



## Backhanders, kickbacks and bungs

### A new era in dealing with the old problem of bribery

The introduction of the Bribery Act 2010 (the “Act”) on 1st July 2011 will herald what many believe to be a new era in dealing with an age old problem. It will certainly place a great emphasis on businesses to ensure that they put in place processes to counter bribery. This article will look at the main provisions of the Act and its implications following its imminent introduction.

Until now, England & Wales have had no statute in place for dealing with bribery other than of a public official. Most recently, the UK was criticised for its handling of BAE Systems (“BAE”) in respect of a contract with the Tanzanian government. BAE paid a third party USD12.4 million to assist with the negotiation and sale of a radar system to the Tanzanian government. BAE accepted that it was highly likely (though could not be proved) that part of that money was used in the negotiation process. In order to avoid a conviction of corruption, BAE pleaded guilty to failing to keep adequate accounting records contrary to section 221 of the Companies Act 1985. Fortunately for BAE, the Act will not be retrospective.

Under the Act, a person is guilty of an offence of bribery where they offer, promise or give a financial advantage to another person as an inducement for an action which is illegal or a breach of trust.

A person is also guilty of an offence where they accept a bribe.

Actions referred to in the Act are all functions of a public nature, all activities connected with a business (which includes a trade or profession), any activity performed in the course of a person’s employment, or any activity performed by or on behalf of a body or person (whether corporate or unincorporated). The action is carried out improperly if there is performance or non-performance which breaches the expectation that it will be carried out in good faith, impartially or where the person performing the activity is in a position of trust.

The Act also makes commercial organisations accountable for the acts of its employees and agents by making such organisations guilty of an offence if a person associated with it bribes another person, intending to obtain or retain business or a business advantage for the organisation. Commercial organisations will be required to put in place “adequate procedures” to prevent bribery by those acting on their behalf. Companies will be “strictly liable” (which makes the offence easier to prove) and an organisation will only be able to defend a prosecution if they have these procedures in place.

Commercial organisations are defined as a body incorporated, or a partnership formed, under the laws of any part of the UK and which carries out business anywhere in the world, or any body incorporated, or any partnership formed, in any part of the world which carries on business in the UK.

If a commercial organisation could be caught within the provisions of the Act, the Serious Fraud Office (the “SFO”) or the Crown Prosecution Service (the “CPS”) must decide whether it is in the public interest to bring a prosecution. This would include considering the impact it would have on innocent stakeholders, such as employees and creditors, and the wider community and whether a criminal conviction is a proportionate outcome.

Whilst sole traders do not come within the definition of ‘commercial organisation’, they are not immune from prosecution. Guidance from the CPS suggests that, as with commercial organisations, it will look at all the evidence in relation to the offence committed by the employee and consider whether it is in the public interest to investigate whether the employer knew about the bribery. Employers could then find themselves guilty of the individual offence under the Act or an offence of conspiracy.

Individuals found guilty of an offence under the Act are liable to a prison sentence of up to ten years and an unlimited fine, while companies are liable on conviction to an unlimited fine. The fines for companies will be significant and although no guidance has been provided on this a recent Crown Court decision has suggested that fines for corruption should be in the millions or more. The Secretary of State for Justice recently confirmed that public authorities will have discretion to exclude commercial organisations convicted of failing to prevent bribery under the Act from tendering for public contracts.

What is of interest is the impact the Act will have on commonplace practices within commercial organisations, such as corporate hospitality, gifts and expenses. Practices such as facilitation payments, which are common in the USA to expedite matters such as obtaining permits and processing governmental papers, are illegal under English law and will remain so under the Act. Therefore, UK companies conducting business in the USA will be guilty of an offence under the Act if they make a facilitation payment, whereas US counterparts will be free to continue making such payments, provided they do not carry on business also in the UK, giving them what many multinational organisations believe to be a dangerous advantage.

The Ministry of Justice has produced Guidance on the Act, but this has been criticised by Transparency International UK’s Executive Director, Chandrashekhhar Krishnan, who commented:

“The Bribery Act, as passed by the last Parliament, is one of the best anti-bribery laws in the world. But the Guidance will achieve exactly the opposite of what is claimed for it. Parts of it read more like a guide on how to evade the Act, than how to develop company procedures that will uphold it.”

With its imminent arrival, it is vital that all businesses, from sole traders to large multinational companies and partnerships, implement policies to try to prevent bribery. Attwaters are currently advising a number of clients on how to do just this in time for and beyond the introduction of the Act in July.

Should you require any further information concerning this or any other corporate-commercial matters, please contact **Scott Simmons** on **020 8508 2111** or by email **scott.simmons@attwaters.co.uk**

The information contained in this article is intended for guidance only and is not intended to provide specific legal advice to you or your business. Expert advice on any issue should always be obtained. Attwaters Solicitors do not accept liability for any loss that may arise from relying on or using the information contained in this article.

## Profile

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Scott undertook his training contract with Attwaters and qualified in 2006. He worked for a large regional law firm, specialising in commercial property, before travelling to Gibraltar to work for a large multinational trust management company where he broadened his experience in tax planning. There, he advised clients on matters such as joint ventures, debt-equity swaps and the management of overseas companies. This diverse experience gives Scott the ability to provide wide-ranging advice, with a key emphasis on client care, support and management of transactions through to completion.

Scott practices in a number of areas of corporate and commercial law, from company share acquisitions and sales to business transactions and advising clients on matters such as terms and conditions and franchise agreements.



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