

INTERNATIONAL BUSINESS ATTITUDES TO CORRUPTION





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Control Risks and the Economist Intelligence Unit undertook a survey to examine international attitudes to bribery and corruption. This canvassed general counsels, senior corporate lawyers and compliance heads in more than 300 companies around the world.

From the results, it was apparent that international companies have disturbing gaps when it comes to dealing with the dangers of bribery and corruption. Indeed, the findings suggest that organisations may not be prepared properly should they be exposed to a corruption scandal. Based on this research, it would appear that too many companies still fall short of best practice in their anti-corruption compliance programmes.

What is clear from this survey is that the issue of bribery and corruption – and initiatives to prevent it – are increasingly on the corporate agenda. Yet, despite this, we noted that there seemed to be a danger of complacency in some areas and the risk of a company finding itself in the middle of a corruption-based investigation remains real.

Of those surveyed, 13 organisations thought there was a 90%-100% chance that their company would be required to investigate a suspected violation of anti-bribery laws involving an employee in the next two years. A further 60 organisations (19%) thought that it was 'somewhat likely' (a 60%-90% chance). Less than a third (30%) thought it was 'very unlikely'.

THE BIGGEST CONCERN: PRESSURE TO PAY

The majority (58%) of respondents cited 'operational' bribes as a main cause for concern. By contrast, only 29% referred to the 'classic' corruption risks associated with winning business, such as demands for bribes to secure contracts. Resisting demands for small bribes requires a combination of concerted top-level leadership, and day-to-day ground-level determination and ingenuity. This is likely to be a major challenge for years to come and, as such, it is right that it should rank so high on the corporate agenda.

PREVENTION: MORE WORK IS NEEDED

Some companies are laying themselves open to problems. Failing to implement 'adequate procedures' to prevent bribery and corruption needlessly exposes an organisation to a breach of anti-corruption legislation. They will be poorly placed to defend themselves if they ever come under investigation. To assess the extent to which these procedures were embedded within organisations, respondents were asked to identify which standard anti-corruption measures were in place in their companies. The responses from those surveyed point to significant gaps in their anti-corruption initiatives. In today's compliance environment, every company – regardless of their national origin – needs to have a plan for dealing with suspected violations.

- Only half of those surveyed (50%) have due diligence procedures in place when selecting local business associates, despite the known risks. International legal practice makes it clear that companies may not claim ignorance of a third party paying bribes on their behalf if they have done nothing to prevent such malpractice in a high-risk environment.
- Just over one third (35%) of companies surveyed do not have formal policy statements forbidding bribes. Almost half (47%) of those questioned do not have policies or statements banning 'facilitation payments'. Without exception, all companies should have a formal anti-bribery policy statement; to fail to have one is falling short.
- 91% of respondents state they have no specialised anti-corruption training for employees in high-risk areas. Almost three quarters (74%) of companies have no anti-corruption training programmes in general. All employees, regardless of their role, should receive basic training on how to combat corruption, and specialised in-depth courses should be mandatory for staff in high-risk situations.





Without exception, all companies should have a formal anti-bribery policy statement; to fail to have one is falling short

- 64% have standard clauses in contracts with sub-contractors and consultants stating that they will not pay bribes on the company's behalf. The 36% that have no such contractual clauses are leaving themselves exposed to a number of issues.
- Only 40% have whistleblowing lines where employees can make confidential reports on concerns relating to corruption.

SUSPECTED VIOLATIONS: WOULD YOU 'SELF-REPORT'?

When companies come across evidence that an employee may have paid a bribe, they need to decide whether to disclose the incident to the authorities and, if so, when. Every case needs to be assessed on its own merits, subject to expert legal advice. But, in Control Risks' view, it will usually be wiser to conduct the investigation first, with a view to gathering the maximum amount of information as quickly as possible, and then report once the situation is clearer. As soon as companies self-report, they lose control over the investigation. The findings indicate that the appetite for self-reporting is much greater than it has been in previous years.

- The majority of respondents (68%) said they were more likely to self-report to regulators now, if they came across a suspected bribery case involving an employee, than they would have done in the past.
- Just over half of respondents (53%) said that, if a suspected bribery violation came to their attention, they would report their suspicions to the regulators first – even if the details were uncertain – and then conduct the investigation.
- However, 31% said they would conduct the investigation first and self-report only if the violation were confirmed. A smaller group (15%) said they would investigate and report the violation only if it were confirmed and likely to come to the attention of law enforcement in any case.

DATA PROTECTION LAWS: A GROWING CHALLENGE

The increased cost and complexity of investigations – particularly given the growth of data protection laws around the world – underline the need for effective compliance programmes and constant vigilance. Most companies realise that data retrieval is likely to become an increasingly important issue in the event of a suspected, or actual, investigation. In this survey we asked respondents a series of questions relating to data retrieval and data transfer, with particular emphasis on conducting complex international investigations.

- The biggest challenge to managing an effective cross-border investigation, cited by more than half of those surveyed (54%), was 'dealing with local data protection laws'.
- The majority of respondents (67%) also expressed the opinion that the impact of data protection laws on their companies will increase in the next one-to-two years. Our experience suggests that this is almost certainly the case, and that the challenge will increase as more countries apply data protection laws more strictly.
- 56% of respondents indicated that the challenges associated with actually collecting data would have an impact on their organisation over the next two years, and 66% expect the need to move data across borders to increase.



Only half of those surveyed (50%) have due diligence procedures in place when selecting local business associates, despite the known risks

Corruption remains a major challenge for international business. While the US, the UK and other Western governments have introduced strict laws making it a criminal offence to pay bribes abroad, standards of governance remain, at best, inconsistent in key international markets. Well-managed international companies have no choice but to comply with their countries' anti-corruption laws, yet they are often faced with competitors that follow different standards. The result is that there are often deep inconsistencies between legal principles and commercial practice.

