

# The Bribery Act and Corporate Hospitality

**Date:** Wednesday, 22 February 2012

**Place:** Thames Room, Exhibition and Conference Centre (UWE)

## **Programme**

**1.30-2pm: Coffee and Registration**

**2.00-2.25pm: Introducing the Bribery Act and Corporate Hospitality**

Eoin O'Shea, Lawrence Graham LLP

**2.25-2.50pm: The Legal Perspective**

Kerry Gwyther, TLT LLP

**2.50-3.15pm: The Government Perspective**

Roderick Macauley, Bribery Act Implementation Manager (Ministry of Justice)

**3.15-3.30pm: Tea/Coffee Break**

**3.30-3.55pm: A Business Perspective**

Gary Jones, Intel (Director of Legal Affairs for EMEA)

**3.55-4.20 pm: An Academic Perspective**

Dr Richard Alexander, School of Oriental and African Studies

**4.20-4.55pm: Training in Good Corporate Hospitality**

David Morgan, Human Resources UWE

**4.55pm: Conclusions**

# The Bribery Act and Corporate Hospitality

Eoin O'Shea, Lawrence Graham LLP

## Biography

### Expertise

Eoin is an expert on the regulation of international corruption and economic crime generally. He has experience of very large corporate investigations and advises industry-bodies, companies and directors on criminal liability and compliance. He has wide experience of using civil law remedies such as injunctions to manage business-critical risks. He has acted in a wide range of international disputes and arbitrations, for clients in the defence, energy, life-sciences and financial sectors.

### Experience

- Acting for international energy company in very large potential dispute;
- Acting for utilities company in major regulatory and criminal investigation;
- Advising a number of companies in defence and other sectors on anti-corruption compliance and associated risks;
- Acting for GlaxoSmithKline in complex injunction proceedings;
- Acting for Sumitomo Chemical and Dainippon Sumitomo Chemical in complex multi-jurisdictional proceedings in pharmaceutical sector;
- Acting in International Chamber of Commerce international arbitration for Brazilian bank.

### Professional

Barrister (4 Field Court) 1996 – 2002

Simmons & Simmons 2002 – 2008

Lawrence Graham 2008 - present

### Publications and Speaking Engagements

#### *Publications*

*Lords of the Realm – Above the Law?* Times 29/01/09

*The Woolf Report: A Template for Corporate Ethics*, In-House Lawyer July 2008

*Shady Dealings*, New Law Journal 01/02/08

*Bribery, Another Chance to Get it Right*, The Times Online 11/12/07

*UK Businesses Beware the Long Arm of US Law*, The Lawyer 14/08/06

*NatWest Three – Why You Should Be Worried*, Times 28/06/06

*Europe, Enforcement and the English*, Legal Business January 2006

*Managing Business Risk* (Kogan Page 2006) (contributor)

*Countdown to 2000* (Butterworths 1998) (contributor)

# The Bribery Act and Corporate Hospitality

## *Speaking engagements*

*Law and Extremism in the European Union* – European Federation of Pharmaceutical Industries, July 2008

*The International Regulation of Corruption* – Launch of Centre for Fraud Studies, Teesside University, July 2008

*Evolving Attitudes to Bribery* – Defence Manufacturers' Association Conference, June 2008

*Economic Crime: The International Super-Regulators* – Fraud Europe Conference, April 2008

*Law Commission Proposals for Reform of Corruption* – UK Defence Industry Anti-Corruption Forum, March 2008

*Extradition - Is Britain the 51st State?*, 2006

*Jurisdiction: A Funny Thing Happened on the Way to the Forum*, 2005

## **Synopsis**

1. What the Bribery Act says about gifts and hospitality (hint: nothing)
  
2. What the Ministry of Justice Guidance says about gifts and hospitality (nothing very useful)
  
3. Attitude of the Serious Fraud Office to gifts and hospitality
  
4. So why is this a problem?
  - a. Definition of bribery– s.1, s.6 of the Act
  - b. The agency problem
  - c. The media problem
  
5. Some common sense:
  - a. controlling expenditure
  - b. managing risk
  - c. involving (or not involving) lawyers / accountants
  
6. Typical corporate gifts and hospitality procedures
  
7. Will these be "adequate"?
  - a. responsive to risk
  - b. operated consistently
  
8. Trends and the Future

# The Bribery Act and Corporate Hospitality

Kerry Gwyther, TLT LLP

## Biography

Kerry is head of TLT's Commercial Regulatory Services and specialises in compliance and incident management, investigations and prosecutions by the major regulators: the Health and Safety Executive, Environment Agency, Trading Standards, Office of Fair Trading and the Serious Fraud Office.

