
DLA PIPER
MINERALS MATTERS
Autumn 2017

INTRODUCTION

Hello and welcome to the latest edition of Minerals Matters.

A lot has happened since the last edition but the issues that affect business remain the same and certainty remains elusive and in many respects even harder to find.

We have had a snap general election which the government expected to provide strength and stability but which has had precisely the opposite effect and leaves a weakened Prime Minister answering questions about her short term future and leading a party which no longer has a parliamentary majority. We have also had elections in other European countries which have provided surprising results and the Catalonia situation continues to escalate with both sides taking significant action.

Brexit continues to dominate the political landscape in the UK with negotiations proving perhaps more difficult than many anticipated with the timeline and outcome remaining uncertain. Included in this edition is an article from DLA Piper's Brexit Director Paul Hardy whose experience enables him to give a unique insight in to Brexit and the issues that it creates.

The Autumn Budget will soon be delivered and hopefully it will include measures which provide confidence to business and encourage investment.

Donald Trump continues to be unpredictable but the America first approach remains and is perhaps reflective of a World where people are increasingly starting to look inwards.

Yet since the last edition we have had a clear example of what can be achieved by the industry and why it is so important to the UK economy and needs to be supported. The opening of the Queensferry Crossing showcases not just amazing design and construction but the incredible things that the minerals industry is capable of.

Included in this edition are articles relating to Drones, Environmental Impact Assessment, Mining Investment, Real Estate, Tax and Brexit. As ever do please let us have feedback and suggestions for future articles.

Finally, on behalf of DLA Piper I hope you have a strong end to the year and wish you (a very early) Merry Christmas and a successful and prosperous 2018

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DRONES: RESOURCEFUL USES IN REAL ESTATE

The use of drones across all sectors is increasing. PwC estimates that the emerging global market for business services using drones is valued at over $127Bn and the biggest slice of that market is most likely to be in infrastructure, including the on-going supervision and maintenance of real estate.

There are without doubt huge opportunities for deploying this technology in the real estate sector, with a wide variety of potential uses that drones could be put to. However, at the same time there are numerous areas of law that this technology can stray into. It is therefore important that not only drone operators, but also those in the real estate sector who are considering utilising drones, have a clear understanding of their responsibilities and potential liabilities.

USES IN REAL ESTATE

- **Mining** – drones can map entire sites quickly and at lower cost. They can replace manual inspections in dangerous areas and potentially detect changes in the land being worked before they can be seen by workers. In addition, drones can provide an extra level of security support and report on stockpile volumes.
- **Construction** – drones can be used both before any building work commences to ensure accurate surveys of sites and mapping of intended structures, through to monitoring weather conditions during builds and delivering progress reports in real time (and there are suggestions that there are already drones being used to ensure projects keep to time and to record where slippages occur).

Drones can go places people cannot (or which can only be reached with large and expensive equipment) not only allowing them to survey hard to reach places but also to assist in the actual construction process, saving time, money and avoiding placing workers in potentially risky situations.

- **Planning** – in addition to providing site surveys drones are being used to monitor compliance with planning conditions by councils and local residents and can be utilised by developers to provide accurate records of progress.
- **Property marketing** – aerial photographs and films are the new weapon in an agent's arsenal (and can be produced without the need for expensive helicopters and crews). Evidence suggests that aerial videos and images are resulting in increased interest and enquiries. That potentially leads to more competition for properties, increased returns and deals closing more quickly as the buyer/tenant has a better idea of the property they are purchasing/letting.
- **Property maintenance** – drones can deal with the three Ds of robotics – those jobs that are dirty, dangerous and dull (apologies to building surveyors!). Drones can quickly assess and report on the state and condition of a building, cost efficiently, without the need for weeks of expensive and unsightly scaffolding. They can ensure that issues are identified early and addressed quickly before they become more serious, hard to address and thus more expensive.

In addition, when a tenant vacates a property drones can be used to prepare accurate and contemporaneous video or photographic dilapidations schedules for use either by a landlord, to identify any breaches of a lease, or by a tenant, as evidence of the state and condition in which the building was left.