With this background in mind, Control Risks and the Economist Intelligence Unit (EIU) conducted an international survey of corporate lawyers from organisations around the world. We wanted to know:

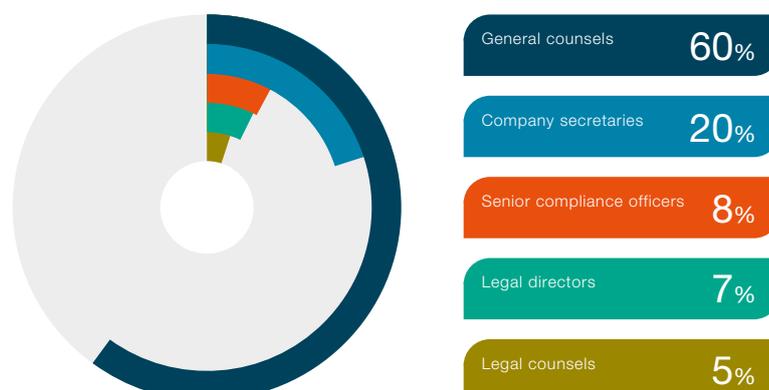
- How do companies assess and manage bribery and corruption risks, and what are the greatest concerns corporate lawyers have?
- What preparation do they give their employees to deal with such issues?
- What do their policies say – and how far are they put into practice?
- How do companies respond when they are challenged by regulators?
- What happens when they need to conduct an investigation and what difficulties do they encounter?

The survey was conducted in mid 2013. All the respondents occupy senior positions in their companies' legal or compliance departments; 60% were general counsels, chief legal officers or deputies to holders of these posts; 20% were company secretaries; others were senior compliance officers (8%), legal directors (7%) or legal counsels (5%).

The respondents were from a total of 316 companies worldwide. The Asia-Pacific region was best represented with 109 companies, followed by Western Europe (75), North America (49), Latin America (34), South Africa (30), the Middle East (11) and the former Soviet Union (8).

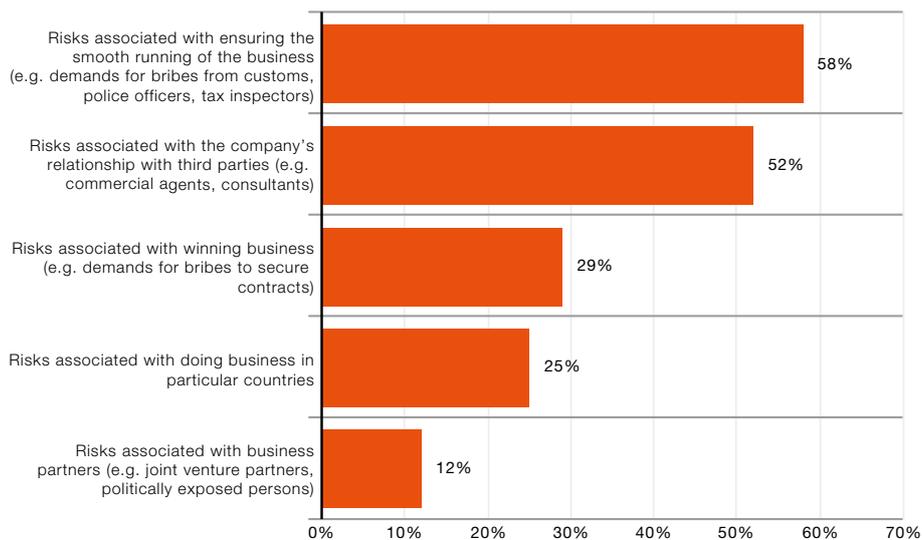
Between them, they represent 19 commercial sectors: the largest categories were manufacturing (72 companies), financial services (59), energy and natural resources (41), and professional services (24).

Respondents' positions in their companies' legal or compliance departments



RISK ASSESSMENT: WHAT ARE CORPORATE LAWYERS' GREATEST CONCERNS?

Well-targeted risk assessment is essential, but where do companies feel most vulnerable, and what are their major priorities? To find out, we asked respondents to select their two greatest concerns from a list of five potential risk areas.



At first sight, our respondents' order of priorities is surprising. International enforcement focuses on eradicating large bribes to secure major contracts, and we might have expected risks associated with winning contracts to come top of the list. Instead, a clear majority selected the 'risks associated with ensuring the smooth running of the business' as their greatest concern.

THE MOST SIGNIFICANT CHALLENGE: DEMANDS FOR 'OPERATIONAL' BRIBES

The focus on operational bribes fits with Control Risks' recent experience of helping international companies to operate in medium-risk and high-risk countries. Two contradictory factors highlight the dilemmas that companies face.

- **Operational bribes often come across as a form of extortion.** The amounts of money exchanged may be relatively small – typically less than USD 100 – but demands often carry a threat: 'if you don't pay, your business will suffer', whether as the result of expensive delays in customs processing or licence applications, or in the form of unjustified tax requisitions. Until recently, it has often seemed simpler to pay up and move on.
- **Crackdown on small bribes.** The US Foreign Corrupt Practices Act (FCPA) excludes 'facilitation payments' from its definition of the criminal offence of foreign bribery. However, this defence applies only when payers are trying to speed up routine government transactions to which they are entitled. Since the early 2000s, US enforcement agencies have been cracking down with increasing vigour on companies that pay for services to which they are not entitled – for instance, paying lower rates of duty or evading customs inspections altogether. One of the best known examples is the prosecution of the freight-forwarding company Panalpina, which in 2010 paid financial penalties totalling more than USD 81m to settle FCPA charges relating to bribes to customs officials in West Africa and Central Asia. Six of Panalpina's clients paid substantial fines in relation to the same case.

Unlike the FCPA, the UK Bribery Act has no exclusion for facilitation payments. British prosecutors state that if a company has a practice of making facilitation payments as 'part of a standard way of conducting business', this would be a factor 'tending in favour of prosecution'. Many other OECD countries likewise include facilitation payments in their laws against foreign bribery. Such payments are, in any case, illegal under most countries' domestic laws.



International attitudes to facilitation payments may be changing, but companies still find themselves operating in an awkward transition period where there remains no clear consensus on how to deal with them. The problems are particularly acute in countries with weaker governance standards. The most striking regional variation in this research came from India, where more than three quarters (76%) of respondents highlighted demands for operational bribes as a major concern. This does not reflect Indian enforcement levels – companies are rarely punished for making such payments – but rather the continuous, day-to-day hassle of getting things done. In our experience, well-managed companies suffer as much as – or more than – poorly managed ones. All too often, refusal to pay bribes still results in lengthy delays.