Kerry acts for a number of Blue Chip and High Street Corporates advising on domestic and international compliance and regularly appears as an advocate in Courts throughout the UK where he has dealt with a number of high profile cases nationally and locally.

Kerry lectures on regulatory compliance and prosecutions, particularly in relation to corporate governance, personal liability of Directors, corporate manslaughter and Bribery Act compliance. He has designed a number of compliance schemes already to enable businesses to demonstrate compliance with the Bribery Act 2010 in the UK and abroad and acts as an external auditor of compliance schemes.

Kerry is a member of the Association of Regulatory Lawyers and is also an accredited and practising commercial mediator. He is recommended in the leading legal directories, Chambers UK & Legal 500.

## Synopsis

The Bribery Act 2010 came into force on 1 July 2011. The Act applies to the whole of the UK but has wide extra-territorial jurisdiction to deal with bribery committed outside the UK. The Act created wide general offences of bribing another person and being bribed as well as a new corporate offence of failure to prevent bribery by an "associated person".

Considerable publicity was given to the impact of the Act on Corporate Hospitality and other promotional expenses: at first glance it appeared as though the giving or accepting of Corporate Hospitality would fall foul of the Act. Subsequent Government and SFO guidance has made it clear that the intention of the Act is not to make genuine hospitality or reasonable and proportionate business expenditure illegal. However, the Act will catch hospitality that is merely a cover for bribing another and could expose not only the individuals concerned to prosecution but also the company. The Act can also catch the activities of third parties, such as agents, on behalf of a company.

This talk will focus on: the legal boundaries between bribery and bona fide hospitality, the legal position of the two sets of Guidance, what they say and the reliance that can be placed on them, and the steps organisations can take to protect themselves from prosecution. Brief mention will be made of corporate hospitality in relation to foreign public officials and the distinction between hospitality and facilitation payments.

# The Bribery Act and Corporate Hospitality

Roderick Macauley, Bribery Act Implementation Manager (Ministry of Justice)

## Biography

Roderick is a barrister with extensive practitioner experience in the criminal law coupled with domestic and international legislative and jurisdictional expertise. He is now working as a criminal law adviser at the United Kingdom Ministry of Justice. For the past four years he has led on the reform of the criminal law of bribery which culminated in the Bribery Act 2010. Roderick subsequently developed the United Kingdom's Government Guidance published on 31 March 2011. He has travelled extensively before and since the commencement of the Bribery Act on 1 July 2011 offering advice and guidance to the global business community, anti-corruption practitioners, law firms and civil-society on the scope of the Bribery Act and in particular on corporate liability under the Act and commercial bribery prevention.

## Synopsis

Corporate hospitality and promotional expenditure are established and essential aspects of doing business. So proportionate hospitality and promotional expenditure that is intended to establish cordial relations or better present products and services should and will not engage the criminal law. But such expenditure can also be employed as bribes. Accordingly the law has always criminalised unethical use of these types of expenditure. The Bribery Act 2010 maintains the status quo. Like the preceding law the Act does not contain any exemptions for hospitality or promotional expenditure but as the Government guidance published at the end of March 2011 clarifies, bona fide hospitality and promotional expenditure is not the focus of the Act. These types of expenditure could engage all four offences under the Act but would do so in different ways. In many cases the "improper performance" test will apply. The focus of recent debate is how this type of expenditure relates to the section 7 failure to prevent offence. The Government guidance and case studies on the Act provide examples to illustrate the way in which the provisions of the Act would or would not be engaged by hospitality or promotional expenditure and how organisations should approach the establishment of adequate bribery prevention procedures to address any identified bribery risks. Prosecutions relating to the transfer of unethical expenditure characterised as hospitality or promotional expenditure will typically involve inviting the tribunal of fact to draw inferences from circumstantial evidence. Levels of expenditure and sector norms can, therefore, have evidential significance. Government policy is to encourage business to contribute to the competitive but also fair and ethical pursuit of business objectives.