- **Energy Efficiency** – with the implementation of minimum energy efficiency standards in the UK and an increased focus on a property's energy usage, drones can play an important part in identifying how and where energy is lost within a property. Companies such as Siemens are already looking at using infrared cameras attached to drones to map the specific areas where heat is emitted by buildings, allowing owners to more easily identify opportunities for renovation and upgrading.
- **Retail** – drone usage in this sector is perhaps still waiting for "take off", although trials are taking place. Drones potentially provide faster deliveries in the ever competitive retail market place (especially last mile deliveries) and the ability for retail businesses to meet growing demands of consumers to receive goods instantaneously. Time will tell if this supplants or supplements existing methods of delivering goods and the impact it will have on retail and warehousing space.
- **Telecoms** – mobile operator EE recently showcased their patent-pending balloon and drone "air masts". The aim being to connect the most remote parts of the UK and fill network gaps on a more permanent basis in places where traditional telecoms masts are less effective or telecoms companies have been unable to construct as yet due to negotiations with land owners.

LEGAL ISSUES

Drone usage in the real estate sector is not limited to the usual elements of property law alone. The use of drones touches on various areas of law, all of which should considered both by drone operators and those employing their services, such as:

- **Trespass & Nuisance** – flying a drone into or over a property that does not belong to a drone operator risks constituting a trespass for which the affected landowner or occupier could take civil action. A landowner has rights to airspace in the lower stratum and therefore immediately above their land.

Whilst historically it was considered that a landowner owned everything above their land "all the way to heaven", case law acknowledges that this will not be enforced all the way and an owner of land has rights in the air space above their land only to such a height as is necessary for the ordinary use and enjoyment of their land and the structures upon it.

That said, even where a drone is operating at such a height as to not trespass, persistent drone usage that causes an interference with the use and enjoyment of another person's property could be found to be a nuisance and/or an invasion of privacy.

- **Data Protection Law** – the use of drones that are equipped with cameras may fall within the scope of data privacy legislation. This is particularly relevant if the drone has the ability to zoom in on a specific person, or if a person could be identified by the context of the surroundings. The potential for intrusion (even if unintentional) is high, because of the height from which drones operate and the vantage point this affords. As such drone operators will need to ensure that they are acting responsibly and have respect for the privacy of any individuals who may be recorded by the drone. Where images or other personal data are transmitted from the drone to the operator (e.g. a live feed of video footage), or are stored on the drone (e.g. via the drone's memory card) there is an added risk in relation to the security of the personal data. Appropriate steps should be taken to adequately protect any personal data against interception, loss, or unauthorised access by using, for example, encryption methods.

Detailed privacy assessments should be undertaken to ensure that the drone use is necessary, proportionate and justifiable. In particular, operators should consider the capability of the camera (i.e. the ability to zoom), whether the flight plan of the drone presents any higher personal data risks, the implications of sharing images obtained from the drone's camera and the need to protect the images collected. Any data collected must be stored securely and retained only for the minimum time necessary for its purpose. Ensuring that the camera only operates when and where specifically required will help to minimise compliance issues.

- **Health & Safety Law** – as with many technologies accidents can occur, but if those operating drones are not appropriately trained there is an even greater risk of personal injury to individuals on the ground and/or the risk of criminal damage to property. This carries not only the risk of having to pay compensation but also potentially criminal charges and imprisonment.

In addition, health and safety considerations should always be at the forefront of a property owner or occupier's mind and whilst a decision may be taken to use drones to save humans having to undertake potentially risky surveillance and maintenance work, new health and safety issues will arise, such as ensuring the safety of those piloting the drones (who at present need to maintain a line of sight with the drone at all times) or simply those individuals on the ground beneath where the drone is operational.

- **Aviation Law** – the Civil Aviation Authority (**"CAA"**) regulates UK airspace and the Air Navigation Order 2016 (**"ANO"**) contains regulations in relation to the flying of drones.

Where a drone is flown for non-commercial flights, the CAA has published a "Dronecode" confirming the relevant limits for flying drones safely and legally. In the event that a drone is used for the purposes of commercial operations or, is outside of the operating

limits set out in the ANO, the operator must seek permission from the CAA (and, if received, must ensure that the drone is flown according to relevant limits for flying drones safely and legally). Accordingly, if a drone was required to carry out maintenance inspections of property, it would be required to have CAA permission to do so. If granted, the drone would be forbidden from flying over or within 150 metres of any congested area (which includes any area of a city, town or settlement which is essentially used for residential, industrial, commercial or recreational purposes) or within 50 metres of any vessel, vehicle or structure which is not under the control of the person in charge of the drone. More immediate uses are therefore likely to involve industrial premises and not those in populated areas.

