

Bribery Act: sword suspended again

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The announcement by the Ministry of Justice (MoJ) that the implementation of the Bribery Act 2010 is to be delayed for a second time is likely to be greeted with limited enthusiasm by the UK construction industry and the professionals who work in it and with it. This includes the many who share the view of Justice Secretary Kenneth Clarke that what is needed is "a coherent and joined-up approach to combat international corruption."

The doubts which persist relate to the way the legislation is being handled and to its content and that of related guidance, yet to be published.

The process of implementation has not inspired a great deal of confidence amongst international businesses, nor, ironically, amongst lobby groups at the opposite end of the spectrum of opinion, who are dismayed by the lack of immediate action, as they see it.

Passed in the last hours of the last Labour government, the Act received the Royal Assent in April 2010, but it remains unimplemented. Its scheduled date in July 2010 for coming into force was put back to allow a two-month consultation period with the business community, which began in September 2010.

At the end of last month, the MoJ felt obliged to announce that it had failed to meet its self-imposed January 2011 deadline, because the planned guidance was not ready, hence the further delay. A few commentators have speculated that this delay may herald amendment of the Act before it is even in force. Some of this may be motivated by frustration: it is considered unlikely that significant changes will be made at such a late stage.

Of more genuine concern is the uncertainty which continues to surround this legislation. At its most immediate level, the uncertainty relates to time. The MoJ has not committed itself to any fixed time period for ending the further delays beyond stating that the commencement date will be three months after the publication of the guidance. This is somewhat hard, to say the least, on those contractors and other organisations who have put in place systems, with their attendant costs and difficulties, to try to avoid committing offences under the Act, while some competitors are unable or unwilling to make a start.

Much has been written about the new offences at the heart of the Act:

- offering, promising or giving a bribe
- requesting, agreeing to receive or accepting a bribe
- bribing a foreign official to obtain or retain business

And perhaps the one with the biggest implications for businesses operating globally:

- the strict liability offence of failing to prevent bribery by those acting on their behalf

The penalties, the unlimited fine and the maximum ten year prison sentence have invited headline treatment. What is actually of the greatest weight to the big players in construction is uncertainty, uncertainty in assessing risk exposure. For an organisation with thousands of employees, the scope is big enough. But the Act extends to an "associated person" (who performs services) of the commercial entity. The acts done by that person anywhere in the world may involve the organisation in criminal



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liability. A “senior officer,” from directors down to senior managers, may also be caught up in criminal liability if they knew or connived with direct bribery by the corporation.

The position of joint venture (JV) partners and their organisations is of enormous significance – and uncertainty. The Head of the Serious Fraud Office (SFO) had, at the time of writing, announced in the national press that the SFO would be “sympathetic” to oil and gas industry companies, particularly those operating in countries where corrupt practices are commonplace. However, his acknowledgement that “sometimes companies have very little ability to obtain information about what their partner is doing” in JVs will have a real resonance with construction contractors with international operations and the strongest agreement with his statement that they will be “concerned about their responsibilities for what their partners do and want to know the extent of their liabilities.”

The construction industry worldwide is not immune from corrupt practices, including bribery. There have been well documented high-profile cases which demonstrate this, although few of the studies conducted which try to quantify its extent seek to compare it with other industries. Some of the UK’s biggest corporations engage in construction and engineering-related activity in very different business environments around the world. They will await the MoJ’s guidance and the subsequent implementation of the Bribery Act in the hope that it will at least reduce the considerable degree of uncertainty currently prevailing.