

Decision time

The UK Bribery Act and the changing face of business

Anti-Corruption Survey 2010



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Decision time

Corruption has long fulfilled the role of the unspoken spectre in business dealings, not only overseas but also domestically, be it the sinister ‘grand corruption’ witnessed in the higher echelons of governments or ‘petty corruption’ involving officials at a local level.

Although the primary focus is currently on the bribery of public officials, corruption also operates globally at the business-to-business level where bribes are paid to win customers and contracts. How significant a role corruption plays is impossible to say, but Transparency International maintains it has “dire global consequences, trapping millions in poverty and misery, while breeding social, economic and political unrest. Corruption is both a cause of poverty and a barrier to overcoming it¹”. At the business level it drives up the costs of doing business as the bribes paid are inevitably absorbed into the cost of the goods, works or services procured. This in effect distorts markets by creating uneven playing fields on a global basis.

The UK’s response to the pervasive threat of corruption relies upon a combination of the common law and piecemeal legislation dating back to the last century, under which there have been less than a handful of convictions. Until recently, this stance has been in stark contrast to the fearsome levels of intervention shown by the US Department of Justice under its Foreign Corrupt Practices Act 1977 (FCPA).

In October 2008, the Organisation for Economic Cooperation & Development (OECD) issued a stinging and highly critical report on the UK’s continued failure to address deficiencies in its laws on bribery of foreign public officials and on corporate liability for foreign bribery. There followed a series of settlements (some contentious) spearheaded by the Serious Fraud Office (SFO) with a number of UK companies. However, the most significant reaction has been the passing of the Bribery Act 2010, which, although not yet in force, creates four specific bribery offences including a new and radical corporate offence for failing to prevent bribery.

The legislation is undoubtedly groundbreaking in terms of the new corporate offence, and indeed the previous government was talking a tough game on corruption, with the Act enjoying all-party consent. However, the portrayal of a tough new regime is difficult to reconcile with the estimate included in the Ministry of Justice’s Impact Assessment² of the Bill that there would be only around 1.3 additional prosecutions a year (1 SFO prosecution per year and 1 CPS prosecution in a

three-year period) arising from the introduction of the new corporate offence. Less scrupulous companies may view this very low forecast for prosecutions as signalling to them the green light to continue doing business the way they always have, with little risk that they will ever form part of such a statistic.

It is unclear following the change in government and its likely need to review the detail, whether the phased introduction of the Bribery Act will now occur in the time frame originally envisaged for this year. Although there may be a slight delay, this will undoubtedly prove to be important and meaningful legislation for UK business.

Our survey was conducted in the weeks leading up to the Bribery Act receiving Royal Assent in April 2010. While the focus was on the pending change in the law, the survey also explored other relevant aspects of the corruption spectrum as it sought to understand the viewpoints of senior management with anti-corruption responsibilities from a variety of companies, ranging from medium enterprises to large listed organisations.

¹ http://www.transparency.org/news_room/faq/corruption_faq – Transparency International UK (charity no. 1112842) is the UK Chapter of the world’s leading non-governmental anti-corruption organisation, Transparency International (TI).

² <http://www.justice.gov.uk/publications/docs/draft-bribery-bill-impact-assessment-ii.pdf> 20 February 2009

Several key findings emerged from our survey, which have gone on to define the themes featured in this report:

1. A sense of unfairness:

overall the Act is welcomed, but UK companies are bearing the brunt of addressing the corruption dilemma – many believing the government is not doing enough, especially to force foreign governments to change their ways.

2. Competitive edge put at risk:

there is a concern that compliance with the Act will make UK business less competitive in certain markets, facing unscrupulous foreign competitors playing by their own rules.

3. Lack of preparation:

not only are many companies unprepared for the Bribery Act, but also they remain exposed to existing corruption legislation.

4. Naivety or complacency:

for the majority of companies the Bribery Act appears to be of little or no consequence as they consider themselves to be ‘not at risk or in a low risk sector’ (even though 90% do business abroad). Additionally, the focus of UK business appears to be on the bribery of foreign public officials, and there is no obvious indication emerging that companies are assessing their business-to-business (B2B) risks.

5. Good corporate governance:

where anti-corruption strategies are in place they are inconsistent, lacking critical elements of an ‘adequate procedures’ framework. There are indications that many companies have not undertaken a corruption risk assessment.

This survey revealed a number of findings that stakeholders in the anti-corruption arena should find of interest, including the willingness of businesses to assist in reducing corruption, but at the same time wanting realistic solutions to enable them to do so in the shape of increased government support and legislation. It is clear that the government’s introduction of the Bribery Act alone will not meet their expectations.

That said, as the corruption debate continues, there is no doubting the UK’s movement towards meeting its obligations as an OECD (Organisation for Economic Co-operation and Development) member, alongside its moral and practical responsibilities in addressing foreign bribery.

We wish to thank all the 166 businesses which took part in the survey as well as all the contributors to this report. Your help and commitment are much appreciated.

Sterl Greenhalgh
Head of Anti-Corruption Group
Grant Thornton UK LLP

Executive summary

While the Bribery Act is viewed by most respondents as marking a positive step for UK business, a complex ethical conundrum still exists for UK companies.

The challenges posed by unscrupulous competitors, the difficulty in achieving compliance in certain countries, allied to the stringent restrictions on facilitation payments³ and the uncertainty over what is acceptable corporate hospitality, means difficult decisions loom for UK companies seeking to emerge with strength from the economic downturn and generate growth.

A clear message from our survey is that companies cannot, on their own, eliminate bribes when doing business, consequently believing the government needs to do far more to reduce the demand side of corruption by leaning on certain governments and officials to change their ways. There is also a perceived need for the government to provide better local support and advice to companies on corruption issues when they do business in these same countries.

One key area of concern is that many organisations appear either complacent or uninformed as to the reality of corruption risk, casting a shadow over the UK's ability to simultaneously comply and retain competitive edge. It is entirely feasible that some UK boards will be confident that they manage a compliant company, even though respondents conceded they are not confident that local country managers faced with delivering results will always adopt the right ethical behaviour. The real concern would be that such local accommodations might actually find favour with some boards, who might be content to turn a blind eye to what happens on the ground in order to achieve profits. The current economic conditions would most certainly increase pressure in this regard and could make profit driven behaviours even more aggressive in some instances.

Four key themes emerged from our survey and these are discussed at length in parts 1-4 of our report, including:

1. Is the Bribery Act fair?
2. How will business respond to the Act?
3. Will companies change their ways of doing business?
4. Putting anti-corruption on the board agenda

“Those that think there is a low risk have their heads in the sand”.

Colin Cowan,
Detective
Superintendent,
OACU (City of
London Police)

³A facilitation payment is made to a foreign official, political party or party official for 'routine governmental action', such as processing papers, issuing permits, and other actions of an official, in order to expedite performance of duties of non-discretionary nature, ie, which they are already bound to perform. The payment is not intended to influence the outcome of the official's action, only its timing. They are legal under the FCPA, and recognised as such by the OECD, but are considered as bribes under existing UK law and under the Bribery Act.



“The commercial incentive can sometimes override the ethical values of how one should behave.”

Financial Services,
10,000+ employees

1. Is the Bribery Act fair?

The Bribery Act has generally been well received by businesses, even though some commentators have described the new Act as representing the ‘gold-standard’ of legislation, which goes far beyond its US counterpart – the FCPA. The Act’s extended reach is due to the inclusion of commercial bribery and not simply bribery of foreign public officials. Significantly, it also introduces a new corporate offence of failing to prevent bribery. Although positive in their acceptance of the new Act, we detect an underlying sense of unfairness held by respondents in terms of having to comply when many of their competitors overseas do not.

The government stands charged with a lack of action with over 90% of respondents considering it should be doing more to promote anti-corruption measures to foreign governments, ensuring UK companies can compete on a level playing field with overseas competitors. It remains to be seen whether initial enthusiasm for, and compliance with, the Act will wane if

the government is not seen to persuade foreign governments to respond to this, and similar legislation, by curbing the demand side of bribery by their officials.

The payment of a bribe in order to do business is considered unavoidable by nearly a quarter of respondents. A dichotomy exists: either paying bribes in order to continue doing business and therefore risk being investigated (or alternatively rely on the discretion of the prosecution authorities), or in the worst case withdrawing from operations and investment in the country concerned. This is a clear challenge for organisations and casts a shadow on the fairness of the Act and whether it can work in practice.

The inconsistent treatment of facilitation payments under the FCPA and Bribery Act remains a difficult issue also. Such payments, although permissible in specific circumstances under the FCPA, are prohibited under the new Bribery Act. This ‘zero tolerance’ position will inevitably cause problems, as such payments are an everyday feature of business life in certain countries.

In theory, once in force the Act will require rapid and drastic changes to long established, local business practices in certain foreign jurisdictions (even though they are illegal under existing legislation). Inevitably this will come as a surprise to those many beneficiaries of facilitation payments, and will clearly create obstacles for UK companies in their business conduct – from having a telephone installed quickly to gaining an introduction to a public official.

A common sense approach to tackling these obstacles would seem an obvious method for prosecution authorities. However, the uncertainty around to what extent, if at all, prosecution authorities will show discretion over the scope and scale of such payments means this may not be the case – adding to the sense of unfairness expressed by some respondents.

50% of Technology, Media and Telecoms (TMT) companies consider they are at low risk and a further 21% not at risk at all. This is despite the industry recently seeing Macmillan Publishers UK Ltd recently agreeing a settlement with the World Bank over alleged improper payments to public officials in Southern Sudan and subsequently self-reported itself to the SFO.