In Brazil, 58% of respondents expressed similar concerns. Brazil-based companies commonly work with ‘*despachantes*’ – agents who help their clients to navigate complex and time-consuming bureaucratic procedures. The employment of *despachantes* is within the law, but only as long as they themselves stick to legal procedures. The Brazilians work in an environment where demands for small facilitation payments are common, but this does not mean that they can afford to be complacent about the legal and operational hazards – rather the opposite.

In our experience, resisting demands for small bribes requires a combination of concerted top-level leadership, and day-to-day ground-level determination and ingenuity. We expect this to continue to be a major challenge for years to come and believe that it is right that it should now rank so high on the agenda of corporate lawyers.

THIRD PARTIES: STILL A PRESSING ISSUE

Just over half (52%) of respondents cited risks associated with third parties as one of their two greatest concerns, and the pattern was broadly similar across jurisdictions. To give an example of the kind of third parties we meant, we referred to commercial agents and consultants in the survey question. Other examples could include lawyers, accountants and visa brokers.

The FCPA, the UK Bribery Act and other similar national laws specifically forbid ‘indirect bribery’, where an intermediary pays bribes on a company’s behalf. The risk is that one of these intermediaries might pass on part of their fee as a bribe in return for favourable treatment – the awarding of a contract or the granting of a licence.

International legal practice makes it clear that companies may not claim ignorance of a third party paying bribes on their behalf if they have done nothing to prevent it. To cite one example, in late May 2013 the French company Total SA agreed to penalties totalling USD 398.2m to settle FCPA charges relating to Iran. The company had employed intermediaries, who were ostensibly serving as business development consultants, to channel some USD 60m in bribes to a government official to obtain rights to petroleum concessions. In this case Total fell within US jurisdiction because it is an issuer of American Depository Receipts (ADRs) on the New York Stock Exchange.

BRIBERY TO SECURE CONTRACTS REMAINS A SIGNIFICANT CONCERN

The prevention of bribes to secure contracts has been – and will continue to be – the main focus of international enforcement. Being caught up in a major bribery case would be a nightmare for most corporate lawyers and, one might imagine, would be at the top of their list of concerns.

Nearly a third (29%) of our respondents acknowledge this nightmare. If the other two thirds appear to be more relaxed, this may be because they think the risks are easier to control. The majority – though by no means all – of the companies surveyed have policies specifically forbidding bribery to secure contracts. Most senior executives are aware that such practices are unacceptable. Failing to win a contract because a competitor has paid a bribe is painful, but companies should never be tempted to compromise their integrity or their reputation.



Just over half (52%) of respondents cited risks associated with third parties as one of their two greatest concerns, and the pattern was broadly similar across jurisdictions



Until recently, even well-managed international companies might have regarded small bribes to customs officers as a normal cost of doing business

DIFFERENCES IN ATTITUDES TO 'COUNTRY RISKS'

Only a quarter of the total sample of respondents cited 'risks associated with doing business in particular countries' among their two 'greatest concerns'. This response should not be taken to imply that they think that the issue is unimportant, but rather that it is not at the top of their list of fears.

The most striking aspect about this question was the wide variation in responses from different countries. Nearly half of the US respondents (20 out of 44) classified country risks as being among their two greatest concerns. In light of strict FCPA enforcement, US corporate lawyers are more likely to argue that the risks – or the costs of compliance – are too high to justify investing in countries where the potential for corruption is high.

By contrast, the UK-based respondents are much less concerned, but this may reflect the fact that nearly half of them work for companies whose operations are restricted to Western Europe, where corruption risks are lower. This is in contrast to the Brazilians and the Indians, which are already operating in countries that many consider to be a higher risk from an integrity perspective.

But this point has wider application, and not just for those operating in high-risk environments. Many international business strategists think that they have little choice but to engage with major markets such as India, China, Brazil and Russia. If the decision to invest has already been made, the questions that matter are not so much to do with the country as a whole, but rather the risks attached to specific transactions and business partnerships.

LOCAL BUSINESS PARTNERS: MORE ATTENTION NEEDED

Selecting the right business partner is an example of the 'specific transactions' over which companies need to take particular care. If all goes well, local partners can serve as a good guide to the political and regulatory environment in the country in which the company is planning to work. In the best case, they can help to anticipate problems and identify practical, locally-driven solutions that can also satisfy the demands of international best practice. If things do not go well, these local partners may themselves be a source of corruption. However, only 13% of respondents cited this as one of their two main concerns, and the pattern was broadly similar across all jurisdictions.

Control Risks has worked on many cases where local businesspeople have used their political and commercial connections to work against the interests of their international partners and, in some cases, even attempted what amounted to a reverse takeover of the joint venture's assets. One of the main lessons is the need for careful due diligence on potential partners. However, only half of the companies we surveyed report that they have such procedures for partners. The respondents to our survey may be underestimating the risks.

A CLOSER LOOK AT SPECIFIC SCENARIOS: WHAT DO COMPANIES ACTUALLY DO?

Having established the respondents' overall approach to bribery and corruption related risks, we sought to gain a more nuanced view of how they might act in a given set of circumstances. To do this, a number of scenarios were outlined and respondents were asked to give their assessment of the risk prevalent in each: could the risk be largely ignored (insignificant); managed through normal procedures (routine); managed through enhanced procedures (major); or was it simply a deal-breaker?

The majority of responses to each scenario assessed the risk as 'routine' or 'major'. In these cases, acknowledging the risk and proceeding with care – or with great care – is an appropriate response, provided that the company is truly alert to the risks and can find ways of managing them. However, some responses suggested there is less than a full appreciation of the hazards, particularly around 'regular' facilitation payments, commission on contracts and charity donations. The scenarios, and the views of the respondents, are detailed in the following five pages.



