

CORPORATE HOSPITALITY: OUT TO LUNCH OR OUT TO BRIBE?

Contrary to some reports, the UK Bribery Act does not signal the end of corporate hospitality or promotional expenditure.

FOCUS ON THE UK BRIBERY ACT

Corporate hospitality can be used as a mechanism for bribery and exerting improper influence in the course of business. The UK Bribery Act aims to criminalise this type of behaviour, not legitimate and proportionate corporate hospitality.

As acknowledged in the Ministry of Justice's recently published draft guidance, "... *reasonable and proportionate hospitality or promotional expenditure which seeks to improve the image of a commercial organisation, better to present products and services, or establish cordial relations, is recognised as an established and important part of doing business*".

A REMINDER OF THE BRIBERY ACT OFFENCES

There are two general bribery offences:

- offering, promising or giving a financial or other advantage
- requesting, agreeing to receive, or accepting a financial or other advantage

In order to amount to a general bribery offence the financial or other advantage must be intended as an inducement or reward for the improper performance of a function or activity.

There is also a separate offence of bribing a foreign public official. For this offence there must be an intention for a financial or other advantage to influence that official in his or her official role and thereby secure business or a business advantage.

HOW DOES THIS AFFECT CORPORATE HOSPITALITY?

There has been some debate and uncertainty because there are no rules, monetary limits, exemptions or defences in relation to gifts and hospitality within the Bribery Act. Corporates and individuals may find it difficult to know where to draw the line.

The question as to whether a particular item of expenditure constitutes a bribe will depend on all the surrounding circumstances. What is reasonable is to be left to prosecutorial discretion. Prosecutors will decide:

- what is legitimate or illegitimate corporate hospitality within the scope of the Act;
- whether there is sufficient evidence for a reasonable prospect of a conviction; and
- whether or not it would be in the public interest to prosecute.

During the passage of the Act the government position was that if a case involving corporate hospitality should come to the attention of a prosecuting authority, "... *the public interest might not be best served by a prosecution unless... the hospitality was excessive or unreasonable*".

By way of example, inviting several clients to a Christmas party at a local hotel in order to promote good business relations is not generally the type of event which would trouble prosecutors; but inviting a particular client to an all expenses golf weekend in Portugal when an important contract is up for renewal might well be a different matter.

Subsequently, the Director of the Serious Fraud Office has publicly stated:

“... most routine and inexpensive hospitality would be unlikely to lead to a reasonable expectation of improper conduct”

and

“There is a quite clear distinction that I am sure juries will be able to make between inexpensive, modest hospitality offered to many and lavish hospitality that might be offered to a very small number of people in the hope of getting a contract.”

The position may be clarified further when guidance for prosecutors is published in early 2011.

A COMMON SENSE APPROACH

For those considering offering corporate hospitality there are several key questions to ask:

- Could the gift or hospitality be seen as unduly lavish or expensive? (If the recipient is not in a position to reciprocate to the same standard it could be seen as excessive.)
- Is the recipient a foreign government official?
- Does the gift or hospitality invitation extend to family members?
- Is the gift or hospitality outside industry/local norms?
- Is it intended to be an inducement or reward for past or future business?
- Do we expect anything in return?
- Are there any current contractual negotiations, tenders or pitches for new business connected to this person/business/organisation?
- Are we trying to outdo our competitors in order to win business?

If the answer is ‘yes’ to any of these questions proceed with caution, as there is an increased risk profile for bribery.

KEY POINTS FOR INDIVIDUALS

- Comply with internal policies and procedures.
- Think carefully about the underlying intention (a bribe is intended to induce or reward improper conduct).
- Would you be happy to justify your actions to others – colleagues, family or friends?
- How would you feel if you read about it the paper?
- If in doubt seek further advice.

If you have finished with this document, please pass it on to other interested parties or recycle it, thank you.

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KEY POINTS FOR CORPORATES

- Limits: decide on a monetary threshold (which may need to vary from country to country) below which gifts and hospitality are acceptable and need no prior authorisation.
- Procedure: decide how to deal with gifts and hospitality which are over this threshold or require prior authorisation.
- Transparency: decide how to record and scrutinise the provision and acceptance of gifts and hospitality.
- Publication: ensure that all officers, employees and business partners are aware of the gifts and hospitality policy and receive anti-bribery and corruption training where appropriate.
- Reporting: ensure that there is a system in place for employees to report suspicions of bribery and corruption.
- Enforcement: ensure that breaches are dealt with appropriately – whether that be disciplinary measures or termination of contract.

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