

# The Bribery Act and the Real Estate Industry

*Jonathan Pickworth\**

**In this article, the authors discuss The Bribery Act 2010 and its implications for the real estate industry.**

The Bribery Act 2010 (the “Act”) came into force on July 1, 2011, and has serious implications for the real estate industry. The Act has wide extra-territorial reach and will affect both individuals and commercial organizations with a UK connection, even if the act of bribery occurs overseas. For commercial organizations, the scope is even wider—the act in question might take place abroad and by someone who has no connection with the UK, yet can still result in criminal liability for the organization. Convictions for offenses under the Act may lead to 10 years in prison, unlimited fines, confiscation orders, debarment from tendering for government contracts across the EU, disqualification from acting as a director and, of course, serious reputational damage, not to mention the high cost and devastating impact of a protracted and public investigation. Clearly, the Act must be taken very seriously.

## **The Scope of the Act**

The Act defines the offenses of bribery very widely and includes the general offenses of bribing another person and being bribed, as well as a separate offense of bribing a foreign public official. The test for com-

mercial bribery is different to that for bribing a foreign public official, where the offense can be committed even where there is no intent to induce improper performance. Probably the most significant aspect of the Act is the new strict liability corporate offense of failure to prevent bribery, where the only defense available to commercial organizations is for them to have “adequate procedures” in place to prevent bribery.

## **Extraterritorial Reach**

Importantly, under the Act, the bribery does not need to have occurred in the UK for an offense to have been committed. In relation to the offenses committed by individuals of bribing, being bribed or bribing a foreign public official, provided the person committing the offense has a close connection with the UK, for example they are a British citizen or are ordinarily resident in the UK, the physical act of bribery can occur inside or outside of the UK.

The corporate offense of failure to prevent bribery is not confined to the UK either. Provided the organization is incorporated or formed in the UK, or that the organization carries on a business or part of a business in

\* Jonathan Pickworth is a partner at Dechert LLP. Resident in the firm’s London office, the author may be contacted at [jonathan.pickworth@dechert.com](mailto:jonathan.pickworth@dechert.com).

the UK (wherever in the world it is incorporated) then the organization is within the ambit of the offense. There has been consternation in some quarters as to the broad territorial reach of the Act. Surprisingly, much of this reaction has come from U.S. companies even though the U.S. Foreign Corrupt Practices Act (“FCPA”) has had, until now, the longest arm in terms of global anti-corruption enforcement. The only requirement under the new UK law is that the commercial organization must do business or *any part of its business* in the UK which means that compliance programs of international companies need to be updated across their operations, not just in the UK.

### **Bribing Another Person and Being Bribed**

The offense of bribing another person includes an individual offering, promising or giving a financial or other advantage intending to induce or reward improper conduct, or knowing or believing its acceptance to amount to improper conduct. “Improper” here means breaching an expectation of good faith, impartiality or trust. So, for example, an individual who is a developer and has applied for planning permission to build an office block and car park next to the council offices and who offers to allow the members of the planning committee to park free in the car park, could fall foul of this offense.

The bribe does not actually have to be given; just offering it, even if it is not accepted, could fall within the offense. Additionally, the offer does not have to be explicit—a “nod and a wink” will be enough and an offer made through a third party will also be caught.

An individual being bribed is also an offense under the Act. This includes request-

ing, agreeing to receive or accepting a financial or other advantage where that constitutes improper conduct, or intending improper conduct to follow, or as a reward for acting improperly. Therefore, the act of asking for a bribe is an offense, even if the bribe is not actually given. So, for example, if an individual who is a developer suggests to a building contractor that he will be awarded the building contract for a development if he also builds a swimming pool at the developer’s house, the developer may commit an offense even if the contractor does not agree.

### **Bribing a Foreign Public Official**

There is a separate offense under the Act of bribing a foreign public official to gain or retain a business advantage. Unlike the general bribery offenses above, this separate offense does not require evidence of an intention on the part of the person bribing to induce improper conduct, or knowledge or belief its acceptance will amount to improper conduct; only that the person bribing intends to influence the official acting in his/her official capacity.

It is worth highlighting that, unlike the FCPA, facilitation payments (i.e., small bribes made to secure or expedite the performance of a routine or necessary action to which the payer has a legal or other entitlement) are not permitted under the Act. All companies operating globally should adopt a zero tolerance approach to all bribery, including facilitation payments. U.S. companies in particular need to take care that there is no permissive language in their current policies or codes of ethics regarding facilitation payments, or else they could fall foul of the Bribery Act even though they might be compliant with the FCPA.