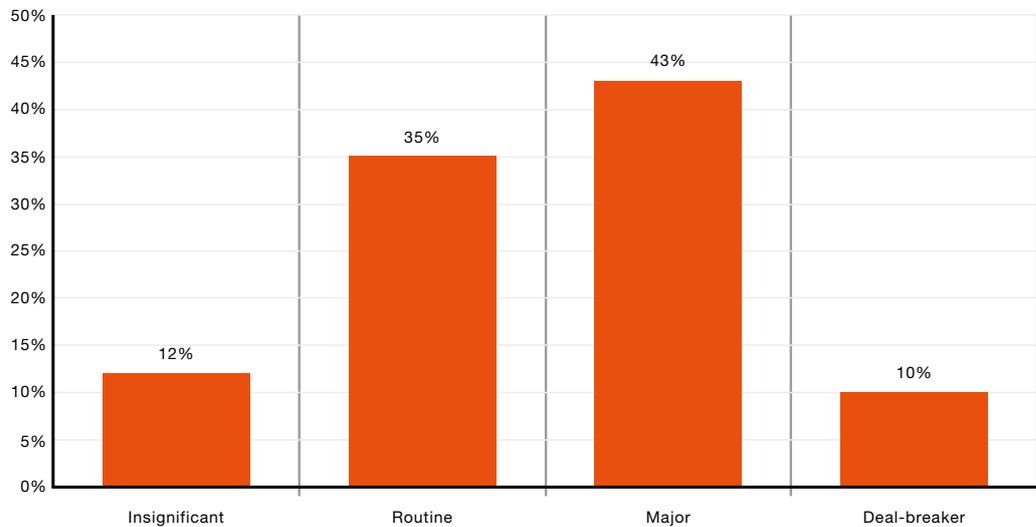
Resisting demands for small bribes requires concerted top-level leadership, and ground-level determination and ingenuity

SCENARIO ONE: MAKING 'FACILITATION PAYMENTS' TO GET GOODS THROUGH CUSTOMS

We explored the implications of demands for operational bribes by asking respondents to imagine a situation in which companies in their industry regularly make facilitation payments to avoid unacceptable delays in processing goods through customs.

This scenario is an all-too-common example of demands for operational bribes designed to 'ensure the smooth running of the business'. The fact that other companies tend to pay will make it harder to resist. Equally, the tightening international enforcement environment will make it hazardous to pay.

Assessing risks: companies in your industry regularly make facilitation payments to avoid unacceptable delays in processing goods through customs



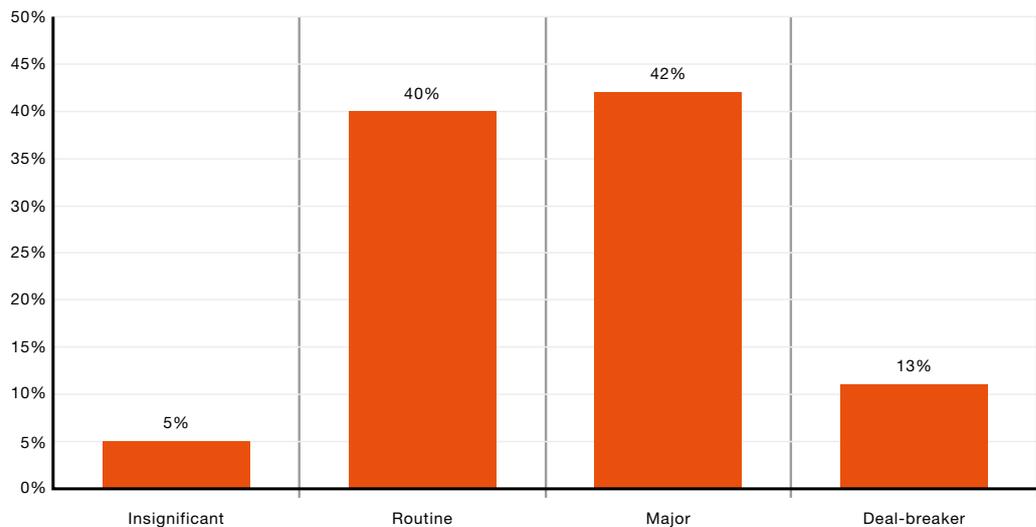
As can be seen from the chart above, there are significant groups of outliers at both ends of the spectrum. We cannot be certain, but the implication is that the people who think the risks are insignificant would probably allow their employees to pay. Equally, it is striking that as many as 10% of respondents think that customs bribery is a deal-breaker. Until recently, even well-managed international companies might have regarded small bribes to customs officers as a normal cost of doing business.

In Control Risks' view, resisting 'systemic' bribery demands need not be impossible. But it is hard. Expert advice from specialists such as customs house agents may be part of the answer as long as these do not operate as bribe-paying third parties. Companies may have to accept delays – rather than bribes – as a cost of business, hoping that introducing a policy of resistance will over time reduce the likelihood of demands for bribes. Ultimately, however, the solutions to these problems of institutional corruption in government departments must come from the governments themselves.

SCENARIO TWO: PAYING 10% TO A COMMERCIAL AGENT

Our second scenario has, until recently, been something of a classic: 'it is compulsory to use the services of a commercial agent, and the normal commission is 10% of the contract value'. International companies need specialist advice when they enter new markets, and this has often included recruiting the services of a commercial agent. However, as illustrated by numerous enforcement cases in the US and elsewhere, problems arise when these intermediaries pay on part of their commissions as bribes.

Assessing risks: commercial agents are compulsory, and the normal commission is 10% of the contract value



In view of the many enforcement cases involving intermediaries, it is scarcely surprising that only one in 20 of our respondents regarded these risks as 'insignificant', and no one at all took this view in the US. Overall, more than half thought this scenario either presented 'major' risks or was a deal-breaker.

