1 Proportionate procedures (risk based – assessments &c
Are we relying on 3rd parties?)

Procedures includes policies to deal with identified risks, including:

Financial and commercial controls such as adequate bookkeeping, auditing and approval of expenditure.

Transparency of transactions and disclosure of information.

Enforcement, detailing discipline processes and sanctions for breaches of the organisation's anti-bribery rules.

Principle 2 Top-level commitment

Communication advocacy zero-tolerance maybe examples?

Articulation of best (not just adequate) procedures.

Instantiation of whistle-blowing procedure.

Consciousness raising.

Principle 3 Risk Assessment

periodic, informed and documented. By reference to

- Country perceived high levels of corruption, an absence of effectively implemented anti-bribery legislation and a failure of the foreign government, media, local business community and civil society effectively to promote transparent procurement and investment policies.
- Sectoral risk: Higher risk sectors include the extractive industries and the large scale infrastructure sector.
- Transaction risk: certain types of transaction give rise to higher risks, for example, charitable or political contributions, licences and permits, and transactions relating to public procurement.
- Business opportunity risk: such risks might arise in high value projects or with projects involving many contractors or intermediaries; or not apparently undertaken at market prices, or no clear legitimate objective.
- Business partnership risk: in bed with whom? Via whom?

Principle 4 Due Diligence

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 – talk the talk and walk the walk

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 monitors and reviews
makes improvements where necessary.

- (+ Case studies)
- 'situational crime prevention.
- NB case studies on hospitality, and facilitation payment
- NB threats is reference to criminal law defence of duress (which requires physical threat).

Case study 1 – Principle 1 Facilitation payments

A medium sized company ('A') has acquired a new customer in a foreign country ('B') where it operates through its agent company ('C'). Its bribery risk assessment has identified facilitation payments as a significant problem in securing reliable importation into B and transport to its new customer's manufacturing locations. These sometimes take the form of 'inspection fees' required before B's import inspectors will issue a certificate of inspection and thereby facilitate the clearance of goods.

A could consider any or a combination of the following:

- Communication of its policy of nonpayment of facilitation payments to C and its staff.
- Seeking advice on the law of B relating to certificates of inspection and fees for these to differentiate between properly payable fees and disguised requests for facilitation payments.
- Building realistic timescales into the planning of the project so that shipping, importation and delivery schedules allow where feasible for resisting and testing demands for facilitation payments.
- Requesting that C train its staff about resisting demands for facilitation payments and the relevant local law and provisions of the Bribery Act 2010.
- Proposing or including as part of any contractual arrangement certain procedures for C and its staff, which may include one or more of the following, if appropriate: • questioning of legitimacy of demands • requesting receipts and identification details of the official making the demand • requests to consult with superior officials • trying to avoid paying 'inspection fees' (if not properly due) in cash and directly to an official • informing those demanding payments that compliance with the demand may mean that A (and possibly C) will commit an offence under UK law • informing those demanding payments that it will be necessary for C to inform the UK embassy of the demand. • Maintaining close liaison with C so as to keep abreast of any local developments that may provide solutions and encouraging C to develop its own strategies based on local knowledge.
- Use of any UK diplomatic channels or participation in locally active nongovernmental organisations, so as to apply pressure on the authorities of B to take action to stop demands for facilitation payments.

Case study 4 – Principles 1 and 5 Hospitality and Promotional expenditure

A firm of engineers ('F') maintains a programme of annual events providing entertainment, quality dining and attendance at various sporting occasions, as an expression of appreciation of its long association with its business partners. Private bodies and individuals are happy to meet their own travel and accommodation costs associated with attending these events. The costs of the travel and accommodation of any foreign public officials attending are, however, met by F.