The risk posed by some third party intermediaries (TPIs), such as brokers and other forms of local agents, further fuels this sense of unfairness – especially where their involvement in certain countries is imposed or mandatory: 20% of our respondents said that TPIs were imposed on them either by local custom or regulation. The focus by the FSA on the role of third parties, as highlighted in the Aon ‘Final Notice’⁴ and the recently published report on Anti-Bribery & Corruption in Commercial Broking,⁵ demonstrates that TPIs increase an organisation’s exposure to corruption risk, further complicating the task of compliance.

The current difficult economic environment is also seen to create further pressure, which may lead to organisations increasing risk or engaging in illegal activity.

For risk averse companies that choose to fully comply with the provisions of the new Act, a loss of competitive advantage appears inevitable and nearly half of those surveyed thought this would be the case.

In respect of the new corporate offence, the Act states that it will be a defence if the company can prove it had ‘adequate procedures in place to prevent bribery and corruption.’ It is against this background that businesses will be looking to the government to provide clear guidance as to what constitutes ‘adequate procedures.’ Over half of our respondents are awaiting this guidance before finalising their procedures. If these companies expect the guidance to offer a highly detailed set of specimen policies and procedures, it’s likely they will be disappointed – compounding the persisting mood of unfairness. It is difficult to see how guidance at the outset

can be anything other than principles, perhaps featuring detailed scenario-based examples by industry sector, offering some clarification as to what is expected.

That said, companies should note that considerable guidance already exists. They need to be more proactive in ensuring the right governance is in place, which can be tweaked if anything radical emerges in the Secretary of State’s guidance on adequate procedures.



⁴ See <http://www.fsa.gov.uk/pubs/final/aon.pdf>

⁵ http://www.fsa.gov.uk/pubs/anti_bribery.pdf

2. How will businesses respond to the Act?

The response of UK businesses to the new Bribery Act, specifically the presence of 'adequate procedures' to prevent bribery, is particularly relevant to good corporate governance – specifically the internal control environment. Overall our survey findings were disquieting.

In part there was a lack of preparation ahead of the new Act, but there also exists an underlying current of either naivety or complacency about corruption risk more generally.

There are strong indications, as previously mentioned, that some organisations are scrutinising their existing anti-corruption procedures, and will be looking to the pending government guidance to help shape them. However, for others, it seems the new Act will trigger their first real consideration of whether bribery and corruption are issues for them and force the design and implementation of a policy and procedures.

Our report reflects views from a range of sectors. This cross section of opinion clearly shows an inconsistent approach to mitigating anti-corruption risk. Even the highly regulated financial services participants form part of this inconsistent pattern.

Further to this inconsistency there are also misconceptions about risk exposure. Over half consider themselves at low or no risk when, contrary to this, 21% have conducted a corruption investigation in the last two years. This is just one of the indicators to suggest that a number of sectors are surely at a greater risk than is currently perceived.

Our findings highlight that many businesses do not perform corruption risk assessments, and at the same time consider the risk in their sector to be low. We found that over half of all businesses contacted consider themselves only at 'low risk' or 'not at risk' from corruption. For these companies we suspect understanding and appreciation of bribery and corruption is also low, as we found 1 in 10 within this group have previously been asked to offer an inducement or make a facilitation payment, while 21% have conducted a corruption investigation over the last two years. Clearly, these actions imply a contradictory position in that their sectors are surely at a greater risk than is currently perceived or assessed.

Gaps in knowledge are obvious contributors to risk, one such example being the lack of understanding of 'successor liability' within a merger and acquisition (M&A). Here the buying

Many businesses underestimate their exposure to corruption risk: 42% do not currently conduct a thorough assessment of their exposure, nor have they established a plan to revise existing policies.

company may potentially inherit the risk of prior corrupt activity in the acquired company. This is another major issue, where certainly over half of our respondents could become exposed due to a lack of awareness or understanding.

If businesses are to emerge successfully from the challenging economic environment, building an ethical culture across an organisation as part of a coordinated response to corruption and its related risks should be a boardroom priority in demonstrating good corporate governance. Some key components and their associated challenges are:

Embedding an ethical culture

Educating managers and staff to understand the importance, as Siemens describes it, of 'doing good business' is seen as an essential component of good corporate governance. However, this can take time to achieve in any organisation and can be incredibly challenging for global businesses due to their disparate locations and operations.

An adequate procedures framework

An intrinsic aspect of good corporate governance will be board sponsored strategy for addressing corruption and related risks. It will manifest itself in a sound internal control environment, reflected by its policies and procedures and mechanisms for ensuring compliance and providing assurance to all stakeholders.

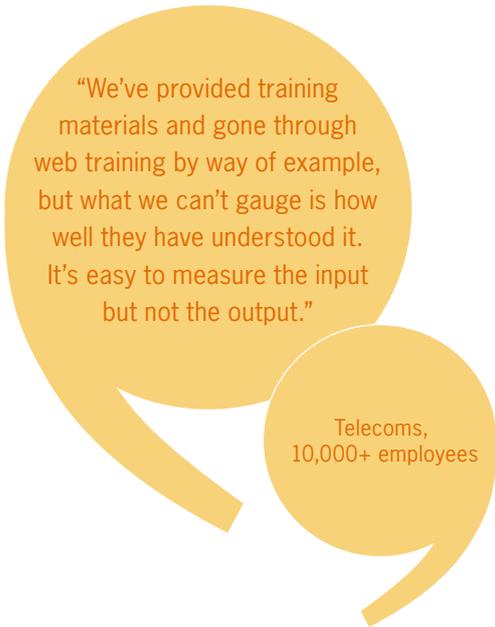
As highlighted previously, some companies are choosing to wait before 'finalising' their response to the Act. Given the different priorities for the new coalition government, it is conceivable that this guidance may not emerge as originally predicted this summer. Waiting for guidance could be dangerous for companies, with 66% of respondents recognising the importance of getting the timing and technical content right, stating that they would be prepared to pay a government agency to provide guidance as to whether their own procedures are adequate.

Training

An effective anti-corruption training programme for all management and staff which will play a key role in embedding an ethical culture into an organisation. That said, we found that only one-third of respondents deliver a dedicated anti-corruption training programme. Some respondents also raised concerns as to the difficulty of ensuring training is effective: More worryingly,

52% of respondents noted that however well implemented anti corruption training is, they have a concern that teams on the ground may still do business according to local custom.

In assessing businesses' response to the Act there is still much work to be done, not only in terms of being ready for the offences but also we suspect in terms of understanding, appreciating and assessing corruption risk.



"We've provided training materials and gone through web training by way of example, but what we can't gauge is how well they have understood it. It's easy to measure the input but not the output."

Telecoms,
10,000+ employees

3. Will companies change their ways of doing business?

As well as considering businesses' response to the Act we were also interested to discover if the Act would drive change in how companies operate. The US standpoint is that law enforcement activity is seen as essential as an agent for change in corporate behaviour, as companies have no will or desire to do so themselves. Will this be the case in the UK? How companies react to the new law and the decisions they take in respect of the markets they operate in will be of critical importance in the post-Bribery Act era.

The UK legislation may well force change in current business models and traditional ways of doing business. This appears to be a clear intention of the Act. Real challenges are expected in achieving compliance in some markets, and nearly one-third of businesses say there are places in the world they will no longer consider doing business as a result of the new law.

Other potential changes in business models may have to be less intentional. One example would be the interpretation that contingent commissions paid by insurance companies to brokers to direct business to them are tantamount to a bribe. This is currently generating considerable anguish in the insurance sector. Equally, the implication that corporate hospitality may have financial limits imposed, the exceeding of which might then construe as a bribe, could well lead to empty boxes at many sporting events. Is it realistic to suggest that a buyer attending a day at the races at the invitation of a supplier will result in improper performance?

As already noted, the use of third party intermediaries (TPIs) or agents/brokers creates a particular corruption risk. One in five businesses surveyed have TPIs imposed on them and they are rightly concerned about the corruption risks that these present, particularly in the Middle East and Africa. This might be one of the areas where the government

has to provide better support, as requested by the majority of respondents, or it could result in businesses having to exit certain high-risk territories and leaving these areas to competitors from other countries.

One other response UK companies may consider adopting is doing business differently to mitigate corruption risk, particularly in competitive tendering situations. One option would be adopting the concept of Collective Action as pioneered by Transparency International through its Integrity Pact structure and more recently encouraged by the World Bank Institute's Guide on Collective Action.

4. Putting anti-corruption on the board agenda

Since the draft Bribery Bill was first published in 2008, it is not just the law that has changed but also attitudes to its enforcement. There has been an unprecedented level of engagement ahead of the enactment of new legislation by the lead law enforcement agency – the SFO, as well as the City of London Police (Overseas Anti-Corruption Unit), NGOs, such as Transparency International, and other professional advisers, including the Bar, major accounting and law firms. The SFO has recently demonstrated its commitment through high profile cases such as Balfour Beatty, Mabey & Johnson, BAE Systems and Innospec. However, despite this increased enforcement activity, our survey suggests many businesses and their boards seem not to be taking corruption risk or the new Act seriously.

Of course, many global businesses (especially in sectors that have been the

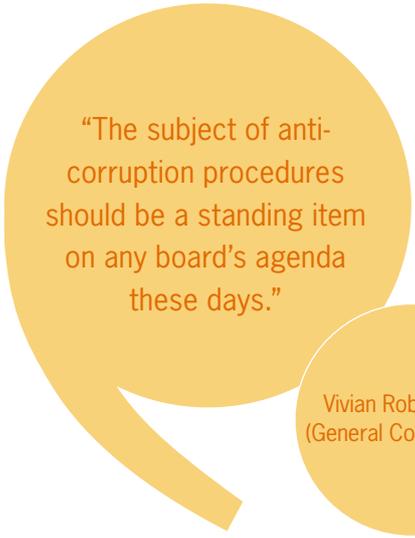
focus of the FCPA, such as extractive industries) consider they already have robust anti-corruption compliance programmes in place. It appears, however, that many boards have still not addressed the demands of the new Act.