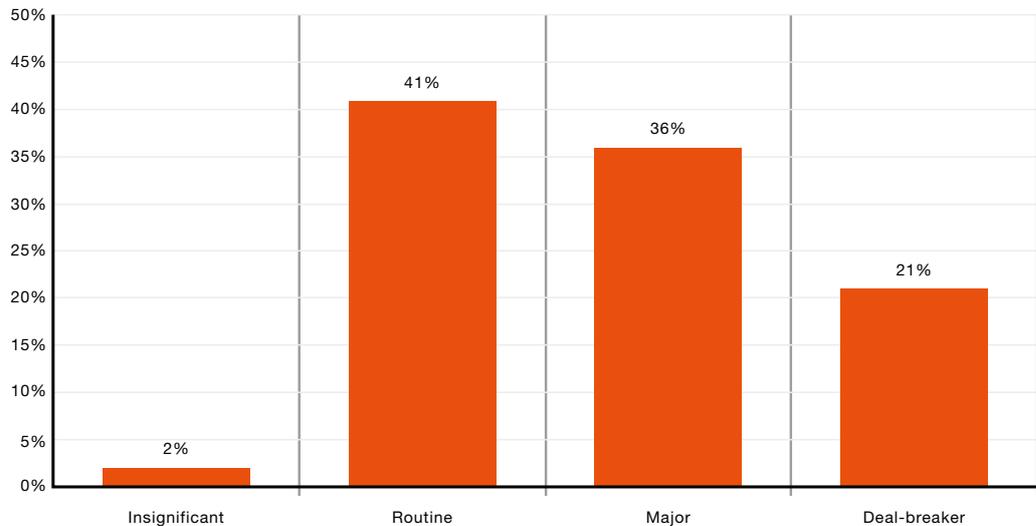
Even so, it is striking that as many as 40% of respondents – including 36% in the US and 30% in the UK – thought that the risks were 'routine'. There is now an established body of best practice on how to manage risks associated with employing commercial agents or other third parties. These practices include implementing due diligence procedures; incorporating anti-bribery clauses in contracts (often having a right to audit); and constant monitoring. Nevertheless, dealing with this issue remains a challenge, partly because of the large number of third parties engaged by any one company. In the case of a large international firm, the total may easily run into the hundreds or thousands.

SCENARIO THREE:

IS IT A CHARITABLE DONATION, OR A BRIBE TO SECURE A CONTRACT?

Control Risks still hears of cases where bribes are paid directly in 'brown envelopes', or brightly coloured suitcases. In practice the most common scenario is where the bribe is paid by an intermediary. However, companies need to be alert to the possibility of still further variations. In this scenario, we asked respondents to consider a situation where companies bidding for government contracts are normally expected to make a donation to the minister's charity. In effect, they are being asked to 'pay to play'.

Assessing risks: companies bidding for government contracts are expected to donate to the minister's favourite charity



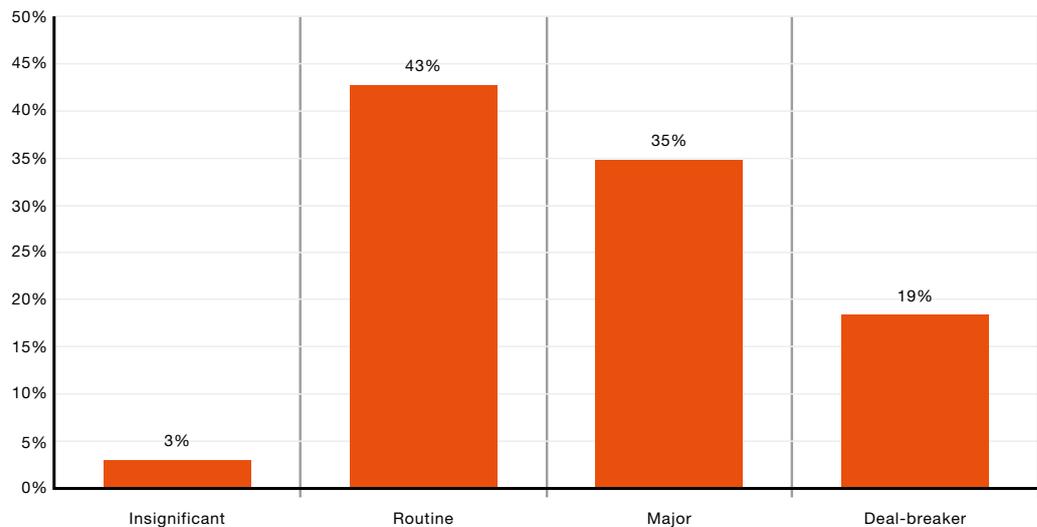
The obvious concern is that the charitable donation might be seen as a form of bribery. Only six respondents out of more than 300 took the view that this scenario represented an 'insignificant' risk, whereas 64 respondents (one in five) thought that it could be a deal-breaker. If there is a surprise, it is the large number of respondents in all jurisdictions who thought that a donation of this kind might represent a 'routine' management challenge.

Charitable donations and sponsorships may well form part of a company's corporate and social responsibility (CSR) programme, as well as helping to raise awareness of the company's name and making friends in the communities where it operates. From an integrity perspective though, the minimum requirements are that any donations should be public, and that the charities should be well-managed organisations that publish their accounts, and serve a legitimate social purpose. Above all, the company's donation should be an expression of goodwill – not money given in expectation of a return favour.

SCENARIO FOUR: JUDGES DEMAND BRIBES WHEN DECIDING COMMERCIAL DISPUTES

In our fourth scenario, we outlined a situation where 'judges are notoriously corrupt and frequently accept bribes when deciding commercial disputes'. In such circumstances, companies run the risk of losing out to their competitors in the event of a legal dispute. In the worst case, they could lose their investments altogether.

Assessing risks: judges are notoriously corrupt and frequently demand bribes when deciding commercial disputes



Again, very few of our respondents – only eight (3%) in total – thought this scenario presented an insignificant risk, whereas nearly one in five regarded it as a potential deal-breaker. The US respondents were significantly more risk averse than their colleagues in other jurisdictions: 39% thought that a corrupt judiciary presented a 'major' risk and 43% thought that it was a deal-breaker. This ties in with the finding that US respondents were more sensitive to country risk in general. At the other end of the spectrum, more than half the Brazilian respondents thought that risks related to a corrupt judiciary were 'routine', at least to the extent that they need not deter investment.