Larger drones (with an operating mass exceeding 20kg) are subject to additional requirements, and if an individual or organisation wishes to conduct regular flights with their drone, they will probably need to submit an operating manual to the CAA for a permanent approval.

Drones are one of the many new technologies that are disrupting the Real Estate sector and evidence suggests those involved in the sector are starting to deploy drones to provide new and creative ways of carrying out traditional tasks at reduced costs. It is unlikely to be a technology that proves to be a brief fad and property owners, occupiers and managers should consider exploring how drones can assist with the development and management of their portfolios. DLA Piper has dedicated and specialist Technology, Aviation, Real Estate and Data Protection teams that can advise on how to successfully deploy such technologies.

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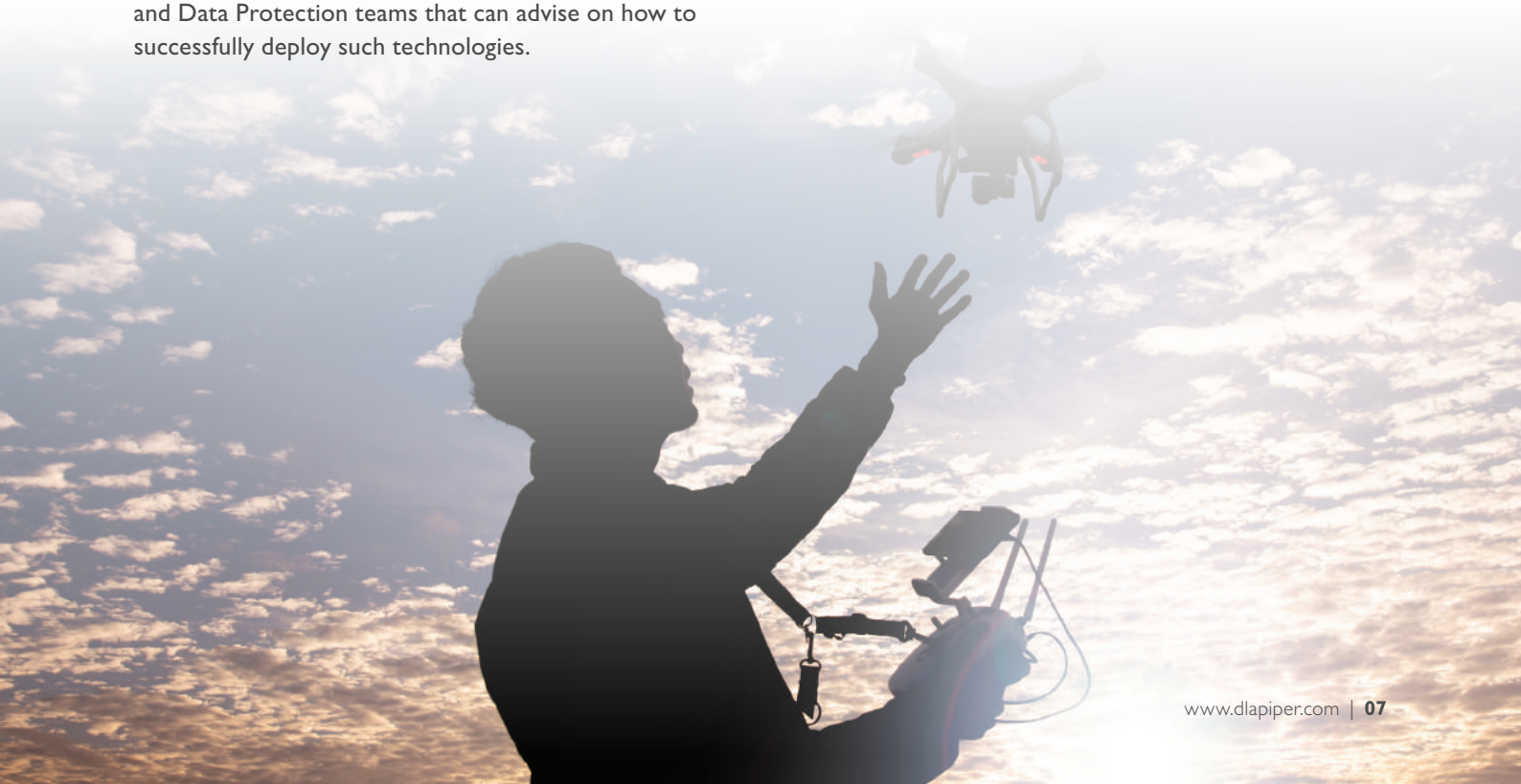

CHANGES TO **ENVIRONMENTAL IMPACT ASSESSMENT**

OVERVIEW

The EU Directive which requires proposals for large scale and sensitive development to be subject to environmental impact assessment was amended just over three years ago.