When discussing ‘adequate procedures’, many professional advisers often refer to the need to ensure the enterprise has a compliance programme in place. However, this should be considered as simply one element of good corporate governance. The real focus for organisations remains its internal control environment being key to its governance regime, with implications far beyond corruption legislation.

Although over one-third of respondents claim board level understanding of international bribery and anti-corruption legislation to be ‘very’ or ‘quite good’, more than one-quarter claim it to be ‘very’ or ‘quite poor’. This finding will be of particular interest to the SFO when

assessing the success of its outreach programme. Equally, respondents go on to add that this would apply to at least one-third of managers within their business. This lack of understanding in senior management is disturbing when most commentators agree it is essential to demonstrate clear ‘tone from the top’ in organisations.

Also of interest to the SFO, in their capacity as lead enforcement agency, will be the fact that over 81% of respondents would comfortably report a serious allegation of bribery. This could mark a potential increase in self-reported cases.



“The subject of anti-corruption procedures should be a standing item on any board’s agenda these days.”



Vivian Robinson QC
(General Counsel, SFO)

We consider the following steps to be key in establishing the right environment:

Tone from the top

Specific responsibility for an anti-corruption programme needs to be allocated to a board member or experienced senior manager who has the relevant authority to overcome any barriers encountered. Without this a clear tone from the top is unlikely.

A board sponsored strategy

This needs to be established and should reflect a clear position on risk appetite as well as an accurate assessment of risk exposure.

Implementation

Once a clear strategy is in place, implementing it throughout the business across all staff and jurisdictions is critical to ensure success. Clear policies and procedures must be in place to ensure consistent application of the strategy.

Investment

Making the right levels of investment (in terms of budget and people) and aligning this to senior responsibility for anti-corruption matters is the final key decision for the board to make.

Concluding comments

This survey sets out to be both timely and enlightening, raising important issues that need to be considered. Hopefully it will also attract the attention of those board members, including non-executive directors, who may not yet have had time to appreciate what the new Bribery Act means, or those who perceive themselves as having a low risk of corruption. We hope our report can lead to a rethink of this assessment. The risk of a 'senior officer' (which is broadly defined under the Act) being found guilty of conspiring or consenting to bribery brings with it severe custodial penalties. Furthermore, directors may find themselves liable for failing to ensure they had 'adequate procedures' in place to prevent bribery. Ultimately, a board sponsored strategy has to be driven from the top throughout an organisation, based on key decisions that reflect corruption risk appetite and an understanding of risk exposure. Will your business decide to simply comply at a minimum level to the new Act, improve its existing strategy, or shift to a new business ethics driven culture?

Methodology

The data and analysis featured in this report reflect a market survey of 166 senior executives in the United Kingdom. The majority of businesses surveyed (61%) have an annual turnover of between £50 million to £1 billion, while a further 9% have a turnover in excess of £1 billion. Although most respondents fall outside the FTSE 100, over 60% are listed companies.

Nearly 90% of participants demonstrate the views of businesses operating internationally, with the remainder representing insights from domestic organisations.

Grant Thornton has produced this report in conjunction with market research agency RSM. Interviews were completed by RSM's senior B2B

interviewers, and took place in late March to April 2010 in the immediate run up to the Bribery Act being passed.

Senior decision makers with responsibility for anti-corruption were asked to assess questions in three areas:

- Awareness and understanding of corruption risk
- Current issues and trends in anti-corruption legislation and behaviour
- Policy and strategy

Respondent screening ensured that all respondents were the key decision maker or influential, dependent on how the organisation was structured, in decisions regarding anti-corruption matters at their company.

The Bribery Act

The Bribery Act was recently passed by both Houses of Parliament and has received Royal Assent, although it is yet to come into force.

Under the new Act, senior representatives of businesses potentially face personal criminal liability for offences (both in the UK or abroad) including offering, promising or giving a bribe, requesting or accepting a bribe, or bribery of a foreign official in order to obtain business.

Businesses also face corporate liability for failing to prevent a bribe being paid by anyone performing services for the business (including third parties). This means, for the first time, companies employing someone engaged in bribery can be penalised, even if they did not condone or even know about it.

The penalties are severe, including up to 10 years in jail for individuals and unlimited fines for companies.

A business can be liable unless they have 'adequate procedures' in place to tackle bribery and to make sure it does not happen.

Which is the primary industry sector that your organisation operates in?

	Counts	%
Financial Services	42	25%
Real Estate & Construction	22	14%
Industrials	20	12%
Technology, Telecoms, Media	16	10%
Business Support Services	13	8%
Energy or Extractive	11	7%
Food & Consumer Markets	9	5%
Travel, Tourism & Leisure	9	5%
Health Services/Pharmaceuticals	6	4%
Retail	5	3%
Not for profit	4	2%
Other	9	5%
Total	166	100%

Is the Bribery Act fair?

The Bribery Act has been well received by businesses, with 88% of our respondents believing the new legislation was a positive move for the UK.

Some commentators have described the new Act as reflecting the ‘gold-standard’ of legislation that surpasses its US counterpart – the FCPA. The wider remit of the UK law includes commercial bribery, not simply bribery of foreign public officials, and introduces a new corporate offence.

Currently 40% of companies polled consider that complying with the new Act inevitably means that UK business will lose out to foreign competitors who are prepared to pay bribes to win business.

We reviewed the data to further explore whether this sense of unfairness recurred in other responses. It was apparent that despite positive acceptance

of the new Act overall, over 90% of respondents consider the government should be doing more to promote anti-corruption measures to foreign governments, ensuring UK companies can compete on a level playing field with foreign competitors.

In the same vein, some 60% of companies also thought the government should be doing more to assist them in overseas markets.

It remains to be seen whether businesses’ initial enthusiasm for (and potentially compliance with) the Act will wane if the government is not seen to persuade foreign governments to respond to this, and similar legislation, by curbing the demand side of bribery by their

officials. The sense of unfairness appears exacerbated by the finding that 23% of respondents agree there are situations where the payment of a bribe is unavoidable in order to do business.

Not surprisingly, the challenging issue of facilitation payments is another area showing signs of unfairness. Although permissible in specific circumstances under the FCPA, under the new Bribery Act they are not. The ‘zero tolerance’ approach outlined in the Act is highly likely to cause problems, with such payments seen as an everyday feature of doing business in certain countries. One respondent’s sanguine observation was that “if all you do is operate just as everyone else

Fig. 1 Complying with the forthcoming Bribery Bill means UK businesses will lose out to foreign competitors

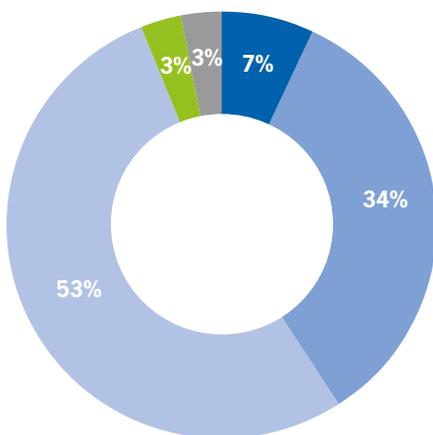


Fig. 2 The UK government should be promoting anti-corruption measure/legislation to foreign governments to ensure UK companies can compete on a level playing field

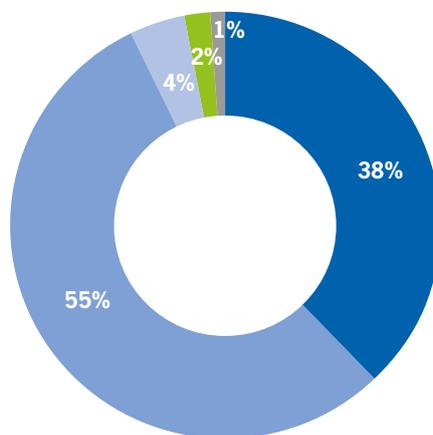
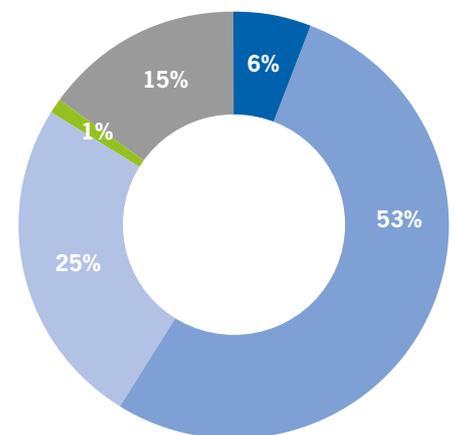


Fig. 3 The UK government does not do enough to promote anti-corruption awareness for UK businesses operating overseas



■ Strongly agree ■ Agree ■ Disagree ■ Strongly disagree ■ Don't know

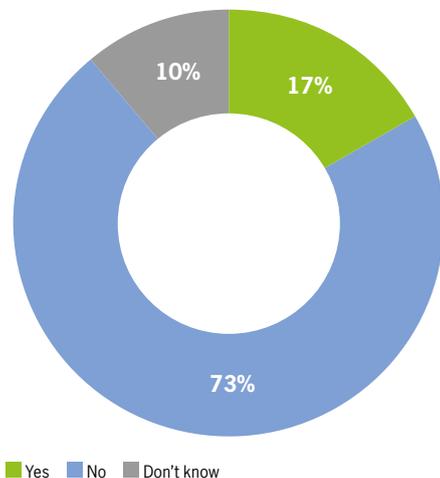
Is the Bribery Act fair?

does and gain no advantage, you're on a level playing field. If that is culturally and locally acceptable, then to subject UK companies to that being a criminal act essentially requires those companies to exit that geography." (Financial Services, 10,000+).