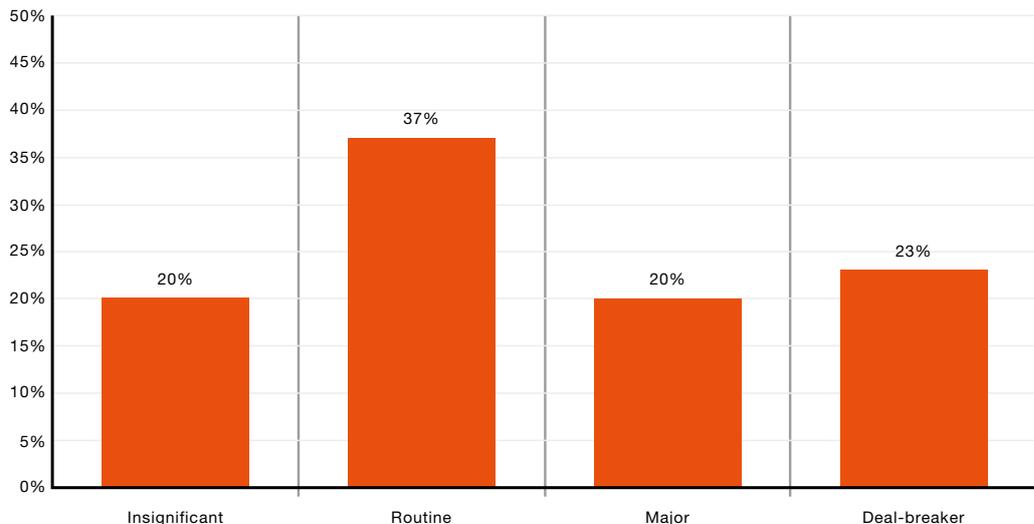
International companies typically try to manage these kinds of legal risks by specifying in their contracts and investment agreements that any commercial disputes must be decided in an external court of arbitration. But this is, at best, only a partial solution because such disputes tend to be long and arduous. In practice, some companies will decide to take the consequences of these risks in other ways, for example by deciding to settle cases out of court on terms that they may consider 'unfair' rather than embarking on costly legal disputes that have a low chance of success. In other cases, they may decide not to invest at all.

SCENARIO FIVE:

A JOINT VENTURE PARTNERSHIP WITH THE COUSIN OF THE PRIME MINISTER

In our final scenario, we presented another example of an issue corporate lawyers may be faced with: the company has a business opportunity in the form of a joint venture partner who is a cousin of the prime minister and therefore a 'politically exposed person'. This kind of situation is not uncommon in developing economies where there is a narrow political and commercial elite dominated by a small number of families. So does this mean that there is nothing to worry about?

Assessing risks: your potential joint venture partner is a cousin of the prime minister



This scenario raised alarm bells among a significant minority of respondents: nearly a quarter thought that it should be a deal-breaker. However, the majority were more relaxed: more than half thought that the risks were either 'insignificant' or 'routine'. The US respondents are more risk averse in other areas, but they appear to be more confident here.

In Control Risks' view, it would be wrong to be complacent. In certain circumstances there may well be legitimate commercial reasons to work with the prime minister's cousin. Equally, there are key questions that need to be asked: what exactly is the nature of his or her contribution to the joint venture, and how exactly are they rewarded?

To take a cynical view – which will, after all, be the view taken by regulators and investigative journalists – is there a possibility that they are being paid for minimal services as a kind of proxy bribe to the prime minister? And what happens if the government changes?

DO COMPANIES HAVE 'ADEQUATE PROCEDURES' TO PREVENT BRIBERY?

The basic ingredients of an effective compliance programme are well known. Anti-corruption NGO Transparency International published the first edition of its Business Principles for Countering Bribery in 2002. The US government has long summarised the basic ingredients of an effective compliance programme in successive editions of the Federal Sentencing Guidelines. In 2011 the British Ministry of Justice issued its own guidance document outlining its understanding of 'adequate procedures to prevent bribery'.

With these guidelines in mind, we asked respondents which of a series of standard compliance measures were in place in their companies. Our questions fell into three categories:

- **Company leadership.** We wanted to know how far companies demonstrated a firm commitment to combat bribery, for example by appointing a board member with specific responsibility for anti-corruption, and by defining clear business integrity policies.
- **Risk management procedures.** We asked how far companies have risk assessment procedures when entering new countries, and when engaging with new business partners and third parties.
- **Support for employees.** Staff members need active support, particularly when operating in high-risk environments. We wanted to know whether companies had training programmes in place, and whether it was possible for employees to raise concerns relating to corruption through confidential whistleblowing lines.

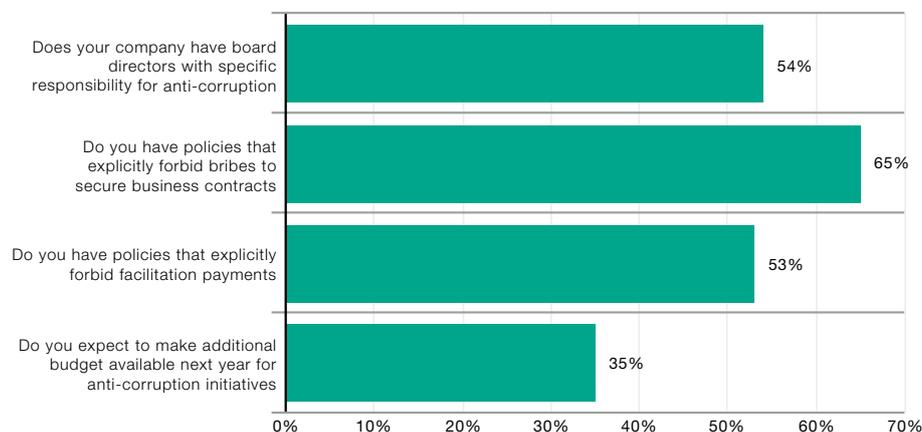
The most striking feature of our findings is not that so many companies have such measures in place, but rather that there are gaps – none of the respondents indicated that their organisation had all expected measures in place. Under the UK Bribery Act, companies that fail to institute 'adequate procedures' are liable to the corporate offence of 'failure to prevent bribery', and in some cases directors may be held personally responsible. Similar principles apply in the US and other jurisdictions. Companies and senior executives that fail to apply these measures are putting themselves at risk.

COMPANY LEADERSHIP

Clear company leadership – often described as the right 'tone from the top' – is a fundamental requirement. In the best case, chief executives and senior board members set the tone for the rest of the company, ensuring high standards of compliance through their personal examples. In the worst case, to adopt a saying popular in Eastern Europe, 'the fish rots from the top'.