UK Government had until May 2017 in which to implement the changes through UK legislation. At that time, the prospect of an exit from the European Union was nothing being taken seriously in politics. Three and bit years later, the UK is on the verge of finding out what Brexit means in practice and for which there is the potential for some rowing back on European laws.

At this stage however, there is no change and the Government introduced new updated 2017 Regulations in May this year (The Town and Country Planning (Environmental Impact Assessment) Regulations 2017) to address the required changes of the 2014 EU Directive. We have considered what this means in practice for promoters of major development proposals.

SUMMARY OF THE KEY CHANGES AND IMPLICATION FOR PRACTICE

Screening: whereas a developer requesting a screening opinion was only previously required to supply a plan of the site and such other information as considered relevant, it is now mandatory to provide information that addresses:

- The development's physical characteristics and location
- The environment likely to be significantly affected
- Any likely significant environmental effects resulting from residues, emissions, the production of waste and the use of natural resources.

In addition, developers may provide details of proposed mitigation measures, which may avoid or reduce the significance of the identified effect.

Whilst it is already best practice to provide the consenting authority with enough information to be able to make its screening opinion, the new mandatory requirements will mean that technical assessments will

need to be submitted with the screening opinion request. The frontloading of this part of the process will be seen as a burden to many developers.

The 21 day deadline for producing a screening opinion remains unchanged but now there is provision which provides for the developer and planning authority to agree an extension of up to 90 days or where the planning authority can justify "exceptional circumstances".

Scoping: though the scoping process is still not mandatory under the new Regulations, the ES must now be "based on" the scoping opinion where one has been requested. Developers therefore need to consider whether scoping is in their best interest – a balance between gaining some certainty over the required content of an EIA versus being required to supply information that it does not expect to provide. The ability to challenge a scoping opinion is still not expressly provided for but one assumes that a developer can resubmit a new request for reconsideration. In the event that there have been material changes to the project since the first scoping opinion, then it seems that the exercise will have to be revisited prior to the submission of the application as failure to do so may leave the process open to challenge, for failing to "base" the ES on the scoping opinion, unless that term is given a liberal meaning.

Content of Environmental Statement: the list of environmental factors to be considered as part of the EIA process has changed. Some of the changes are considered to be less substantial whereas others have introduced a widened scope. For example, changes to terminology include:

- "human being" replaced by "population and human health";
- "flora and fauna" replaced by "biodiversity with particular attention to the Habitats and Wild Birds Directives"; and
- "climatic factors" amended to "climate".

The inclusion of "human health" as an EIA consideration might be seen by some as a progressive step towards the planning system playing a more active role in assessing the effects of development on quality of life, health and wellbeing. The difficulty for developers (and consenting authorities) will be that the range of issues to be covered by "human health" is potentially vast. In reality, human health considerations are already dealt with in, for example, Health Impact Assessments and air quality chapters of the ES; however, the change in terminology will encourage applicants to deal with health impacts in a more focused way than before.

The Regulations now also include a category requiring consideration of the likely significant effects due to any vulnerability of the development owing to risks of major accidents and/or Disasters – such as major flooding and one assumes could also include terrorist activity.

Competent Experts: Environmental Statements and the information supporting them must now be produced by competent experts and the developer must ensure that submissions are accompanied by a statement outlining the relevant expertise or qualifications of such expert. The Regulations do not define 'competent' so this is potentially open to some interpretation and may be the subject of further clarification. This new requirement is likely to have a material effect for a number of developers who currently produce certain elements of information supporting the EIA process in house. For example, reports accompanying screening and scoping reports will now require the same level of expert input which will limit the scope for lighter touch screening/scoping requests.

The authority must also ensure it has sufficient expertise to review EIA submissions which is likely to create an additional financial burden as many will be forced to utilise external technical support in circumstances where officers may have previously dealt with the review of information.

Consultation Period: the consultation period for a submitted ES has increased from 21 days (or 28 days for DCO projects) to a minimum of 30 days for new applications and the submission of further or additional environmental information.