## Failure to Prevent Bribery

It is possible for a corporate body (and its senior officers) to be found guilty of any of the general offenses of bribing, receiving a bribe and bribing a public foreign official listed above. However, the difficulty for the prosecution in proving corporate liability is that it must show that the necessary mental element can be attributed to the “directing” mind of the corporate body. Therefore, it is of major significance that the Act has introduced a new strict liability corporate offense of failure to prevent bribery, where the prosecution will not have these evidential problems in taking action against corporate entities.

The new offense is committed by a commercial organization where a person “associated” with it bribes a person with the intention of obtaining business or a business advantage for that organization. The only defense available to the commercial organization is that it had “adequate procedures” in place to prevent bribery.

For example, if an architect offers a bribe to a member of the planning committee to obtain planning permission for a client company’s development, the client company may fall foul of this offense if the client company does not have “adequate procedures” in place.

## Who is an Associated Person?

An “associated” person for the purposes of this offense is widely defined as a person who performs services for or on behalf of the commercial organization. Therefore, it could include not only employees and agents such as managing and letting agents, but also, depending on the particular circumstances, subsidiaries, joint venture partners, contractors, consultants such as architects, survey-

ors, mechanical and electrical engineers, and intermediaries or brokers who are paid a fee for putting together a deal or finding a site. Where a joint venture is conducted through a separate legal entity, that entity might be treated as “associated” with its members for this purpose, but will not automatically be; it will depend on the degree of control the member has over the entity. A supplier or contractor who is merely acting as a seller of goods is unlikely to be regarded as an associated person.

## What are Adequate Procedures?

Guidance issued by the Ministry of Justice sets out the following key principles:

- *Proportionate procedures.* The procedures to prevent bribery should be proportionate to the bribery risks faced by the organization and the nature, scale and complexity of the organization’s activities.
- *Top-level commitment.* Senior management should be committed to preventing bribery and a senior person should have overall responsibility for the program.
- *Risk assessment.* The organization should carry out periodic, informed and documented assessments of its exposure to bribery and act on them.
- *Due diligence.* Appropriate checks should be carried out on persons performing services for the organization and those persons should in turn be required to carry out similar checks on the persons they deal with.
- *Communication.* Bribery prevention policies should be clearly communicated internally and externally and there should be continuous training.

- *Monitoring and review.* The risks and procedures should be regularly monitored and reviewed.

Every commercial organization should have procedures in place that are proportionate to their business and their risk profile, but which above all must be “adequate.”

### Corporate Hospitality

The guidance makes clear that the Act is not intended to criminalize bona fide hospitality or promotional expenditure. It is advisable to have transparent internal guidance and an appropriate policy firmly in place to guide employees and directors. When assessing corporate hospitality, the following general questions should be considered: 1) Is the hospitality offered for a legitimate purpose or is it intended to influence decision making?; and 2) Is the level of hospitality proportionate and therefore considered to be a routine business courtesy, or is it excessive?

An organization should have policies and procedures in place to ensure that there is adequate clear guidance to enable associated persons to know what is acceptable and that there are appropriate procedures for securing approvals and reimbursement.

By way of example, a managing agent taking a client to a sporting event would not normally be caught by the Act. However, the scale or timing of the hospitality could allow an inference to be drawn under the Act—for example if the sporting event is abroad and the client and his/her spouse are accommodated at a five star hotel for a week, or if the agent’s contract is up for renewal.

An architect providing reasonable travel and accommodation to allow a prospective client to inspect a previous project is unlikely to fall foul of the Act because the hospitality

is both for a legitimate purpose and proportionate.

### Legal Documents

As part of an organization’s “adequate procedures” suitable provisions will need to be included in legal documentation with “associated persons.” The terms of engagement of agents, consultants and service suppliers should include provisions requiring them to comply with the organization’s anti-bribery policies and to have and implement their own policies which they must require their own associated persons to comply with. There should also be provision for the immediate termination of the contract if those requirements are breached.

There should not be any need to insert anti-bribery provisions in sale and purchase contracts or in leases or licenses, as the parties to those documents do not perform services for each other and so would not be “associated.” However, it may be appropriate to include such provisions in a development agreement where the developer will be providing services such as the construction and letting of the development for the land owner. The developer would then include corresponding provisions in the agreements with its associated persons, such as the building contract.

### Impact of the Act

It is clear that the Act is going to have a significant impact in the UK and overseas. In particular, the corporate offense of failure to prevent bribery means that commercial organizations in the real estate sector need to take immediate action and carefully consider what procedures need to be implemented to limit their exposure to criminal liability.