To assess the health of our respondents' companies we asked questions about board responsibilities, policy and budget. The answers are summarised in the chart below.

Companies demonstrating clear leadership (% of respondents that said 'yes')





BOARD-LEVEL SUPPORT

When Control Risks advises companies on their anti-corruption procedures, our first question is: 'who is in charge?' If the answer is 'a senior board member', we take this as an encouraging signal, showing that the company takes business integrity seriously.

Our survey findings were not encouraging. Only just over half the companies surveyed (54%) had board members with specific responsibility for anti-corruption measures. The figure for the UK was just 42%, pointing to a degree of complacency among the British companies in our survey.

Control Risks regards anti-corruption as a strategic issue, not just a matter of corporate housekeeping. Active engagement from the very top of the company is essential if companies are to follow through on their business integrity commitments, and they need to do so in all jurisdictions, not just the ones that are obviously high-risk.

ANTI-BRIBERY POLICY STATEMENTS

Our second question concerns policy: what do companies say about corruption risks, and how do they communicate their policy to employees? In Control Risks' view, a formal policy statement addressing bribes to secure contracts and facilitation payments is now a standard policy requirement. Companies lacking such policies send an implicit message to employees that they do not care about corruption.

Again, the answers point to significant shortcomings. Overall, 65% of companies have formal policy statements forbidding bribes to secure business contracts, meaning – worryingly – that just over a third do not. And almost half (47%) indicated that their organisation does not have a corporate statement banning facilitation payments. This is cause for concern.

FUNDING AND RESOURCES

Levels of funding are a third key indicator of an organisation's commitment to corporate integrity. In principle, it is possible that a company could have all necessary compliance measures in place, with no need for additional expenditure. Nevertheless, at a time when the international compliance environment is becoming increasingly complex, we take it as a healthy sign if companies are devoting more funds and/or resources to compliance.

Overall, just over a third (35%) of companies said that they were making additional budget available for anti-corruption initiatives in the next 12 months, and 24% indicated they expected to increase the amount of resources dedicated to anti-corruption initiatives. As might be expected given the robust FCPA, US companies (48%) were more likely to be increasing funding than other countries, even though on most measures their compliance programmes appear to be stronger than those of their international counterparts. However, respondents in Africa and the Middle East were more likely than the average to say they would be increasing the amount of resources dedicated to anti-corruption initiatives (selected by 36% and 34% respectively). A minority (17%) of respondents suggested that additional investment was required, but that budget constraints prevented this from happening.



Over a third (35%) of companies do not have formal policy statements forbidding bribes to secure business contracts

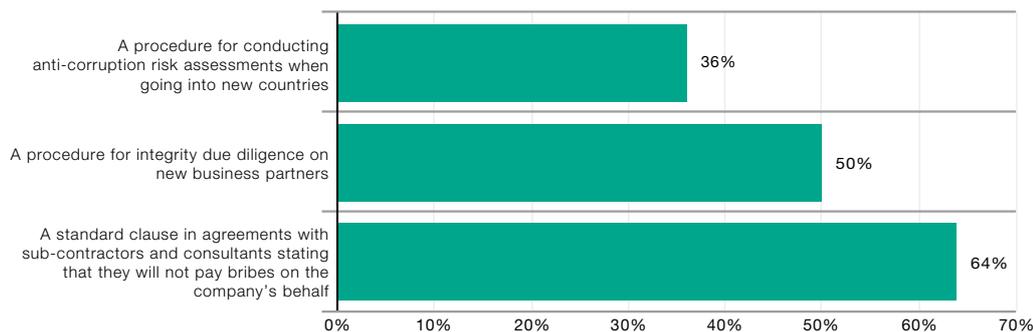


To combat corruption, training is essential, yet only 27% of companies have training programmes for all employees

RISK MANAGEMENT PROCEDURES

Policy statements are important, but companies also need well-designed procedures to put them into effect. We asked several questions focused on three standard management procedures relating to country and business partner risk.

Which of the following does your organisation have in place?



COUNTRY RISK ASSESSMENT

Overall, just over a third of respondents (36%) have standard procedures for anti-corruption risk assessments when entering new countries. Control Risks regards country risk assessment as an essential tool for organisations that are embarking on new ventures in high-risk countries. The scenario where judges are notorious for taking bribes to decide commercial disputes is an obvious example. It is important to know about an issue like this in advance and to plan accordingly, for example when drafting the clauses relating to dispute resolution in commercial contracts.

The fact that only a relatively small proportion of companies have country risk procedures is consistent with the responses mentioned earlier where just 25% cited the 'risks of doing business with particular countries' among their top concerns. One reason may be that many of our respondents' companies are sticking to existing markets rather than venturing into new ones. A second factor is that corporate lawyers tend to focus on specific transactions rather than taking a broader country view. What did surprise us, given the nature of the role the respondents have, is that almost one in five (19%) do not conduct corruption risk assessments in any of the countries in which they operate.

DUE DILIGENCE ON BUSINESS PARTNERS

Setting up a relationship with a new business partner is an obvious example of a 'specific transaction' where a corporate lawyer must be involved. Overall, only half of the companies surveyed have procedures for conducting integrity due diligence on prospective business partners. Within this sample, it would seem that the practice of integrity due diligence is common, but it is not applied universally.

In Control Risks' view, integrity due diligence should be standard practice before embarking on major new business relationships. Of course, the scale and complexity of the enquiries will vary. In low-risk jurisdictions, it may be possible to find everything that is needed through a quick check of public records. However, in emerging markets such records are often unavailable, and it may be necessary to draw on more specialist resources to make confidential enquiries.