When it comes into force, the Act will cause rapid and drastic changes to the way local practices that have existed for decades in certain countries are met. This will inevitably come as a surprise to those beneficiaries of facilitation payments, which, in turn, will cause problems for UK companies. Another respondent noted: "There needs to be a reasonable test within facilitation payments. If it's by

exception and has only happened once or twice, then it isn't an issue. If it's happening all the time in a key part of the business, then that would become an unacceptable position." (Manufacturing, 10,000+). This seems a common sense approach, and indications from presentations are that the law enforcement community will adopt a pragmatic stance. It will be interesting to see their guidance on the Act.

Fig. 4 Have you ever been asked to offer an inducement or make a facilitation payment in order to win business, receive a licence or a permit, or accelerate a business process?



■ Yes ■ No ■ Don't know

"An organisation competing against us in a non-UK territory can flout legislation and not be captured... therefore they feel they can take those risks."

Technology,
10,000+

Is the Bribery Act fair?

Nearly half of the businesses surveyed also appear to recoil from what they perceive as the further bureaucracy the Act will impose on them.

Although not an issue of fairness, the current difficult economic environment is seen as an additional challenge to addressing corruption risk.

We also believe that the potential impact of the Act has yet to be fully appreciated by businesses. Although facilitation payments are seen as a difficult issue for businesses to manage, at least the Act makes it clear that they are not permitted. Corporate hospitality is an area where many businesses perceive unfairness, seen by many companies as an integral part of their approach to doing business.

In a letter dated 14 January 2010, Lord Tunnicliffe, the former government spokesperson in the Ministry of Justice noted that “lavish corporate hospitality can also be used as a bribe to secure advantages.” He cited a comment that the Director of the SFO told the Joint Committee, in that “most routine and inexpensive hospitality would be unlikely to lead to a reasonable expectation of improper conduct.” However, he did not provide any guidance as to where companies should draw the line. In our experience one person’s ‘lavish’ may be another person’s ‘reasonable’. That said, the survey found that 88% of respondents acknowledged that corporate hospitality could constitute a bribe.

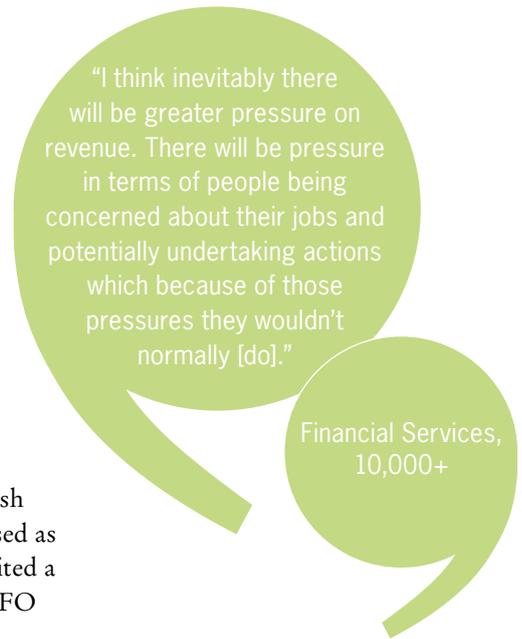


Fig. 5 Effective implementation of anti-corruption policies and procedures is seen as an administrative burden.

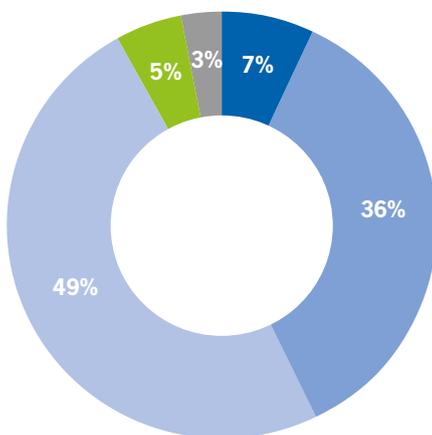
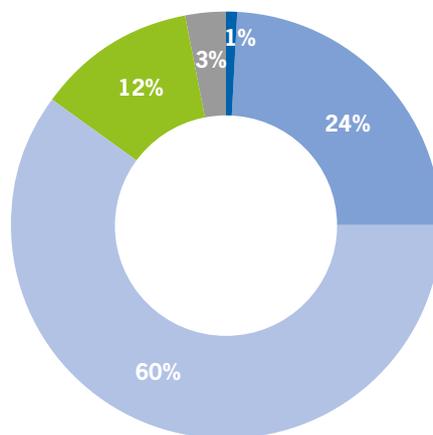


Fig. 6 The current tough economic environment means that compliance with bribery and anti-corruption legislation will become a lower priority.

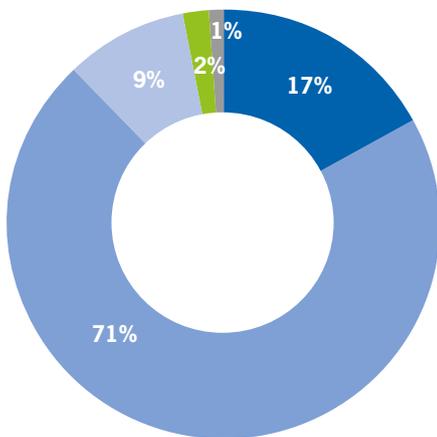


Strongly agree Agree Disagree Strongly disagree Don't know

Is the Bribery Act fair?

It is against the background of fairness that businesses will be looking for clear, scenario-based guidance from the government on the defence to the new corporate offence in that the commercial organisation had in place 'adequate procedures' to prevent bribery. The data reveals that over half of all companies surveyed await this guidance before finalising their procedures. But if the expectation of these companies is that they will be provided a highly detailed set of specimen policies and procedures, we believe they are set to be disappointed. We hope we are wrong in this regard, but it is difficult to see how this guidance at the outset can be anything other than principles based, albeit probably illuminated by example scenarios on a sector basis.

Fig. 7 Lavish corporate hospitality provided to a client might be regarded as an offence



Strongly agree Agree Disagree Strongly disagree Don't know



How will businesses respond to the Act?

Nearly all companies have steps they need to take to respond to the new Act. Making the right decision on the priority and urgency of these is the challenge.

The Bribery Act has been well received by businesses, with 88% of our respondents believing the new legislation was a positive move for the UK.

In posing the question ‘how will companies respond?’, it is apparent from the data that many businesses may well be underestimating their exposure to corruption risk. Nearly all companies have steps they need to take to prepare for the various offences under the Bribery Act to come into force. For certain companies this will require a radical and fundamental change of thinking about their approach to the risk of bribery. Given our findings, the question must be asked just how many companies are actually properly prepared to deal with the existing corruption legislation, both in the UK and other jurisdictions?

For some companies, the new Act has triggered a first consideration of whether or not bribery and corruption are issues relevant to them. Forty-two percent of businesses surveyed have not yet conducted a thorough assessment of their exposure to corruption risk, or established a clear plan to revise their existing policies. The question is, just how many of the companies that responded are actively managing the risk of corruption under current legislation? Furthermore, 28% of respondents were UK subsidiaries with an overseas parent. Of this group, 17% stated that they did not believe their parent company understands the implications of the Act,

in particular the extraterritorial reach – something that could have serious implications for their parent company. A further 14% said they did not know the answer to this question.

Are companies at greater risk than they think?

Our findings highlight that many businesses do not perform corruption risk assessments, and consider the risk in their sector to be low. We found that over half of all businesses contacted consider themselves only at ‘low risk’ or ‘not at risk’ from corruption. We suspect the understanding and appreciation of bribery and corruption among these companies to also be low, with 1 in 10

revealing they have previously been asked to offer an inducement or make a facilitation payment, and 21% having conducted a corruption investigation in the previous two years. Clearly, these actions imply a contradictory position in that their sectors are surely at a greater risk than is currently perceived or assessed.

The responses by tier (Fig. 8) reflect, as perhaps is to be expected, a higher level of understanding among the board and managers, with 72% of boards and 62% of managers having a ‘quite’ or ‘extremely good’ understanding. Eighty per cent of respondents said that they had heard of the Bribery Bill, with nearly half

Fig. 8 Understanding of international bribery legislation



How will businesses respond to the Act?

holding a 'quite' or 'extremely good' understanding of it, yet 20% were not aware of it (the question was asked of the person with responsibility for corruption issues). Less than 50% of staff consider possessing the same level of understanding as management. Additionally, 27% of respondents have not heard of the FCPA.

