

Bribery Act Update: Start Date of 1st July 2011 and New Guidance Published

The Ministry of Justice (MOJ) has now published guidance on how the Act will operate. This follows widespread business fears that the scope of the Bribery Act will render much of Britain's foreign business uncompetitive. Nigel Lubbock comments on the key issues that businesses need to take from this new guidance.

Justice Secretary, Kenneth Clarke, has gone out of his way to stress that the Bribery Act will be interpreted by the Authorities with "common sense and pragmatism". This remains to be seen. The key points to emerge from the guidance are as follows:

1. Corporate hospitality

There has been much overhyped criticism about the potential restraint on corporate hospitality. The guidance is that "reasonable and proportionate hospitality and expenditure" will not be regarded as a bribe. The Litmus test remains the business rationale behind, rather than the extent of, the hospitality. Naively the guidance suggests that if the hospitality is intended to enable a business to "get to know better" a customer or a potential customer, that hospitality is not classed as a bribe. If, however, it can be demonstrated that a business is deliberately extending lavish corporate hospitality with a view to influencing the placing of future business, such hospitality could be classed as a bribe. The timing of hospitality therefore could become critical. If a potential customer is about to place a substantial contract, hospitality may be seen as intended to influence that business decision. To summarise, however, the guidance appears to take a more relaxed view than most commentators of the danger of corporate hospitality being regarded as a bribe.

2. Facilitation payments

Whilst the guidance takes a reasonably benign view of corporate hospitality, it is unequivocal in its prohibition of "facilitation payments". Notwithstanding the fact that such payments are not prohibited in other jurisdictions such as the US it is clear that all such payments will be illegal bribes under the Bribery Act. The only, very limited comfort, is in the discretion of the Serious Fraud Office when deciding whether to prosecute offences.

3. "Doing business in the UK"

The Bribery Act only applies to businesses "doing business in the UK". Courts will apply common sense in deciding whether or not a business has a presence in the United Kingdom. Clarke himself has said that "a mere listing on the London Stock Exchange or the presence of a subsidiary in the United Kingdom will not necessarily satisfy this criterion". We believe that the Authorities are more likely to take a broad brush approach to "place of business".

4. Agent's bribe

Where businesses have complained that they cannot control the behaviour of their foreign agents, the guidance gives some relief in this respect but not totally. The guidance makes clear that a bribe paid by an agent abroad "will not

automatically involve liability on the part of” the business in the United Kingdom. Prosecutors would have to be able to show that the agent paid the bribe with the intention of advancing the business of the UK company. Whilst at first sight, this may give some comfort against liability travelling up the chain to the UK company, in practice, it will be difficult for that company to use this defence if the company has indeed benefited from the agent’s bribe.

5. **Summary**

Whilst many businesses will gain comfort from the lengthy guidance, at the end of the day, we will not know where the line is to be drawn on a number of contentious issues until Courts hand down their Judgments. In the meantime, Steeles Law’s view is that other businesses should be the subject of test cases rather than our clients. Our approach therefore remains cautious but pragmatic. We are pleased to assist businesses in assessing the risks of bribery that they face and to assist in implementing policies, procedures and training to ensure compliance.

6. **Further Guidance**

For a general overview of the key principles of the Bribery Act please see the further guidance on our Website.

If you require any further advice or guidance on the Bribery Act, please contact Nigel Lubbock, James Tarling or Richard Bailey on 01603 598 000 or by email on commercial@steeleslaw.co.uk.