The changes appear marginal at first glance but coupled with the potential for planning authorities to extend the screening period, could delay the progress, especially where additional environmental information is submitted during the determination of a planning application. This would be particularly frustrating for borderline EIA schemes, especially given the added burden of producing expert approved technical information at the very early stages of the process.

Coordinated procedures: where EIA developments are also subject to assessment under the Habitats and/or Wild Birds Directives, the consenting authority is now responsible for ensuring that a coordinated approach is taken – be that coordinating the separate assessments or adopting a joint procedure approach whereby the information to inform both assessments would be dealt with in a single assessment.

TRANSITIONAL ARRANGEMENTS

There are transitional provisions in place for in flight applications. As such any application that is the subject of a scoping request or environmental statement submitted prior to 16 May 2017 will be governed by the previous 2011 Regulations.

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MINING INVESTMENT AND **MINING RECOVERY IN BRAZIL**

Brazil holds nearly 100% of the World's niobium reserves, more than 50% of all of the World's natural graphite reserves, more than 30% of all of the World's tantalum reserves and nearly 15% of all of the Word's nickel reserves, amongst other minerals, according to the Brazilian Mining Agency ("Agência Nacional de Mineração – ANM"). Moreover, according to the United Nations Conference on Trade and Development (UNCTAD), at the beginning of this decade, Brazil occupied second position in the World rankings for iron ore production. Aware of this mineral wealth, the Federal Government is making regulatory and legislative reform to induce an increase in foreign investment in mining.

Aware of the Brazilian mining potential, as well as the inevitable consequences of mining activities for the environment (such as: deforestation, impact on fauna, potential to cause water and air pollution, and so on), the 1987-1988 National Constituent Assembly decided to impose obligations on mineral explorers and exploiters to restore the environment in accordance with technical guidelines set forth by the responsible environmental agency. The idea was lined up with the National Environmental Policy, enacted in 1981, which established the restoration of degraded lands as a principle of law. Thus, in Brazil, the restoration of the environment after the conclusion of mining activities is a constitutional duty.

For the National Environmental Agency ("Instituto Brasileiro do Meio Ambiente e dos Recursos Naturais Renováveis – IBAMA"), in the mining context, the

restoration obligation includes (i) that the degraded land is restored to a stable condition from which it is possible to carry out predetermined development and activities; (ii) that such stable condition meets environmental, aesthetical and social values of the surrounding areas; and, (iii) that a new dynamic balance is reached, followed by the development of a new soil and a new landscape.

The Federal Decree nº 97.632/1989 regulated the restoration procedure ordering that a Degraded Land Recovery Plan ("Plano de Recuperação de Área Degradada") must be filed with the responsible environmental agency at the beginning of the environmental licensing proceedings. This Plan must also be accredited as a condition precedent to the development of the mining activities. Its goal is to establish the environmental, aesthetical and social standards that will have to be met, as well as the activities that are expected be developed after the restoration of the land.

It is worth noting that the need to recover the environment after mining activities is not linked to legal principles such as malice, guilt or unlawfulness. All explorers and exploiters must recover the environment in consequence of a direct constitutional command. On the other hand, non compliance may be considered a crime. Federal Law nº 9.605/98, article 55, imposes the criminal penalty of detention (ranging from six months to a year) and a fine for wrongdoers. Similarly, Federal Decree nº 3.514/08, article 63, imposes the administrative sanction of a fine (ranging from one thousand five hundred reais to three thousand reais per hectare) for those who fail to restore the environment after carrying out mining activities of exploration or exploitation.

Brazil has enormous potential for mining activities, holding great percentages of world's mineral reserves. By its turn, the Brazilian Constitution states that mining activities must be followed by the restoration of the exploited or explored land. As the Federal Government is looking to further develop the mining sector, promoting important reforms to facilitate business, foreign companies may consider it a good opportunity for an environmentally friendly oriented investment.

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THE COURTS SHAFT ARGUMENTS IN FAVOUR OF **IMPLIED TERMS IN AGREEMENTS**

In the case of Perenco UK Ltd ("**Perenco**") and Southern Gas Networks Plc ("**Southern Gas**") v William Henry Bond ("**Bond**"), the High Court looked at the terms of an agreement granting an easement which allowed a company to run a subsurface pipeline across land where the landowner wished to work the land for the extraction of minerals. In particular, the Court looked at whether compensation was available to the landowner as an alternative to diversion of the pipeline.

