

# Decision time

The UK Bribery Act and the changing face of business

Anti-Corruption Survey 2010



# 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 payments<sup>3</sup> 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)

<sup>3</sup>A 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’<sup>4</sup> and the recently published report on Anti-Bribery & Corruption in Commercial Broking,<sup>5</sup> 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.



---

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

<sup>5</sup> [http://www.fsa.gov.uk/pubs/anti\\_bribery.pdf](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.

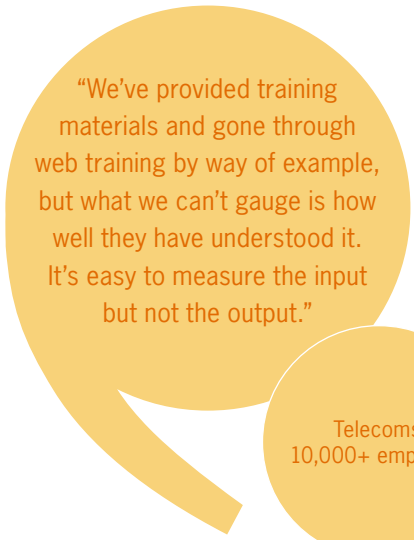
As highlighted previously, some companies are choosing to wait before ‘finalising’ their response to the Act. Given the different priorities for the new coalition government, it is conceivable that this guidance may not emerge as originally predicted this summer. Waiting for guidance could be dangerous 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?

## Contact us

For further information on this report and its findings, please contact:

### London

**Sterl Greenhalgh**

T 020 7728 3448

E [sterl.greenhalgh@gtuk.com](mailto:sterl.greenhalgh@gtuk.com)

### London

**Eddie Best**

T 020 7728 2849

E [eddie.j.best@gtuk.com](mailto:eddie.j.best@gtuk.com)

For your local contact in relation to anti-corruption matters, please see below:

### Birmingham

**Chris Clements**

T 0113 200 1584

E [chris.m.clements@gtuk.com](mailto:chris.m.clements@gtuk.com)

### Bristol & Cardiff

**Will Davies**

T 020 7865 2545

E [will.h.davies@gtuk.com](mailto:will.h.davies@gtuk.com)

### Leeds

**Chris Clements**

T 0113 200 1584

E [chris.m.clements@gtuk.com](mailto:chris.m.clements@gtuk.com)

### Liverpool

**Sally Longworth**

T 0161 953 6314

E [sally.longworth@gtuk.com](mailto:sally.longworth@gtuk.com)

### London

**Sterl Greenhalgh**

T 020 7728 3448

E [sterl.greenhalgh@gtuk.com](mailto:sterl.greenhalgh@gtuk.com)

**Steve Cornmell**

T 020 7728 2611

E [steve.j.cornmell@gtuk.com](mailto:steve.j.cornmell@gtuk.com)

**Will Davies**

T 020 7865 2545

E [will.h.davies@gtuk.com](mailto:will.h.davies@gtuk.com)

**Eddie Best**

T 020 7728 2849

E [eddie.j.best@gtuk.com](mailto:eddie.j.best@gtuk.com)

### Manchester

**Sally Longworth**

T 0161 953 6314

E [sally.longworth@gtuk.com](mailto:sally.longworth@gtuk.com)

[www.grant-thornton.co.uk/anti-corruption](http://www.grant-thornton.co.uk/anti-corruption)



© 2010 Grant Thornton UK LLP. All rights reserved.

'Grant Thornton' means Grant Thornton UK LLP, a limited liability partnership.

Grant Thornton UK LLP is a member firm within Grant Thornton International Ltd ('Grant Thornton International'). Grant Thornton International and the member firms are not a worldwide partnership. Services are delivered by the member firms independently.

This publication has been prepared only as a guide. No responsibility can be accepted by us for loss occasioned to any person acting or refraining from acting as a result of any material in this publication.

[www.grant-thornton.co.uk](http://www.grant-thornton.co.uk)