

Bribery – Can you tell what it is yet?

Business and the advisory community had been stoking themselves up over recent months in anticipation of the Bribery Act coming into force in April. This was supposed to be preceded by guidelines from the Ministry of Justice on interpretation of the Act and how it will be operated by the authorities. But in the last few weeks it has been announced that the guidance will not now be available until at least the spring, and therefore the Act will now not come into force until the autumn. So, where does that leave us? Do businesses have any basis yet for working out what behaviour will or will not put them at risk of prosecution when the law comes into force?

The answer may be that yes, we have some inklings into the approach of the authorities, but the position still remains uncomfortable. In a number of recent speeches and publications the MoJ and SFO have been indicating where the prosecuting authorities will focus their attention and resource. Unsurprisingly, perfectly usual business practices, such as client entertainment on a reasonable scale, customer business trips for legitimate business reasons funded by the supplier, and other payments which may technically fall within the offences under the Act but are in reality perfectly justifiable, will not be the subject of the prosecutors' attention. This is hardly surprising on one level, but still raises questions in at least two respects.

What the authorities are signalling in a sense is to be welcomed, but what should UK businesses do about, for example, the small facilitation payments that in some jurisdictions are regarded as a part of the price of doing business? Do they instruct and train their people that even these are absolutely not permitted (meaning that doing business in a jurisdiction where such payments to local officials are endemic becomes very difficult, to the harm of the UK's export-led recovery)? Or do they take the view that these are not likely to result in prosecution and so should not be their immediate focus? If the latter, companies will surely still be vulnerable to press or pressure group attack in relation to this sort of behaviour. It is also odd to find that you might be supposed to ignore activities which are within the terms of some of the sections of the Act, and even the current pre-Bribery Act law.

Equally, high value scenarios and obviously corrupt practices may be flagged as the main target for prosecutions under the new regime, but different considerations could then come into play. The authorities certainly seemed to shrink from the consequences of a corruption prosecution of BAE Systems in relation to the Saudi defence contract saga, under the existing UK law. The consequences of a Bribery Act corporate conviction become very significant indeed in the context of the EU public procurement rules (which would bar participation to a company with such a conviction) to a large, international business. It may be that there continues to be limited appetite to proceed against such nationally important industries, particularly where it is the company that brings the behaviour to the attention of the authorities.

Companies know they need to be working now to put in place systems to prevent corrupt behaviour on the part of their staff, 'contractors' or agents. They need to be training their people about the consequences of getting this wrong. But, despite the efforts of the authorities to give some indications about the thrust of their own prosecuting efforts when the law comes into force, there is currently every chance that business will be presented with a complex and confusing picture to interpret when the full picture is revealed.

In anticipation of the guidance appearing, and in the expectation that it will provide some further help to interpretation of the application of these rules for businesses, Pitmans are planning a seminar in early June 2011 at which we will speak alongside a recognised leader in the Risk Consulting sector about the Act and some of the practical matters businesses should be putting

in place by then. The provisional date for this is Thursday 9 June 2011, in the morning. Please mark your diaries and we will be in touch nearer the time.

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