



The Bribery Act UK 2010: Can an honest man be cheated?

Whether it's cricketers deliberately dropping catches or government ministers attending business meetings arranged by their mates, allegations of bribery and corruption are made on a daily basis and the consequences can be serious and wide ranging: financial, reputational and personal. And this can be the case even when the allegation is unsubstantiated. We take another look at the Bribery Act 2010, one year on.

The real estate sector is perceived as having one of the highest levels of corruption risk according to a Transparency International UK survey carried out on behalf of the City of London last year. Planning applications, auctions, the interconnected web of contracts and sub-contracts on construction projects, public sector involvement and high deal values all contribute to the industry's vulnerability to bribery.

With this in mind, it is crucial for sector players to understand how the UK Bribery Act 2010 (the Act) will apply on a real estate transaction and what can be done to ensure that its provisions don't inadvertently catch out those going about their ordinary course of business.

So what's new? Well, the Act makes it an offence to:

- Bribe another person
- Be bribed by another person
- Bribe a foreign public official
- Fail, as a commercial organisation, to prevent bribery committed by "associated persons".

The latter offence has been the most controversial. Associated persons could include employees, agents and third party service providers (such as asset managers, property managers or brokers). In this context, it doesn't matter where the underlying bribery has occurred if the commercial organisation is a UK company or if it carries on business in the UK.

Where public officials are involved the Act requires a higher standard of care. And, beware the definition of "public official". This will catch the usual suspects such as planning authorities but is quite broadly worded and so, by way of example, would also capture employees of state-owned enterprises.

It may seem like the legislation creates a minefield but there is no reason why it should, so long as companies take sufficient precautions - or "adequate procedures" to use the wording of the statute. The Secretary of State has helpfully provided six key principles that should govern compliance:

Proportionate policies and procedures - procedures should be proportionate to the bribery risks the organisation faces as well as being clear, practical, accessible, effectively implemented and enforced. In practice this means that large multi-national organisations are expected to have policies setting out their anti-bribery stance, and their approach to risks.

Top-level commitment - the Board of Directors should establish the culture of the company. While a statement from the company's CEO or Chair is often seen as a way of satisfying this principle, larger companies should also ensure that a senior manager is the lead on anti-bribery work, and that the Board is regularly updated on bribery-related issues.

Risk Assessment - described as a "necessary first step". Companies familiar with health and safety or financial risk assessments will know this means identifying risks (in this case the risks that someone related to the company will be involved in bribery) and calibrating them. Specific risks to be assessed in this context are those relating to jurisdiction, business sector, transactions, business partners, as well as internal risks.

Due diligence - companies should be able to show that they scrutinise third party partners and other associated persons sufficiently. Bribery Act enlightened due diligence should also highlight any issues that need cleaning up post-completion - this may include direct interrogative inquiries, indirect investigations or general research.

Communication - this includes implementing and publicising policies properly and training staff appropriately. Lack of staff awareness of the firm's anti-bribery controls, or lack of clear financial controls or policies, is not only contrary to the guidance but should also be considered as a risk in itself.

Monitoring and review - policies should not just sit on the compliance officer's shelf gathering dust. Policies and procedures should be evaluated on an ongoing basis with new risks identified and addressed as they emerge. For example, new HR policies may require a tightening of employee due diligence procedures.

Where a company is charged with failing to prevent bribery, the extent to which it has followed the above guidelines will be considered by the court in cases that reach trial. The existence and adequacy of such procedures will also be a factor in determining whether a company is to be prosecuted.

Due diligence is a key weapon against anti-bribery and corruption but it needs to be properly targeted and handled with care. Anti-corruption due diligence can be quite intrusive and, if badly handled, it can seem like an accusation against a party and its business practices. The key is to explain the need to carry out this due diligence as early as possible and to make sure that the party being investigated knows that this is something that needs to be satisfactorily addressed.

Explaining that it is a standard process can sometimes be an effective way to dispel the suggestion that there is a suspicion that the party is corrupt.



Myth vs Reality

Taking clients out to sporting/social events is now illegal.

This is untrue; the Ministry of Justice has not banned hospitality. The guidelines say it is not the intention of the Act to criminalise bona fide hospitality which seeks to improve the image of a commercial organisation or business relationships. However, it is an offence under the Act, where entertainment is provided with the intention of inducing or rewarding improper performance of a function or activity. The Act is even stricter when it comes to public officials.

The Bribery Act only applies to UK businesses.

Not true. Key offences apply if any part of the offence, including an omission is committed in the UK or if the person involved has a "close connection" to the UK. This could include a telephone call, or a payment authorisation. UK companies committing offences abroad will also be caught. The jurisdictional net is even wider for the corporate offence of failing to prevent bribery.

Don't acquire a company, acquire the asset - then there's no liability under the Act.

It's true that an asset purchase is generally less likely to give rise to liability for prior corrupt actions, but that's far from the end of the story. Leaving aside the ever-present reputational risk, the purchaser will potentially be liable for any corrupt behaviour that occurs after it has acquired the asset. Asset purchases often result in the transfer of many of the personnel who are involved with the asset transferring across to the purchaser. If any of those staff have been involved in corrupt behaviour under the previous ownership, it will be difficult for an investor to put in place adequate procedures to prevent similar future behaviour unless it has a clear picture of what has gone on in the past. Additionally, knowledge that something was done illegally by the seller could also trigger liability under the Proceeds of Crime Act.

If a service provider commits an offence, its clients are not liable.

Well, that depends. The Act makes commercial organisations liable for active bribery offences of associated persons. Associated persons could be employees, agents, subsidiaries, JV partners, consultants, brokers, outsourcing firms and other service providers. It does not include business partners which don't perform services (e.g. investee companies, borrowers, purchasers and suppliers of good and assets).

When buying a company, you don't need to worry about previous bribery or corrupt practices. You can just get an indemnity from the seller.

Unfortunately, indemnities can be of limited protection for an investor as the courts are often reluctant to enforce them in respect of criminal activity. Despite that, an indemnity may be of use for other "indirect" losses, such as the costs of having to obtain new permits to replace any that are ineffective due to the dubious circumstances in which they were obtained during the seller's ownership. Negotiating a comprehensive warranty package with the seller is also important for investors who may need to demonstrate that they had done everything they could to find out about any corrupt behaviour.

Bribery is only subject to a fine

This is incorrect. Not only do companies face potentially huge fines under the new legislation (and individuals up to ten years in prison), but they will also be banned from tendering for any public sector contract in the EU, if convicted of bribery. Companies are being urged by the Serious Fraud Office to self-report instances of bribery they uncover in the hope of more lenient sentences, or even avoiding criminal charges. To further sweeten the deal, exclusion from public procurement contracts is discretionary where the charge is failing to prevent bribery (it is mandatory where a company is convicted of bribery).

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