Thomson Snell & Passmore

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News & views

Business Law

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The Bribery Act 2010

The Bribery Act 2010 is an attempt to ensure that bribery is tackled more effectively in the United Kingdom. It is expected to come into force in April 2011.

Bribery is a threat to economic progress and development around the world. Instead of businesses competing on a level playing field, they might be competing, unfairly, against the biggest backhander. Until now, the United Kingdom has been much less aggressive in dealing with bribery than other national authorities, most notably in the United States. This is soon to change with the introduction of four offences:

1) bribing another person in connection with a business involving either a private or public commercial organisation
2) accepting a bribe
3) bribing a foreign public official
4) failing to prevent bribery - this is the most controversial offence as it makes a commercial organisation liable for bribery carried out by a person associated with it, whether or not it was aware of the bribe. A commercial organisation will include any business, including partnerships and companies. Associated persons will include employees, agents and third parties involved with the business. A consultation exercise is underway in relation to Ministry of Justice guidance on how businesses can help to prevent bribery. The draft guidance is expected to be finalised early in 2011.

There are criminal penalties for these offences. The maximum jail term will be ten years and fines for commercial organisations convicted of failing to prevent bribery will be unlimited.

Although the Act is not radical, it would be naïve of businesses to ignore this opportunity to ensure that they have adequate anti-bribery policies in place.

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From the Editor

Welcome to the October edition of Business Law, Thomson Snell & Passmore's newsletter highlighting some key issues relating to business law.

If you would like further advice on any of the issues covered please contact James Herbert, Partner and Head of Corporate & Commercial.

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We suggest that these are the basic and sensible steps for all businesses to take:

- ensure that high level management understands the implications of the new Act and is encouraged to foster a culture that will not accept bribery
- write a bribery policy and build in anti-bribery provisions into your employee handbook and employment contracts
- carry out a risk assessment of the business. Consider the possible risks based on the type of work that you do and the countries in which you operate
- ensure that your policy extends to third parties that you deal with - know your customers, agents and distributors and carry out due diligence on third parties at the beginning of the relationship
- consider setting up a committee responsible for compliance with the new Act and vet supplier chains and third parties
- provide training to your staff in relation to the Act and its implications for them
- review your policies relating to political or charitable donations, gifts, and entertaining
- keep up to date on the upcoming guidance from the Government. It should be reviewed and changes made to your policy if necessary. ■

Vertical agreements block exemption

In June 2010, a new block exemption affecting vertical agreements came into force, recognising, amongst other things, the growth in online trade.

Even very small businesses can have a market share in excess of the thresholds.

Vertical agreements are agreements between parties operating at different levels of the market, such as distribution, agency and franchising agreements. These agreements often include terms that are, in principle, anti-competitive and technically illegal, for example, geographic restrictions on markets.

It is recognised, however, that the inclusion of these technically illegal terms, for businesses up to a certain size - with up to 30% of the market share - can actually stimulate competition, which in turn benefits consumers. The new block exemption sets out what is permissible. The most notable change is to list restrictions that are permissible in relation to online sales.

Where a trader operates online, before the new exemption came into force, it was unclear whether ‘passive’ online sales were permitted. These are sales that result from a customer contacting the trader, rather than from the trader’s marketing activities.

Some examples of passive sales that cannot be restricted are responding to unsolicited requests from individual customers or hosting a website, even if accessible from outside the distributor’s territory.

At the same time, the new exemption makes clear that certain active online sales can be restricted by contract. Some examples are the distributor sending unsolicited emails to customers or conducting online advertising specifically targeted at certain territories or customers.

There are also new rules in relation to selective distribution systems, where distributors are chosen based on whether they meet certain criteria linked to the products in question. These products tend to be luxury goods, where image is very important to the manufacturer. For example, the selected distributor can be required to sell at least a certain amount of products offline through actual shops so that consumers can see and test products.

These rules are not easy to navigate and specialist drafting is needed when entering into vertical agreements. Bear in mind that even very small businesses can have a market share in excess of the thresholds and you should contact us if you have any concerns.

Software management - are your software licences in order?