These findings set the scene for a number of other responses, which combined with the lack of understanding held by some management groups, expose some worrying deficiencies in the stance companies take on corruption issues, including:

- i. Perception of corruption risk
- ii. Preparedness for the Act
- iii. Lacking typical elements of an adequate procedures framework
- iv. Lack of corruption risk assessments
- v. Waiting for guidance on adequate procedures

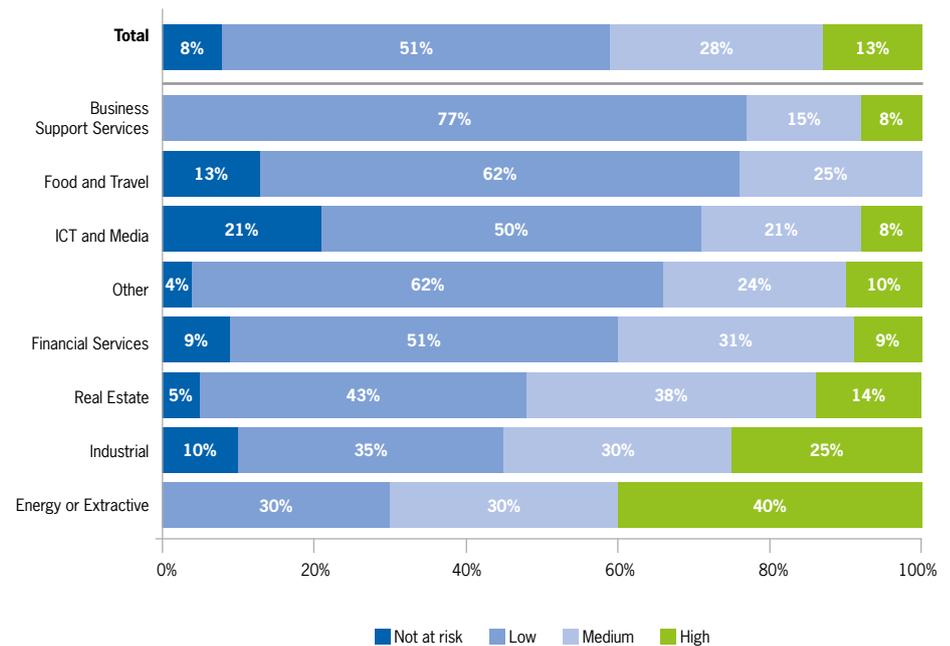
i. Perception of corruption risk

Given that 72% of boards appear to have a 'quite' or 'extremely good' understanding of anti-corruption legislation, and nearly 90% of respondents generate revenues abroad, it raises the question as to whether or not some companies have undertaken a thorough corruption risk assessment, especially considering 59% of respondents believe they face 'low' risk or are 'not at risk' of corruption. In our view, this is a particularly significant finding as it is indicative of a certain amount of complacency in UK business.



The detailed findings are reflected in the following figures:

Fig. 9 Perception of corruption risk by sector



How will businesses respond to the Act?

ii. Preparedness for the Act

Just over half of the businesses surveyed claimed to be ‘quite well’ or ‘extremely well’ prepared for the Act. This data can also be analysed on the basis of respondents’ own perceptions of their exposure to corruption risk. Of those companies that considered themselves to be ‘high’ or ‘medium’ risk, nearly one-third (of which a significant 10% were unaware of the Act) considered themselves unprepared for it.

We would expect a responsible company to be looking to promote its stance on global corruption prominently on its website alongside its stance on corporate social responsibility (CSR).

That so many companies reported a lack of preparedness (setting aside the

issue of being adequately prepared under existing legislation) clearly relates in part to companies waiting for the government to issue guidance on adequate procedures as required by the Act. A company that can demonstrate it has adequate procedures to prevent bribery will have a defence to the new corporate offence of failing to prevent bribery. Forty-two percent of respondents say they are awaiting this guidance before finalising policies and procedures. We also asked respondents if they would be prepared to pay a government agency to provide guidance as to whether a company’s procedures were adequate, to which 66% responded that they would.

Fig. 10 Preparedness for Bribery Act and level of risk perception

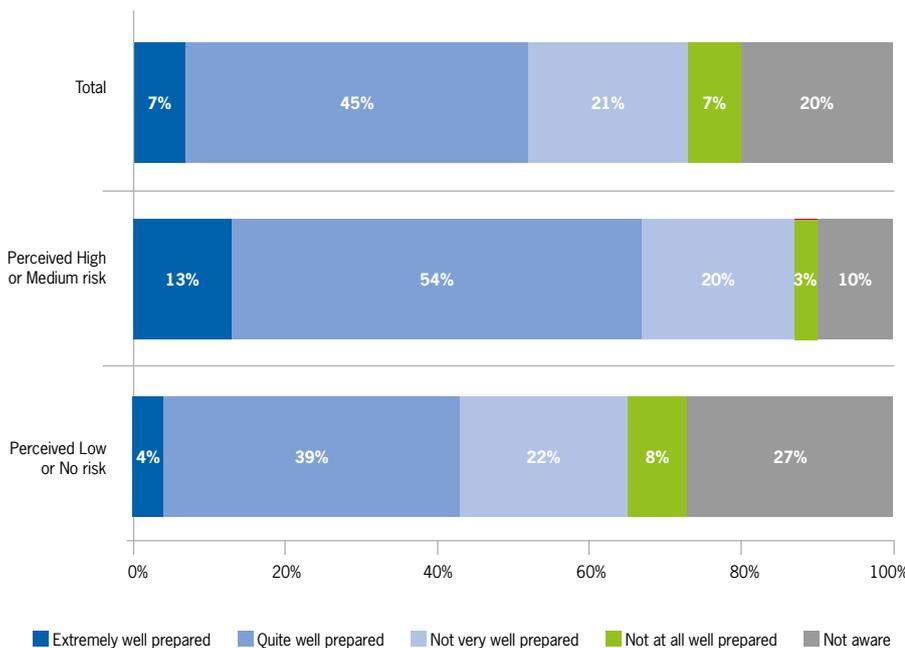
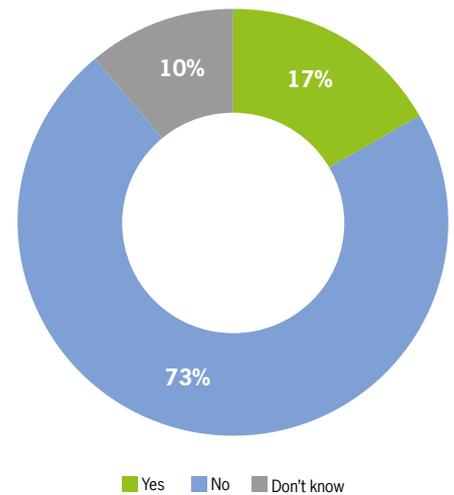


Fig. 11 Have you ever been asked to offer an inducement or make a facilitation payment in order to win business, receive a licence or a permit, or accelerate a business process?

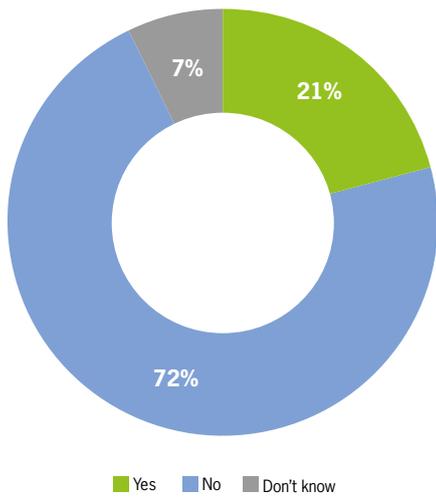


iii. Lacking typical elements of an adequate procedures framework

Respondents were asked if they had ever been requested ‘to offer an inducement, or make a facilitation payment in order to win business, receive a licence, or accelerate a business process’. We avoided asking if their company had actually made such a payment. However, we did query if they had carried out any internal bribery and corruption investigations in the previous two years. Taking other responses into account, the findings were particularly revealing (Fig. 11).

How will businesses respond to the Act?

Fig. 12 Has your business carried out any internal bribery and corruption investigations in the previous two years?



Seventeen percent of respondents representing 25 companies stated they had been asked, of which three had perceived themselves as being at 'low' risk or 'no risk' of corruption.

In response to the follow up question on investigations, the findings are as follows (Fig. 12).

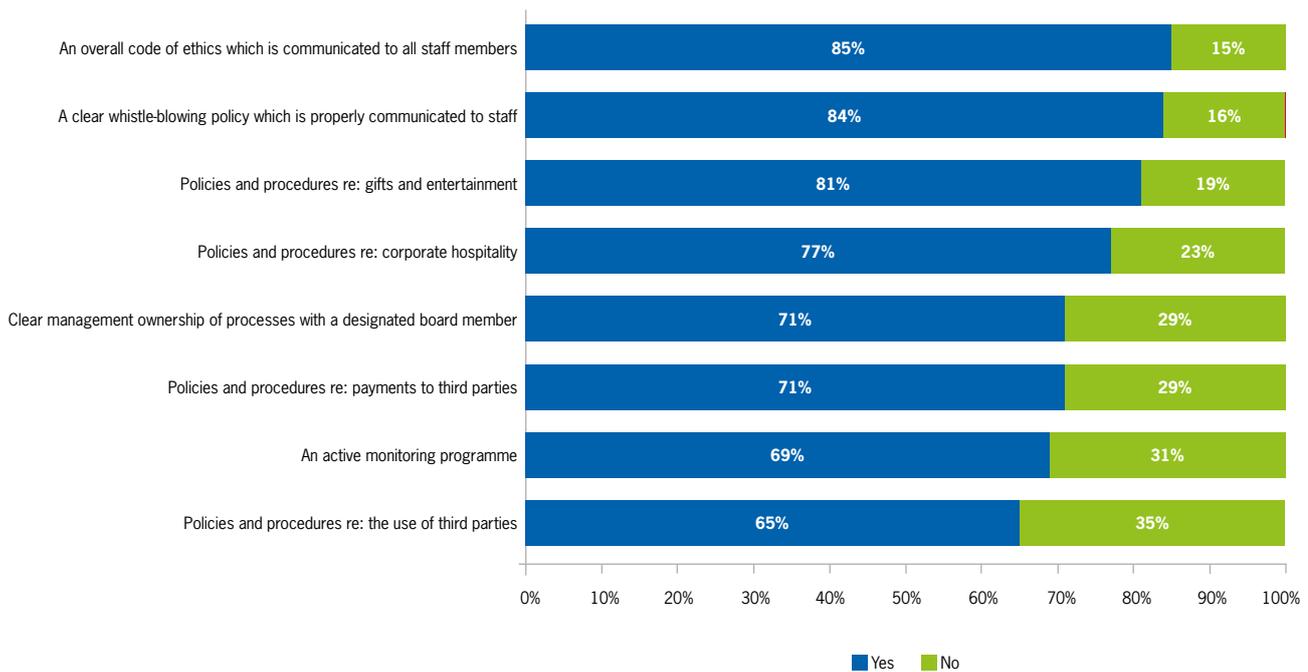
Twenty-one percent of respondents representing 31 companies said they had done so; again three of which had perceived themselves as being at 'low' risk or 'no risk' of corruption.