FACTS

Perenco and Southern Gas entered into separate agreements with the landowner, Bond, in 1994. Southern Gas was granted an easement under a deed to run its subsurface pipeline across the land, whilst Perenco had the right to run its subsurface pipeline under a lease. The pipes ran roughly in parallel with each other. Ball clay was extracted from the surrounding land. The pipelines effectively "sterilised" or "sequestered" the land where they were laid, preventing the extraction of clay and other minerals from these areas of land, a fact that was not in dispute in this case.

Both the deed and the lease expressly provided for compensation to Bond where he wished to extract clay or minerals but the pipelines prevented him from doing so, although both agreements contained a different method for calculating the level of compensation payable.

Bond was required to give 30 days' notice if he wanted to extract minerals from the land, and if Southern Gas or Perenco refused to divert its respective pipeline, the companies could serve a counter-notices under their respective agreements and pay compensation to Bond. The agreements also contained provisions to avoid double compensation: if Bond was entitled to

compensation under both agreements, he could only recover the greater of the two amounts and Perenco and Southern Gas would pay half each.

In 2011, Bond obtained planning permission to extract clay from the land, and served a notice on the companies in accordance with the agreements. Perenco served a counter-notice and paid the compensation due under their lease. Southern Gas did not serve a counter-notice.

As Bond could not work the land unless both pipes were diverted he claimed compensation from both companies, arguing that a term should be implied into the deed with Southern Gas that if Perenco served a counter-notice Southern Gas was also deemed to have served a counter-notice. Southern Gas argued that they were not obliged by the terms of the deed to serve a counter-notice and pay compensation just because Perenco had done so.

The compensation calculated as payable under the deed would have been considerable more than the amount payable under the lease. The parties referred matters to an arbitrator who decided that there was an implied term that Southern Gas should be deemed to have served a counter-notice if Perenco had done so. Perenco and Southern Gas appealed against this decision.

DECISION

The High Court implemented Lord Neuberger's statement of principle in the judgment in *Marks and Spencer v BNP Paribas Securities Services Trust Company (Jersey) Limited* which stated that for a term to be implied, the following conditions (which may overlap) must be satisfied:

(i) it must be reasonable and equitable;

(ii) it must be necessary to give business efficacy to the contract, so that no term would be implied if the contract was effective without it;

(iii) it must be so obvious that it goes without saying;

(iv) it must be capable of clear expression; and

(v) it must not contradict any express term of the contract.

The Court went on to decide that, taking all the parties' arguments into consideration, it was *"not at all clear… that they intended something other than what was expressly agreed to"*. As such, there was no implied term and the court's view was that it would have been easy for the parties to deal with this issue by incorporating express wording in the agreement. The provision that Bond contended should be implied was not one which was required to give business efficacy to the agreements nor was it so obvious that it went without saying.

CONCLUSION

This case is a reminder to contracting parties (such as landowners who are considering granting another party rights across their land, like a right to lay a pipeline) that the courts are taking a strict approach to contract terms and parties seeking a ruling that a term is implied into an agreement may be in difficulty. The parties should ensure that the document reflects the terms agreed before signing up to the agreement and that they have appropriately catered for anticipated circumstances, as the courts will be slow to ride to the rescue by implying terms into a contract.

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NEW OFFENCE OF FAILING TO PREVENT FACILITATION OF A TAX OFFENCE: **APPLICATION TO THE MINERALS AND MINING SECTOR**

With effect from 30 September 2017, a company or partnership (referred to as a "Business" in this article) will be guilty of a criminal offence in the UK if an employee, agent or other person performing services on behalf of the business (each an "associated person") is knowingly concerned in, or otherwise aids and abets, the fraudulent evasion of tax by another person.

WHAT CONSTITUTES AN OFFENCE?

An offence may be a UK tax evasion facilitation offence, or a foreign tax evasion facilitation offence.

For a Business to be guilty of the UK tax evasion facilitation offence where:

- a person has committed a UK tax evasion offence; and
- an associated person of the Business was knowingly concerned in, or aided and abetted the commission of, that other person's UK tax evasion offence.