This article examines the licensing of software used in your business and what to do to stay on the right side of the law.

It is estimated that over a quarter of software in the United Kingdom is unlicensed.

When did your business last carry out an audit of the software loaded onto its systems?

Can you say that your business has a licence for every copy of that software?

Could you produce them?

It is estimated that over a quarter of software in the United Kingdom is unlicensed.

In reported prosecutions, significant fines have been imposed on businesses and they have had to make additional payments for the correct licences for their critical software.

In the United Kingdom, the legal position is that the developer of the software owns that software and the right to licence it to users. It is a common misconception that 'buying' software allows any number of copies to be made. The terms of any licence must be closely checked to ensure that the necessary number of licences have been granted for all the users. Sometimes, this task is delayed as businesses expand or become occupied with financial worries.

Enforcement can happen in various ways. The software developer can sue for copyright infringement or organisations, such as the Federation Against Software Theft (FAST) or the Business Software Alliance (BSA) can investigate.

More likely is a visit by Trading Standards officers, who have power to enter premises and examine the IT systems of a business. Where illegal software is found, IT systems can be disabled until legitimate software has been purchased.

There is an upside to carrying out an audit. It could pay for itself by disclosing where software could be replaced with more cost-effective solutions or where too many licences are being paid for. It will also allow the business to consider regularly which products are best for its needs.

To ensure that your business complies with the law, we suggest:

- carrying out a software audit and introducing a system of regular auditing
- introducing a formal software policy to advise staff that they should not download digital content from the internet
- responding promptly to any approach from the BSA, FAST or Trading Standards in relation to software use.

Data protection - fines for breaches announced

The Information Commissioner's Office now has power to issue fines of up to £500,000 to organisations in serious breach of the Data Protection Act 1998.

The highest fines will, unsurprisingly, be reserved for the most serious of breaches, which result in significant damage and distress to individuals or where the breach is deliberate.

Organisations that have taken genuine steps to prevent breaches are likely to receive the smallest fines or to be issued with an enforcement notice, requiring them to improve their data protection practices.

It is worth noting that organisations regulated by the Financial Services Authority can also be fined by that organisation for similar behaviour, except that fines from the Financial Services Authority are often significantly higher.

In 2009, UK online advertising spend overtook television advertising spend for the first time. Wherever there is explosive growth, the law inevitably follows and online advertising is no exception.

Promoting your business online: follow the rules

The general rule is that online adverts must not be unfair or misleading. This means that the popular practice of 'buzz marketing' (blogging and product recommendations by companies posing as customers) is prohibited.

Behavioural advertising is the use of information about a person's web-browsing behaviour in order to specifically target that person with relevant advertisements. Advertisers who wish to use targeted advertising should make sure that consent is obtained from the user.

Google's AdWords advertisement service allows advertisers to buy keywords so that a search against that keyword will result in the display of the keyword owner's advertisement. Although this is legal, it can trigger claims of trade mark infringement by the owner of the keywords (e.g. the ongoing claim against Marks & Spencer for using the Interflora keyword). Use of business names in website metatags can also lead to trade mark infringement claims.

From March 2011, the Advertising Standards Agency will be able to enforce its codes of practice to online advertising. The codes are broad in effect and will undoubtedly mean that businesses can expect to be challenged more readily in relation to their advertising practice.

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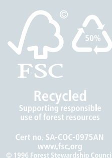
Corporate manslaughter: how much could your organisation be fined?

The Sentencing Guidelines Council has published guidance on the fines that can be imposed on organisations convicted under the Corporate Manslaughter Act 2007. The Act, which has been in force since 2007, created a new offence by which an organisation can be guilty of manslaughter.

The guidelines make clear that the court assessing the fine should not take account of the possible effect of any fine on the shareholders of a company. The guidelines go so far as to state that in extreme cases, it may even be appropriate for the fine to put the organisation out of business.

Fines under the Act are unlimited. The guidelines state that fines will seldom be less than £500,000 and "may be measured in millions of pounds".



Although this newsletter highlights some key issues relating to business law, it should not be considered comprehensive and is not a substitute for seeking professional advice on a specific issue.