To understand the detailed steps that companies need to take to prepare for the

various offences under the Bribery Act we asked a series of questions focused on what we consider would form part of any adequate procedures framework (Fig. 13).

From our findings it's clear many businesses have numerous issues they must work hard to address. We consider the last four elements to be very important aspects of an adequate procedures framework, noting around one-third of companies do not already have these in place.

Fig. 13 Current anti-corruption policies and procedures



How will businesses respond to the Act?

iv. Lack of corruption risk assessments

We also asked whether respondents' companies had conducted a formal risk assessment and created a risk register from issues identified, along with the relevant compensating controls to mitigate the risk of bribery.

The responses were among our most revealing (Fig. 14).

This throws into question some of the other responses; for example, the finding that 72% of boards and 62% of managers have a 'quite' or 'extremely good' understanding of international bribery and corruption legislation. If this holds true, it is difficult to appreciate why a corruption risk assessment has not been performed by more of the companies that responded positively.

One important aspect of corruption risk, which over half of the respondents are unaware of, is the concept of

'successor liability' and the potential for inheriting liability for prior corrupt activity in the context of a merger or acquisition transaction. Indeed, only close to half of companies employ 'specific due diligence focusing on bribery and corruption' (Fig. 15).

Also difficult to reconcile is the claimed level of understanding of companies regarding international bribery and corruption legislation with the amount of training provided to staff. Only 34% of businesses contacted have an anti-corruption training programme. This is seen as a key strand of any approach to good corporate governance and will certainly be considered a keystone of any adequate procedures framework.

Effective training, supplemented by management coaching, is clearly an important element towards embedding an

ethical culture in terms of staff behaviour. Our findings indicate that companies should consider the tools available to assess the effectiveness of their training programmes. Embedding an ethical culture was seen as one of the most difficult challenges for global organisations (Fig. 16).

Worth noting is one other finding from the survey: that effective implementation of anti-corruption policies and procedures is viewed as a burden by 43% of respondents. This statistic neatly encapsulates the challenges faced in embedding an effective ethical culture in an organisation.

Fig. 14 Formal risk assessments and a risk register deployed to mitigate corruption risk

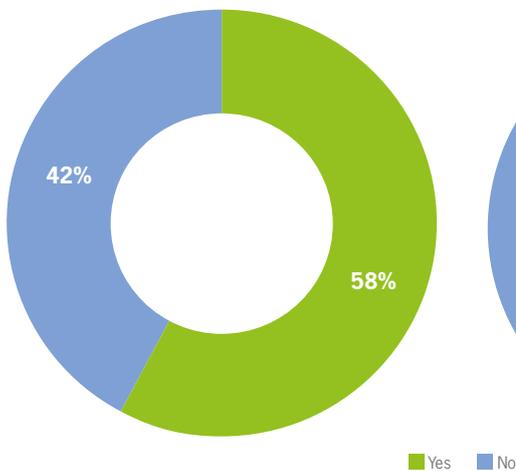


Fig. 15 Specific due diligence focusing on bribery and corruption deployed to mitigate corruption risk

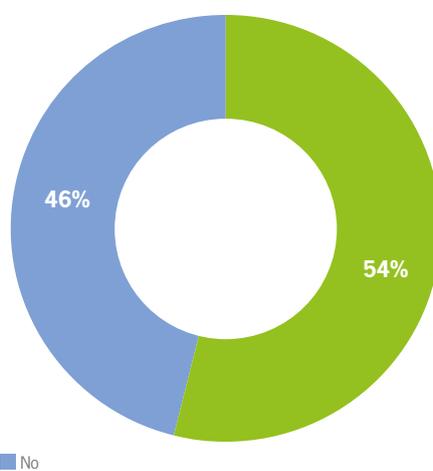
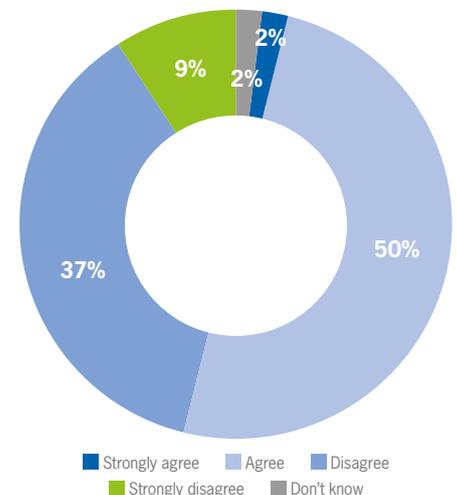


Fig. 16 However well implemented training is, teams on the ground may still do business according to local custom



How will businesses respond to the Act?

v. Waiting for guidance on adequate procedures

As discussed above, many companies are awaiting government guidance before finalising their procedures designed to prevent bribery. Clearly, 'finalising' may take different forms, but it will be a dangerous approach if a company is waiting for the guidance before completing a corruption risk assessment and creating, adjusting or aligning their existing controls. They may also be losing a valuable window of opportunity that exists to do so before the Act comes into force. Equally, given the current pressures on the new government it is conceivable that this guidance may not emerge as originally predicted this summer.



Doing business differently

The Act is seeking to force change in current business models as well as saying farewell to traditional ways of doing business, especially overseas.

The legislation may well achieve its objective of forcing change in current business models and saying farewell to traditional ways of doing business, especially overseas.

The suggestion that contingent commissions paid to insurance brokers are tantamount to a bribe is generating particular anguish in the financial services sector. Equally, the implication that corporate hospitality may have financial limits imposed, which if exceeded may lead to it being considered 'lavish' and construed as a bribe, could well create

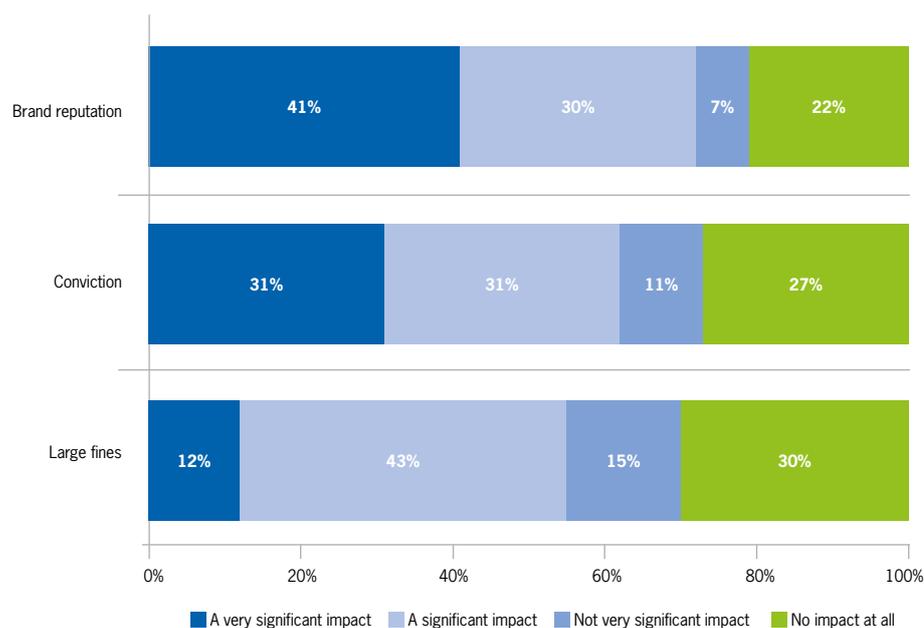
empty boxes at many sporting or other cultural events.

Companies were asked whether 'lavish corporate hospitality' might be regarded as a bribe, with 88% of respondents considering it might. No doubt companies will await the government guidance on this issue, but it is realistic to consider that a supplier who invites a buyer to a rugby match at Twickenham expects that this act will induce improper performance on the buyer's part?

The key threat from the new legislation is the fear of reputation damage from

becoming ensnared in bribery allegations and any resultant investigation. Most respondents agreed that the desire to protect a company's brand and reputation is the key driver of change, as opposed to the threat of a conviction or large fines. It will be interesting to discover if this perception changes if UK law enforcement authorities follow the American trend of awarding lengthy prison terms to senior management.

Fig. 17 How are the following impacting on your business behaviour?



Doing business differently

Achieving compliance in some markets will also drive a change in businesses' operations, with nearly one-third of companies stating there are places in the world they will no longer conduct business as a direct result of the Act. It will be interesting to see if businesses do actually exit particular markets. As a comparison, only 4% of respondents had considered withdrawing from the US market because of the extraterritorial reach of the FCPA.

The countries most likely to be avoided in the future are indicated in the table below in descending order. They are fairly widespread but it is interesting to note that no South American countries appear. However, it is feasible that respondents' overseas interests are not strongly represented on this continent.

- Iran
- Nigeria
- Africa (excluding Nigeria)
- Russia
- Middle East (excluding Iran and Syria)
- Syria
- North Korea
- Romania
- Bulgaria
- China
- Asia (excluding India, China, Japan & South Korea)
- Western Europe (excluding UK, France & Germany)



"We would, as a global company, look very closely at the corruption environment in new markets. If we were putting in productive capacity in markets, we would need to understand whether the business plans we have drawn up actually make sense in the culture of that economy."



Manufacturing,
10,000+

Doing business differently

Over half of the companies surveyed saw the new Act as an opportunity to gain a competitive advantage by demonstrating their compliance with the new legislation (Fig. 18).

However, this viewpoint appears contingent upon the government increasing its role in seeking change in the governance regime in these markets, with 93% of companies believing it fails to do enough in this regard (Fig. 19).

