



Intelligent Transport
Planning Solutions



Bribery Bill update: The form of our democracy is no longer bribery - on any scale

The UK's new bribery legislation is will come into force on the Secretary of State's say so: the result of 14 years' graft to achieve a complete overhaul of the UK's fragmented and antiquated anti-corruption regime and replace it with a modern and comprehensive one, fit for use in today's global market. Notwithstanding the current cloud of apprehension, and the delayed implementation (the law had been due to come into force in April 2011), the message is clear: be prepared and be corrupt free.

Why worry in the first place?

The construction industry is at risk given the significant number of transactions involving procurement, supply chain management and regulatory relationships. The risk increases through the use of joint ventures, agents or intermediaries and where relationships cross borders into countries with different legal codes.

The UK construction industry thus falls pray to all forms of offence: bribery to obtain planning permission or win contracts, concealment of bribes, corrupt practices during tendering and project execution phases, asset misappropriation, accounting fraud...the list goes on.

What does the new law say?

The Act establishes four categories of offence, the first three capable of being committed by an individual or a company, the fourth by a corporate only. To summarise, the first couple of offences render a party guilty if he participates in either active or passive bribery - that is to say, if a party either offers, or receives, a bribe in order to bring about or reward the improper performance of a public or business activity.

The third is a stand alone offence of actively bribing a foreign public official (widely defined), intended to ensure compliance with the OECD Convention on Combating Bribery (1999).

The final strict liability offence could see the prosecution of a commercial organisation that fails to prevent active bribery being committed on its behalf by a person "associated" with it anywhere across the globe. Ultimately, the question of whether a person is sufficiently "associated" is fact specific. A prosecutor is not required to prove an element of negligence, dishonesty or corrupt intent. Knowledge and culpability are irrelevant.

The consequences of a breach of the Act are severe with exposure to up to 10 years imprisonment for individuals and unlimited fines for corporates and individuals.

Why worry now?

The UK government has announced the strictest anti-corruption law globally. And by the same breadth has admitted that it could prove to be a handicap to UK business.

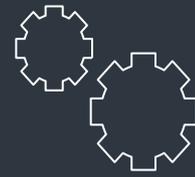
The Act introduces a more stringent regime and higher standards of commercial integrity than those governing many foreign competitors: at a time when the construction industry is bracing itself for another tough year, the fear is that the Brits' competitiveness is being eroded. There is no exception for facilitation payments (low level payments to expediate a routine governmental action) that are considered ordinary business in many jurisdictions and permitted under US legislation. Domestic businesses that buy influence via "off the books" payments or lavish corporate hospitality are targeted, leaving their unconstrained competitors unscathed. Custom and practice is no longer a defence: the dodgy payment has to be permitted by the written law of the relevant jurisdiction.

Companies are also baulking at the injection of uncertainty created by legislation that fails to be entirely prescriptive. How does one distinguish between a customary gesture of goodwill and unacceptable hospitality? What is the extent of liability if a subsidiary company breaks the law? Does a "consenting or conniving" officer have to choose not to investigate or merely turn a blind eye? How far does one have to go to protect oneself? How is the Act to be policed? You get the idea. The answers turn upon a case by case interpretation of the legislation.

The real sting in the tail is the potential debarment from bidding for public contracts.

A piece of advice?

The only defence available to a corporate in relation to the offence of failing to prevent bribery will be to demonstrate that it had "*adequate procedures*" in place. The term is left undefined. Instead, the Ministry of Justice has published draft guidance based around six prevention principles that should be considered: (1) risk assessment; (2) top level commitment; (3) due diligence; (4) clear, practical and accessible policies and procedures; (5) effective implementation; and (6) monitoring and review. The more robust your anti-corruption programme is, the less likely it is that you will be found guilty of the failing to prevent a bribery offence.



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We plan and develop *sustainable* transport solutions to ensure that our advice *improves* and *sustains* the quality of people's lives in the *built, natural, economic* and *social* environment. We resolve transport problems through the design and applications of *innovative* technical and engineering solutions.



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Compliance is about identifying where the risks are: who are you dealing with? Where and when is money changing hands? What due diligence is undertaken on overseas agents or intermediaries? How does existing guidance need to be amended to ensure compliance? Do your staff know the dividing line between an acceptable gift to a customer and a bribe?

The provisions of the Act will take effect immediately on implementation this year and organisations need to ensure that they are ready for it. Despite a business drive to dilute the new legislation, the general consensus is that there is no real prospect of repeal or significant amendment of key parts of the Act. And there is no "one size fits all" solution. Steps should be taken now, on an individualistic basis, towards implementing procedures designed to comply with the requirements of the "*adequate procedures*" defence and in particular:

- apply clear accountability for your anti-bribery policy and processes at senior management level (i.e. appoint an Anti-Corruption Officer who reports directly into the Board);
- conduct a risk-based "corruption audit" of your organisation's global activities;
- draft and/or review and update existing policies and ensure these are visible and properly communicated throughout the organisation;
- deliver a suitable "risk based" training program on bribery and corruption across the organisation;
- conduct adequate due diligence when establishing new relationships with intermediaries and agents;
- monitor the activity of existing agents and intermediaries acting on behalf of your organisation;
- ensure you have sufficiently robust internal controls within your Finance function to identify improper payments;
- review and update your response plan where corruption issues are reported or uncovered;
- consider including standard clauses in commercial contracts prohibiting bribery and corruption; and
- finally, but importantly - ensuring enough time and resource is dedicated to understanding the actions required by the business to comply.

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