F could consider any or a combination of the following:

- Conducting a bribery risk assessment relating to its dealings with business partners and foreign public officials and in particular the provision of hospitality and promotional expenditure.
- Publication of a policy statement committing it to transparent, proportionate, reasonable and bona fide hospitality and promotional expenditure.
- The issue of internal guidance on procedures that apply to the provision of hospitality and/or promotional expenditure providing:
 - that any procedures are designed to seek to ensure transparency and conformity with any relevant laws and codes applying to F
 - that any procedures are designed to seek to ensure transparency and conformity with the relevant laws and codes applying to foreign public officials
 - that any hospitality should reflect a desire to cement good relations and show appreciation, and that promotional expenditure should seek to improve the image of F as a commercial organisation, to better present its products or services, or establish cordial relations
 - that the recipient should not be given the impression that they are under an obligation to confer any business advantage or that the recipient's independence will be affected
 - criteria to be applied when deciding the appropriate levels of hospitality for both private and public business partners, clients, suppliers and foreign public officials and the type of hospitality that is appropriate in different sets of circumstances
 - that provision of hospitality for public officials be cleared with the relevant public body so that it is clear who and what the hospitality is for
 - for expenditure over certain limits, approval by an appropriately senior level of management may be a relevant consideration
 - accounting (book-keeping, orders, invoices, delivery notes, etc).
- Regular monitoring, review and evaluation of internal procedures and compliance with them.
- Appropriate training and supervision provided to staff.

Criminal Finances Bill (2017)

40 Failure to prevent facilitation of UK tax evasion offences

- (1) A relevant body (B) is guilty of an offence if a person commits a UK tax evasion facilitation offence when acting in the capacity of a person associated with B.
- (2) It is a defence for B to prove that, when the UK tax evasion facilitation offence was committed— (a) B had in place such prevention procedures as it was reasonable in all the circumstances to expect B to have in place, or (b) it was not reasonable in all the circumstances to expect B to have any prevention procedures in place.

41 Failure to prevent facilitation of foreign tax evasion offences

- (1) A relevant body (B) is guilty of an offence if at any time— (a) a person commits a foreign tax evasion facilitation offence when acting in the capacity of a person associated with B; and (b) any of the conditions in subsection (2) is satisfied.
- (2) The conditions are— (a) that B is a body incorporated, or a partnership formed, under the law of any part of the United Kingdom;
(b) that B carries on business or part of a business in the United Kingdom;
(c) that any conduct constituting part of the foreign tax evasion facilitation offence takes place in the United Kingdom, and in paragraph (b) “business” includes an undertaking.

Defence

(3) It is a defence for B to prove that, when the foreign tax evasion facilitation offence was committed— (a) B had in place such prevention procedures as it was reasonable in all the circumstances to expect B to have in place; or (b) it was not reasonable in all the circumstances to expect B to have any prevention procedures in place.

(4) In subsection (3) “prevention procedures” means procedures designed to prevent persons acting in the capacity of a person associated with B from committing foreign tax evasion facilitation offences under the law of the foreign country concerned.

Guidance?

42 Guidance about preventing facilitation of tax evasion offences

(1) The Chancellor of the Exchequer (“the Chancellor”) must prepare and publish guidance about procedures that relevant bodies can put in place to prevent persons acting in the capacity of an associated person from committing UK tax evasion facilitation offences or foreign tax evasion facilitation offences

Section 7 prosecutions?

Few, but ...

1. Existence of adequate procedures defence
2. Link to Deferred Prosecution Agreements may prove successful.

Deferred Prosecution Agreements

Crime and Courts Act 2013

Agreement by corporation to pay fines, disgorge profits, install better procedures, &c and not be prosecuted.

Crime and Courts Act 2013 s 45 & Sched 17 Part 2 Para 4(1).

Approved:

SFO v Standard Bank (2015)

Serious Fraud Office v XYZ Ltd (2016)

Leveson LJ in Rolls-Royce (2017)

2. Rolls-Royce Holdings plc (listed on the London Stock Exchange and forming part of the FTSE 100 index) is properly considered to be a company of central importance to the United Kingdom, with a reputation in the field of engineering second to none. On its website, it describes its activities in this way:

“Rolls-Royce is a global company providing highly-efficient integrated power and propulsion solutions. Our power systems are predominantly used in aerospace, marine, energy and off-highway applications.

We are one of the world’s leading producers of aero engines for large civil aircraft and corporate jets. We are the second largest provider of defence aero engines in the world. Rolls-Royce is well established in the marine sector where we design vessels and integrate power systems. We have a growing presence in civil nuclear power, drawing on our skills and experience of over 50 years in powering nuclear submarines. Our MTU brand is world-renowned in high-speed diesel engines powering applications as diverse as rail locomotives and luxury yachts.”