One other likely driver of business change will be the continuing relationships with third party intermediaries (TPIs) or agents/brokers (Figs. 20 & 21), something recognised as a key corruption risk. One in five respondents have TPIs imposed on them and are concerned about the corruption risks that these present, particularly in the Middle East and Africa.

A key aspect of doing business differently will involve considering the approach to good corporate governance as regards the organisation's appreciation of corruption risk and how it can affect their organisation. The level of knowledge will differ according to the grade and role of the individual employee, but the data strongly indicates a disquieting level of understanding at present.

Fig. 18 Complying with bribery and corruption legislation is an opportunity for companies to gain a competitive advantage

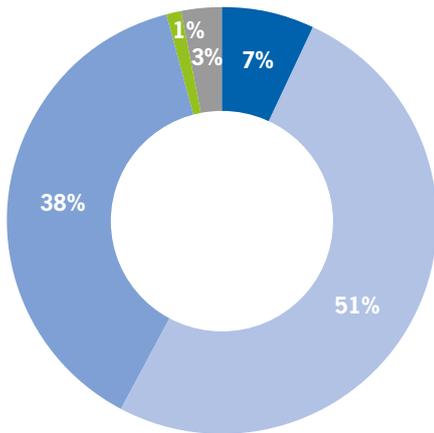


Fig. 19 The UK government should be promoting anti-corruption measure legislation to foreign governments to ensure UK companies can compete on a level playing field

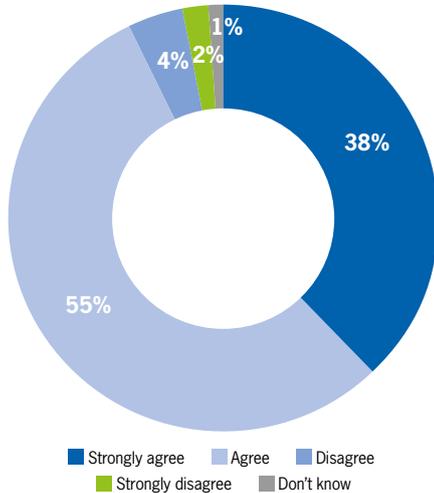


Fig. 20 In international markets do you use TPIs?

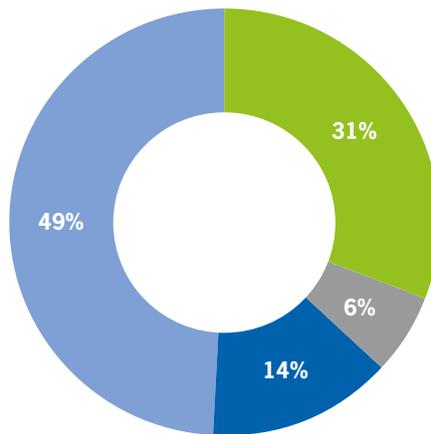
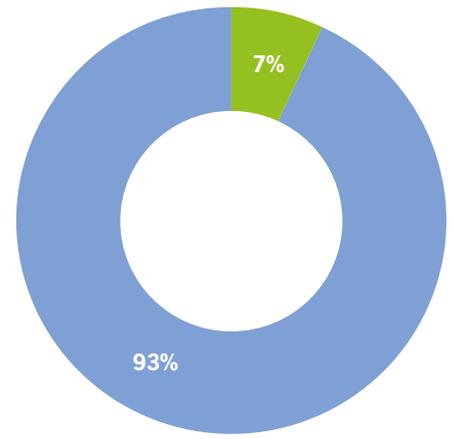


Fig. 21 Using TPIs less due to Bribery Act



Over half of respondents consider the level of corruption risk faced to be either 'low' (51%) or 'not at risk at all' (8%) (see Fig. 9). Given the size of the companies surveyed and the percentage of business derived from overseas operations, this reflects either a naive or highly complacent viewpoint. Equally, it might indicate that the organisation has not yet undertaken a corruption risk assessment.

The data in Fig. 9 indicates the energy/extractive sector is more informed, perceiving a 'medium' or 'high risk' to business (70%). This might be expected, however it scores very low in business support services (77%).

A related finding around the perception of corruption risk involves 52% of respondents. This group believe that however well implemented anti-corruption training is, they have a concern that teams on the ground may still do business according to local custom. This is a relevant concern when compared to the response as to how good the understanding of international bribery and corruption legislation is perceived to be. The following data shows the level of assumed knowledge among managers and staff, ie those employees most likely to be on the ground (Fig. 22).

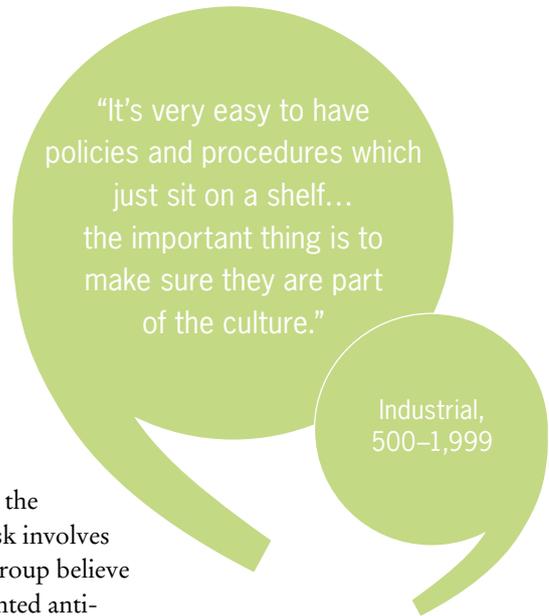
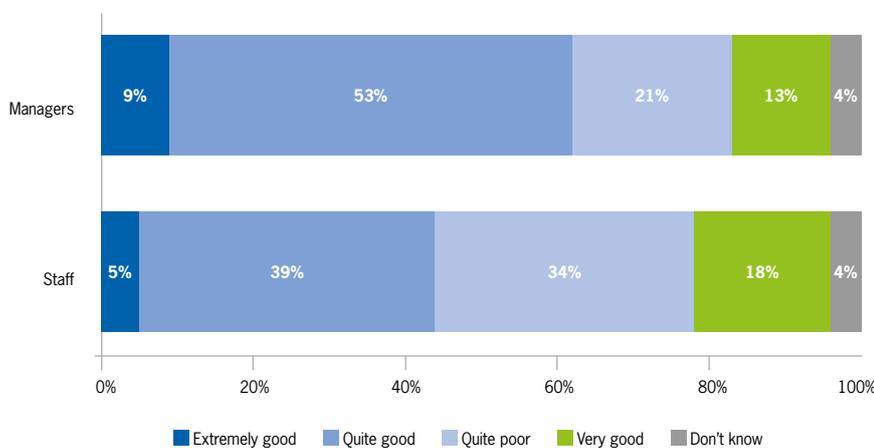


Fig. 22 Understanding of international bribery legislation



The managers' group reveals only 62% are considered to have a 'quite' or 'extremely good' understanding, dropping to 44% among staff. Given that whistle-blowing hotlines will undoubtedly be seen as an important element of an 'adequate procedures' framework, it follows that the majority of employees working overseas are likely to possess insufficient knowledge to recognise potentially corrupt activity in the first instance, so may equally be uncertain about using a hotline. With this in mind, the prospect of these employees fulfilling the aspirational role of the

organisation's 'capable guardians' is unlikely to be achieved without remedial action.

One respondent acknowledged this risk as part of the challenge faced in embedding an ethical culture in a global organisation, noting the challenge presented by "the diversity and spread of our organisation, incoherent cultures and ensuring our global message on our ethics is heard, understood and acted upon." (Telecoms, 10,000+).

It is highly likely that other companies face this dilemma and will need to address it through bespoke training,

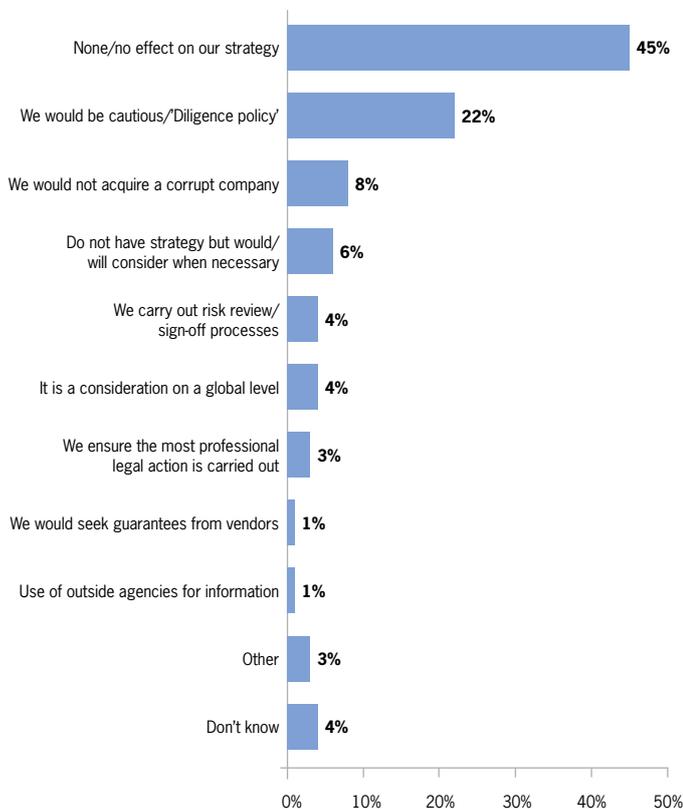
considering the use of tools to assess training cut-through and effectiveness.

The data indicates it is more than likely companies will need to revise their approach in terms of merger and acquisition activity. Findings pointed to nearly half (49%) of all businesses being aware of the concept of 'successor liability'. This applies under in both the FCPA and the Bribery Act (although at 70%, awareness is a little higher among businesses that generate most of their income abroad).