# The Bribery Act and Corporate Hospitality

Gary Jones, Intel (Director of Legal Affairs for EMEA)

## Biography

Gary A. Jones is the Director of Legal Affairs in Europe, the Middle East and Africa (EMEA) for Intel Corporation. He is based in the UK, from where he leads a very diverse, multinational team of approximately 40 highly qualified legal professionals working out of multiple locations across EMEA. Gary rejoined Intel in 2005 after nine years as V.P. General Counsel for LSI Logic Corporation, also in the UK. Among his other duties, Gary was responsible for Intel's worldwide Anti-corruption/Anti-Bribery Program in 2009-2010, and is currently a member of Intel's Ethics and Compliance Oversight Committee, which reports directly to Intel's Board of Directors on Ethics and Compliance matters. A member of the California Bar since 1979, Gary's career in the US, France and the UK over the last 30+ years as in-house counsel to high-tech leaders Intel and LSI, has included responsibility for a broad spectrum of local, national, and international legal matters effecting those companies.

## Synopsis

Gary will be addressing the challenges a corporation like Intel faces both at the national and the international level.

# The Bribery Act and Corporate Hospitality

Dr Richard Alexander, School of Oriental and African Studies

## Biography

Dr. Richard Alexander has been Lecturer in Financial Law at the Department of Financial and Management Studies, School of Oriental and African Studies since September 2004. He began his career as a barrister before becoming a Research Fellow in European Financial Services Law and Coordinator of the International Professional Training and Research Unit at the Institute of Advanced Legal Studies, University of London in 1997.

Dr. Alexander's main fields of professional interest are financial services law and regulation and the control of economic crime. He has published a range of works on this subject and is a member of the Editorial Board of the journal "Company Lawyer". He regularly takes part in professional training courses, conferences and workshops for a wide range of institutions worldwide, as well as guest lectures at the University of Warwick, University of Palermo, China Ocean University and the University of the Free State, South Africa.

## Synopsis

In the lead-up to the introduction of the Bribery Act 2010, considerable concerns were raised by the UK corporate sector with regard, inter alia, to corporate hospitality. Indeed, these concerns led to a concerted lobbying campaign, explicitly aimed not merely at the Act's amendment but its complete abolition before it even came into force. This despite an equally explicit statement by the Serious Fraud Office that reasonable corporate hospitality would remain legal after the Act came into force, just as it was before.

That assurance is made clear by the definition of bribery itself under the Act. This has two limbs: 1) the offer (or acceptance) of a financial or other advantage and 2) where that offer is made either with the intention of causing the recipient to perform their function in an improper manner or in the knowledge or belief that its mere receipt will constitute the improper performance of the person's duties. Limb 2 is what distinguishes bribery from a legitimate gift or other form of hospitality. Reasonable corporate hospitality is not intended to cause the improper performance of anyone's duties; as such, it remains legal. A bribe is so intended; as such, it constitutes a crime.

Even in certain jurisdictions, where the difference may appear blurred, it is not in fact. An example is China. It is part of the Chinese culture that business, both commercial and official, is conducted over a meal; further, that a gift is offered as a mark of respect. However, if the dinner and gift remain within recognised bounds, i.e. no more than any other business party would offer, it will not be intended to lead to the improper performance of the counterparty's duties. This will contrast with a case where the parties compete to offer the best hospitality and the most valuable gift in the expectation that the best host will secure the deal.

# The Bribery Act and Corporate Hospitality

David Morgan, Human Resources UWE

## Biography

David Morgan has worked as a Human Resources Manager at UWE for ten years, managing a small team providing an operational generalist Human Resources support to a portfolio of faculties and services. He has also been involved in Employee Relations and policy development and took the lead for Human Resources in responding to the Bribery Act 2010.

## Synopsis

Based in Bristol, UWE has around 35,000 students and 3,500 staff and a turnover in the region of £200 million. At a time of competing demands (value for money, reducing HEFCE funded student numbers and a strategic need to increase numbers of overseas students, significant contracts with external service providers) what are the implications of the Bribery Act 2010 and how have we responded?