The foreign tax evasion offence is similar except that:

- an overseas tax evasion offence must have been committed and that offence and the facilitation of it must both be criminal under local law and would also be criminal if committed in the UK; and
- the Business must have a UK nexus. This will be the case if the Business is a company incorporated in (or in the case of partnership, formed in) the UK or if the Business carries on the whole or part of its business in the UK. However, there will also be a relevant UK nexus if the conduct which forms part of the foreign tax facilitation offence takes place in the UK. This means that if an overseas company employs an individual who works for part of his time in the UK and that employee does something whilst in the UK which amounts to being knowingly concerned in, or assisting or abetting, another person's tax evasion, the overseas Business will be guilty of an offence in the UK.

It is a defence for both the UK tax and the foreign tax offence to show that the Business had in place reasonable prevention procedures.

HOW WILL THE NEW OFFENCE AFFECT THE MINING SECTOR?

There are certain features of international mining and minerals operations which may make Businesses in this sector potentially more vulnerable to the offence, namely:

- the global mobility of expert employees and contractors, meaning that such individuals will frequently work in more than one country, often being resident of and/or a citizen of another country or countries; and
- the practice of engaging experts through consultancy or self-employed arrangements, rather than as employees.

In these circumstances, due diligence may not always be carried out to check that local income taxes and social security contributions are being properly paid in all relevant jurisdictions, potentially leading to the question whether particular contractual arrangements or practices make it easier for individuals to avoid or evade taxes. Of course, in many cases, non-payment of tax in a particular jurisdiction where an individual is working may be perfectly legitimate, for example, where a double-tax treaty does not give any taxing rights to that jurisdiction. In other cases, non-payment of taxes may be due to ignorance of the need to register for and/or pay local taxes in a particular jurisdiction where an individual only works for short periods of time.

WHAT STEPS SHOULD BUSINESSES TAKE?

The requirement for a business to have in place "reasonable prevention procedures" as a defence to the new criminal offence means that businesses must now conduct due diligence and ask appropriate questions. Risk assessments should be undertaken, focussed on employee and consultant engagements and advice or evidence obtained that either no tax is due in a particular jurisdiction, or that local taxes are being paid. If Businesses fail to go through these processes, inferences may be drawn based on the facts and circumstances: to claim ignorance may not be a defensible position where a proportionate, reasonable assessment of the risks would have indicated that preventative action should have been taken.

Aside from assessing risk and putting risk prevention procedures in place, to demonstrate that reasonable prevention procedures are in place, Businesses will also need to (amongst other things):

- carry out due diligence on other persons who perform services on behalf of the Business, but HMRC recognise that an organisation "may be able to exercise greater levels of control and supervision over some categories of representatives (for example, those directly employed) than over others";
- "top down communication". Based on its risk assessment, the Business must communicate its prevention policies and procedures throughout the organisation, and put appropriate training processes in place.

In summary, Businesses face a similar challenge to put in place risk prevention procedures as applied in recent years in relation to anti-bribery and corruption. Indeed, the experience of developing, implementing and enforcing such policies provides a very valuable basis for working with advisers on new policies of risk prevention in relation to the facilitation of foreign tax evasion. However, with the law taking effect on 30 September steps have to be taken urgently and, whilst HMRC acknowledged in its guidance that *"some procedures (such as training programmes and new IT systems) will take time to roll out, especially for large multi-national organisations"* the Government *"expects there to be rapid implementation, focusing on the major risks and priorities, with a clear timeframe and implementation plan on entry into force"*

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THE IMPACT OF BREXIT IN THE **MINING SECTOR**

INTRODUCTION

Many businesses that are exposed to Brexit are not doing enough to prepare for it – either because they are not sure that it will ever take place, or because they think it is impossible to prepare for it without greater clarity. In this article we explain the main direction of travel in the negotiations, the commercial consequences that can already be drawn, and what mining companies can already be doing to prepare.

DOES THE OUTCOME OF THE UK GENERAL ELECTION MAKE BREXIT LESS LIKELY?

The clock that is ticking is set by EU law, rather than national law. Come 29th March 2019 the UK leaves the EU unless the two-year period is extended by unanimous agreement of the 27 remaining EU Member States. To stop the clock ticking would require a number of steps: a further general election, the Labour Party to win, the Labour Party to reverse its position on holding a second referendum, national legislation authorising a second referendum to be enacted, the second referendum to result in a majority vote to remain, and the UK application to stop Brexit being accepted by all the EU Member States, and possibly the EU Court of Justice. In all, an unlikely series of events would have to unfold for the 2016 referendum result to be reversed.