Even among respondents who consider their understanding of the new legislation to be 'extremely' or 'quite good', one-third are unaware of the 'successor liability' concept. Successor liability risk impacts upon the acquisition strategy of just over one-quarter (26%) of the businesses we spoke to.

It is inevitable that compliance with the new Act will come at a cost, but to date the businesses surveyed have not significantly invested in preparing for the new Act, as detailed (Fig. 24).

Fig. 23 How does successor liability impact upon your acquisition strategy?

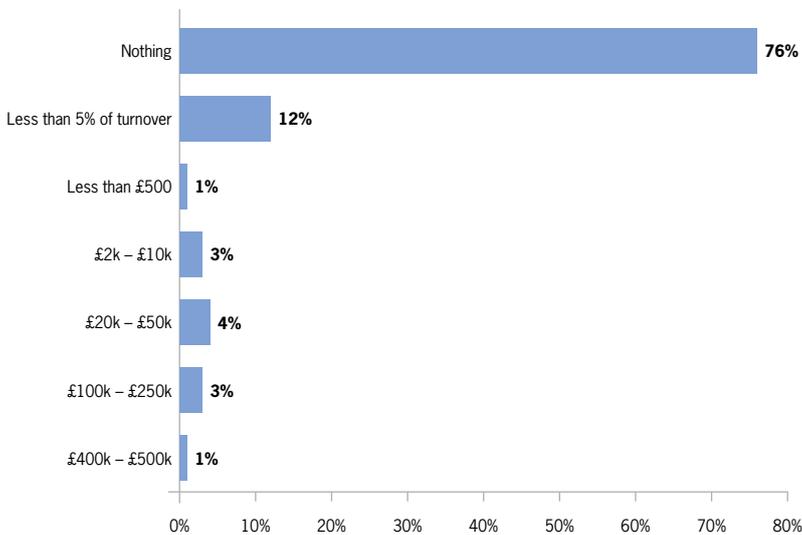


Given the various challenges that business faces as a result of the Act, many will have to consider doing business differently. This could, of course, result in many businesses leaving or avoiding particular countries, while most will certainly have to address an apparent lack of appreciation of corruption risk. Perhaps more radically, in response to the Act businesses may well have to consider fundamentally different ways of doing business, for example reducing or ending certain TPI relationships, or in competitive tendering situations for major capital projects it might be necessary to adopt the concept of Collective Action as mentioned previously. If alternative practices are pursued, this would indicate UK business is not as apathetic as some of the findings would suggest.

“It is no longer enough simply to do business in an ethical way, companies have to be able to demonstrate that they are ethical in all that they do. Received wisdom is that good ethical behaviours come from strong regulation. That is only true for as long as the potential for getting caught is real, whereas embedded ethical behaviours driven by a good and strong corporate culture, are much more sustainable, and self sustaining – if staff know why it is good to do the right thing, then they are less likely to do the wrong thing.”

Neil Holt,
Group Board
Director,
Halcrow Group
Limited

Fig. 24 Investment to date in anti-corruption strategy



Putting anti-corruption on the board agenda

To be effective, an anti-corruption strategy needs to be recognised and sponsored at board level as an intrinsic element of good corporate governance.

This then needs to be cascaded throughout the organisation with the strength and insight a management board should hold for its organisation. The respondents in our survey, however, indicate this is not the reality, with over one-quarter of board members' understanding of international bribery and anti-corruption legislation thought to be 'very' or 'quite poor'.

Our recommended areas for action are:

Tone from the top

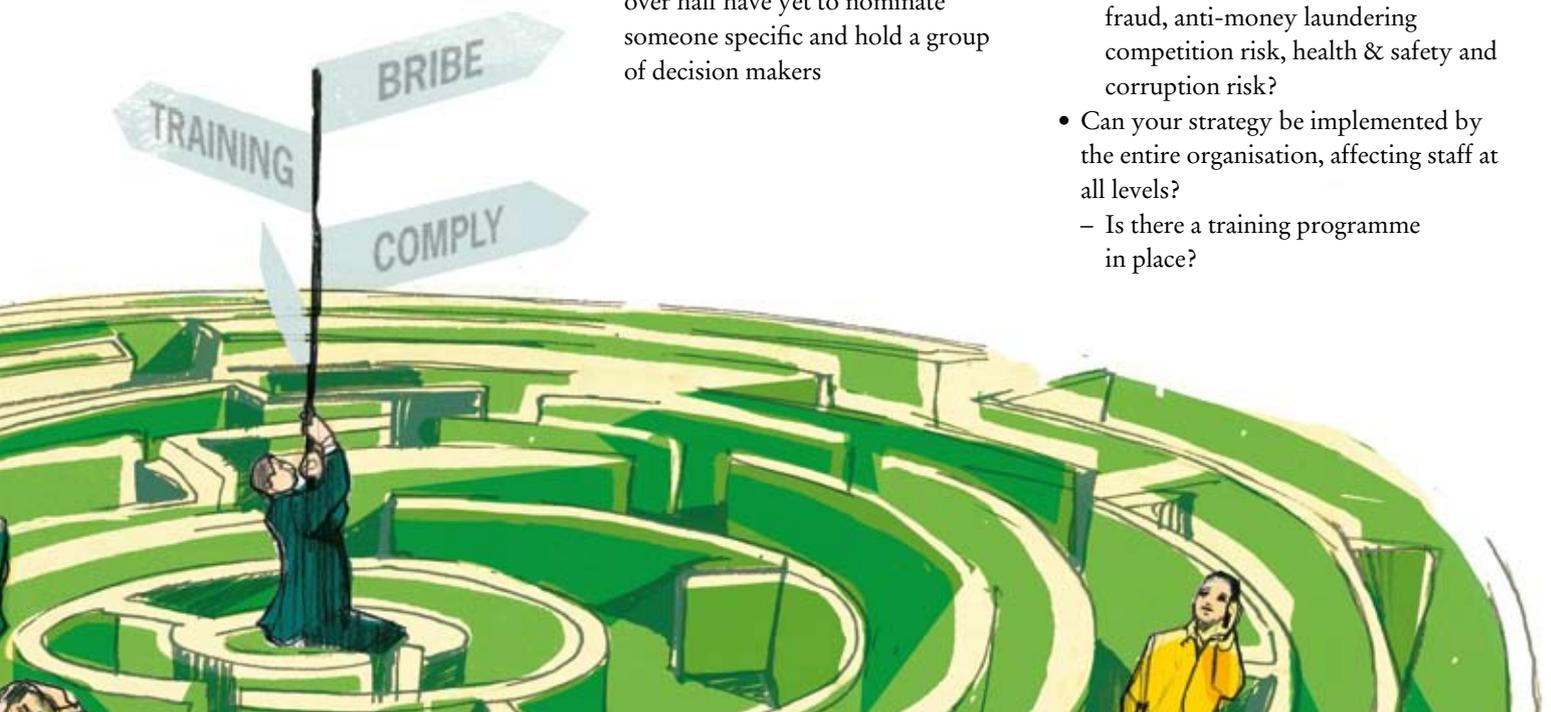
Specific responsibility for an anti-corruption programme needs to be allocated to a board member or experienced senior manager who has the relevant authority to overcome any barriers encountered. Without this, a clear tone from the top is unlikely.

- Who at your organisation is responsible for anti-corruption matters?
 - There is not an obvious member of senior management to whom the responsibility is allocated. Our survey found that over 15 job titles currently share this responsibility, and furthermore over half have yet to nominate someone specific and hold a group of decision makers

Strategy

Board sponsored strategy needs to be established and should reflect a clear position on risk appetite, as well as an accurate assessment of risk exposure.

- Does the board understand its organisation's current risk exposure?
 - Has a formal risk assessment been conducted?
 - Has the risk of approving a facilitation payment and the associated risk of facing prosecution in order to continue business operations been discussed?
- Do you have an anti-corruption strategy and what are its components?
 - Is it aligned with financial crime & fraud, anti-money laundering competition risk, health & safety and corruption risk?
- Can your strategy be implemented by the entire organisation, affecting staff at all levels?
 - Is there a training programme in place?



Putting anti-corruption on the board agenda

Implementation

Once a clear strategy is in place, implementing it throughout the business is critical to ensure success and should span staff at all levels within all jurisdictions. Clear policies and procedures must be in place to ensure consistent implementation of the strategy.

- What oversight and control does the board have of business unit operations in relation to delivery of policies and procedures?
- Are your internal controls aimed at preventing and detecting corruption risks and mitigating them to acceptable levels?

Investment

Making the right levels of investment (in terms of budget and people) and aligning this to senior responsibility for anti-corruption matters is the final key decision for the board to make.

- How much has your organisation invested in preparing for the new Bribery Act?
 - Our findings show there has been a lack of financial investment to date, with 76% of respondents having invested nothing in preparing for the Bribery Act and only 12% spending more than £500

Closing Comments

While there are indications that some companies are considering taking appropriate steps to respond to the implications of the new Bribery Act, many are awaiting government guidance on 'adequate procedures' before doing so. It is clear there is still much work to be done. It is inconceivable that global corruption will be eliminated in the foreseeable future, but governments have to engage more and act collectively to reduce its impact. Financial institutions have to increase oversight on suspicious transactions from politically exposed persons (PEPs) and arguably TPIs. Business also has its role to play by resisting the demand of paying bribes and by refusing to offer bribes to win business. The Bribery Act should assist on both counts and it places the UK at the forefront of far-reaching legislation, enabling law enforcement agencies, if properly resourced, to enforce the Act in the same way as America successfully enforces the FCPA.

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Grant Thornton wishes to acknowledge the contributions made to the research by the 166 respondents and the following who commented on or reviewed the findings:

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