3. Rolls-Royce and its subsidiaries employ some 50,000 people, in more than 50 countries. This case concerns the conduct of its civil aerospace business which manufactures engines for the commercial large aircraft and corporate jet markets and generates approximately 50% of its revenue, defence aerospace business which manufactures engines for the military transport market and is the second largest provider of defence aero engine products and services in the world (generating approximately 20% of its revenue), and its former energy business concerned with the manufacture of gas turbines and compressors to power off-shore platforms, the transport of oil and gas through pipelines, and the generation of electricity which generates less than 10% of its revenue, part of which was conducted by RRESI.

4. Against that background, it can properly be described as devastating and of the very greatest gravity that the conduct of this institution should fall to be examined within the context of a criminal investigation and that the investigation (in very large part conducted and voluntarily revealed to the SFO by Rolls-Royce itself) should reveal the most serious breaches of the criminal law in the areas of bribery and corruption (some of which implicated senior management and, on the face of it, controlling minds of the company). It involves:

- i) agreements to make corrupt payments to agents in connection with the sale of Trent aero engines for civil aircraft in Indonesia and Thailand between 1989 and 2006;
- ii) concealment or obfuscation of the use of intermediaries involved in its defence business in India between 2005 and 2009 when the use of intermediaries was restricted;
- iii) an agreement to make a corrupt payment in 2006/7 to recover a list of intermediaries that had been taken by a tax inspector from Rolls-Royce in India;
- iv) an agreement to make corrupt payments to agents in connection with the supply of gas compression equipment in Russia between January 2008 and December 2009;
- v) failing to prevent bribery by employees or intermediaries in conducting its energy business in Nigeria and Indonesia between the commencement of the Bribery Act 2010 and May 2013 and July 2013 respectively, with similar failures in relation to its civil business in Indonesia;
- vi) failure to prevent the provision by Rolls-Royce employees of inducements which constitutes bribery in its civil business in China and Malaysia between the commencement of the Bribery Act 2010 and December 2013.

5. Further, in relation to the conduct of Rolls-Royce, there have been discussions between the SFO and the Department of Justice in the United States and discussions between the Department of Justice and the Brazilian Ministério Público Federal, to ensure a coordinated global resolution of the relevant conduct. Parallel to this DPA, it is intended that a similar type of agreement reached with the Department of Justice (which has been fully disclosed in these proceedings) and a settlement with the Brazilian authorities will be announced. The American agreement covers the conduct of Rolls-Royce's energy business (in Brazil, Kazakhstan and Thailand) and also addresses conduct relating to Rolls-Royce and RRESI arising from an investigation into its use of an intermediary called Unaoil

Rolls-Royce (2017)

COUNT 1 - CIVIL INDONESIA Conspiracy to Corrupt between 1 January 1989 and 31 December 1998: RR Trent 700 engines for 6 Airbus A330 aircraft In Summary 30. RR senior employees agreed to pay \$2.25 million and a Rolls Royce Silver Spirit car to an intermediary (“Intermediary 1”) or company controlled by that intermediary (“Intermediary 1 Company A”). There is an inference that Intermediary 1 / Intermediary 1 Company A acted as an agent of the office of the President of Indonesia and that this money was a reward for Intermediary 1 showing favour to RR in respect of a contract for Trent 700 engines. In 1989 RR senior employees discussed developing relationships with figures in positions of influence to advance RR sales in Indonesia, in particular with Garuda Indonesia (“Garuda”), the national airline.

And then ...

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Former Rolls-Royce chief quizzed under caution in corruption probe

Serious Fraud Office interviews John Rose and 'dozens' of others



Former Rolls-Royce chief executive Sir John Rose © AP

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FEBRUARY 10, 2017 by [Caroline Binham](#) and [Peggy Hollinger](#) in London

The four-year corruption investigation into past business practices at Rolls-Royce has entangled former chief executive Sir John Rose, one of Britain's most prominent corporate executives, who has been questioned as a possible suspect by the Serious Fraud Office.

Listen on Rolls-Royce

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Another model – Anti Money Laundering

1. Create Offence (Proceeds of Crime Act 2002 ss 327-329): basis for liability ‘knowledge or suspicion’
2. Create duty to report suspicion of the offence (Proceeds of Crime Act 2002 s. 330 Money Laundering Regulations 2007) imposed upon a regulated sector.