KNOWN KNOWNS

There are two facts we already know about Brexit, from which the most important commercial consequences flow.

i) Loss of Single Market access

The first is that the UK is set to leave the EU's Single Market. By doing so, the UK will lose access to the four EU fundamental freedoms: the free movement of goods, services, people and capital between the UK and the 27 EU Member States. In business terms this means that there may be tariffs (customs duties), customs declarations (administrative paperwork to clear cross-border goods), and non-tariff barriers (e.g. compliance with health and safety standards) applied to the trade in goods between the UK and EU-27. There may also be regulatory barriers to the trade in services between the UK and EU-27, for example EU-27 countries may be able to discriminate against UK services on grounds of non-compliance with EU standards. There will be immigration

restrictions on the movement of people between the UK and the EU-27, and different rules for the movement of capital. EU funding for R&D will also end.

The Single Market goes much further, however, than these four freedoms, encompassing all forms of legislation which remove barriers to cross-border business in the EU. Legislation in the field of data protection, consumer protection, environmental protection, indirect taxation (VAT), employment and land and air transport are examples.

ii) Leaving the Customs Union

The second is that the UK will leave the EU's Customs Union, the tariff-free union of the EU's 28 Member States around which exists a hard goods border (known as the common external tariff). The EU's trade policy is the competence of the European Commission; EU Member States are prohibited from conducting their own trade policy.

In leaving the Customs Union, the UK will be able to conclude its own trade agreements, one of the most important of which will be with the EU. But it will no longer be able to benefit from the preferential trade agreements that the EU has with 50 or so countries. There could also be a hard good border between the UK and EU, subject to any preferential access agreed in a trade agreement with the EU.

KNOW UNKNOWNS

It has yet to become clear when the UK's departure from the EU, and therefore the Single Market and Customs Union, will take place. It will either be on 29 March 2019, when the UK is obliged under EU law to leave the EU, or, in the event that transitional arrangements are negotiated under a withdrawal agreement, after the end of a transitional period, which may last two or more years.

TARIFF IMPLICATIONS FOR THE MINING SECTOR

The UK has about 1,500 mines and quarries in operation employing about 30 000 people. Those that export both raw and processed commodities from the UK to the EU (the EU is the largest consumer market for minerals worldwide), or to any of the 50 or so countries with which the EU has a free trade agreement, will have to prepare for the possibility of doing so under "WTO terms", in the event that there is no withdrawal agreement in place when the UK leaves the EU. Several global mining companies are also registered or headquartered in the UK, which supply raw and processed commodities to the EU. They could be treated as UK companies in terms of imports into the EU, regardless of where the commodity is produced.

PREPARING FOR BREXIT

How affected companies respond to Brexit will be critical to their success. Those that have correctly assessed the commercial implications, and made contingency plans flexible enough to keep pace with the negotiations, will navigate Brexit successfully.

With the direction of travel known, companies should take steps now to assess their exposure to Brexit, and if necessary to plan for it. We advise they do so by drawing up a Brexit strategy with four elements: understanding; preparation; action; and influencing. We explain how we can help clients prepare for Brexit in this document: Navigating Your Business through Brexit: Four Ways DLA Piper Can Help. For larger businesses, especially those with separate operating companies or multi-jurisdictional operations, we recommend a Brexit Committee be set up with overall responsibility for implementing the Brexit strategy.

Companies can assess the tariff impact on their supply chains or export markets of reverting to "WTO terms" after Brexit. This is because the UK has said that it will replicate the EU's tariff schedules once it leaves the EU. We explain how we can help clients carry out WTO impact assessments in this document: Beyond Brexit: Understanding the WTO and International Trade.

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CONSUMER CREDIT

Do you trade with individuals, sole traders, or small partnerships consisting of 3 or less partners and allow them to pay you at some later date for goods or services you have sold to them? If you do, you could be providing credit regulated under the Consumer Credit Act 1974, unless an exemption applies. Entering into a regulated credit agreement is an activity for which authorisation by the Financial Conduct Authority is required.

Consumer credit is a complex and regulated area of the law that is relevant to many industries. We help clients with structuring their trading arrangements so that they are exempt and fall outside of the scope of regulation; and where this is not possible, we support clients with navigating the myriad of legal and regulatory requirements.

If you would like more information or have any questions, please contact **Louise Neave** on 0151 237 4952 or by email louise.neave@dlapiper.com.

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