STANDARD INTEGRITY CLAUSES IN CONTRACTS WITH THIRD PARTIES

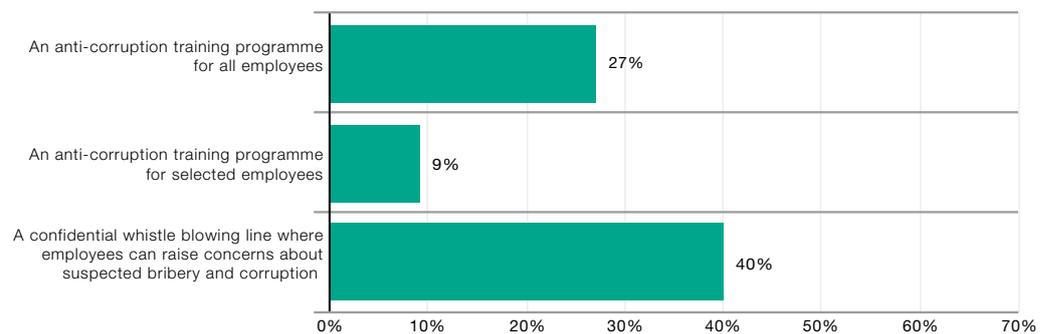
There are evident sensitivities attached to relationships with third parties such as business development consultants and sub-contractors. Overall, 64% of respondents said that they manage such risks by including standard clauses in contracts stating that sub-contractors will not pay bribes on the company's behalf. Given that so many corruption cases involve third parties, Control Risks regards such contractual clauses as a basic requirement. The fact that they are common is encouraging, but all too many companies are still falling short.



SUPPORT FOR EMPLOYEES

Employees at every level need consistent management support if they are to apply their company's anti-corruption principles and procedures in their day-to-day business lives. To assess how far this support was in place, we asked respondents about their training procedures, and whether they had a confidential whistleblowing line in place where employees could report potential problems.

Which of the following does your organisation have in place?



TRAINING

To combat potential corruption, training is essential. Our survey asked whether companies had programmes to raise awareness among all employees, and also among groups of employees that were more likely to face bribery and corruption challenges. In Control Risks' view, companies should ideally combine the two: all employees require basic awareness of the companies' policies, while groups of employees – for example, senior team leaders or sales teams in high-risk areas – will benefit from specially designed training programmes.

Overall, only 27% of companies have training programmes for all employees, and surprisingly, only 9% have training in place for select groups. US companies (48%) were most likely to have training programmes for all employees, reflecting their country's strong compliance culture. The British companies again lagged behind.

If training is to be effective, it needs to link the compliance agenda to employees' daily lives: dry legal discourses are not sufficient. This research has highlighted our respondents' concerns about demands for 'operational bribes'. If companies regularly encounter such demands, they need to train employees in strategies for resisting them.

WHISTLEBLOWING

On a similar note, employees need confidential channels to communicate and raise concerns about bribery, corruption or other ethical issues. Overall, only 40% of respondents said that their companies had whistleblowing lines.

This is one of the few areas where there is a significant difference between the approaches taken by larger and smaller companies: 28% of companies with global annual revenues below USD 500m offer whistleblowing lines, compared with 50% of companies with revenues above this figure. Setting up a full-scale whistleblowing line may be relatively expensive, but the mechanics are less important than the overall company culture. The most important goal is to foster an internal culture whereby employees feel empowered to draw attention to potential integrity problems, preferably before they occur.



Country risk assessment is an essential tool for organisations that are embarking on new ventures in high-risk countries

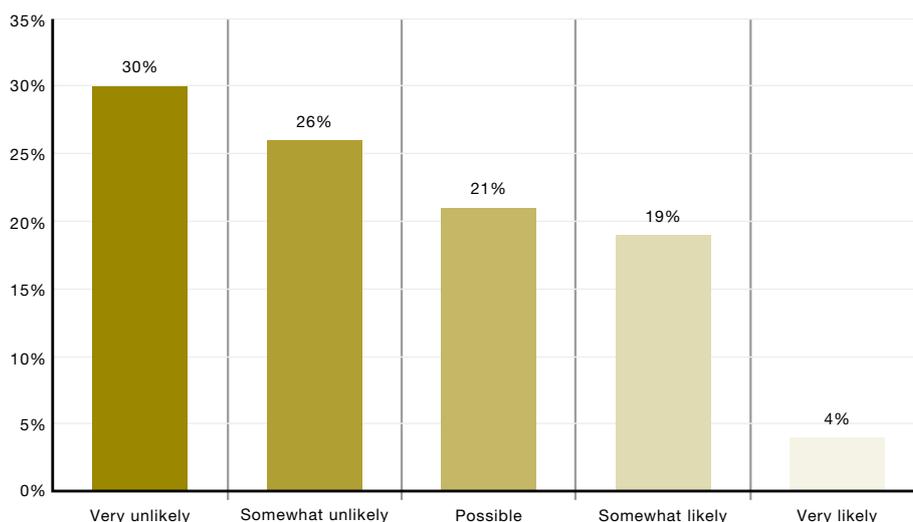
WHEN THINGS GO WRONG: INVESTIGATIONS, SELF-REPORTING AND DATA COLLECTION

Effective compliance programmes reduce the risk of malpractice, but, even in well-managed companies, it is almost impossible to eliminate it altogether. Corporate lawyers working for large international organisations live with the risk that – sooner or later – they will need to investigate a possible violation of anti-bribery laws. Our final set of survey questions was designed to assess how far respondents had prepared for future investigations – and what challenges they expected to encounter.

LIKELIHOOD OF COMING UNDER INVESTIGATION

There is little scope for complacency. A fifth of respondents (21%) thought it was ‘possible’ (defined as a 40%-60% chance) that their companies would be required to investigate a suspected violation of anti-bribery laws involving an employee in the next two years. Another 19% thought that this was ‘somewhat likely’ (a 60%-90% chance); and 4% thought it was ‘very likely’ (a 90%-100% chance).

Likelihood of being required to investigate a suspected violation of anti-bribery laws in the next two years



Half of the US respondents thought that it was ‘possible’ (34%), ‘somewhat likely’ (14%) or ‘very likely’ (2%) that they might need to investigate a suspected violation. Their high levels of concern make sense in the light of current US enforcement trends.

‘SELF-REPORTING’ OF SUSPECTED BRIBERY CASES

Company lawyers face a difficult decision when confronted with evidence that an employee may have violated anti-bribery laws: do they recommend that the company should disclose the incident to the authorities? If so, at what stage should they do so?

The US Department of Justice (DoJ) and Securities and Exchange Commission (SEC) have long encouraged companies to come forward in such circumstances. If companies fail to do so, and law enforcement officials come across the case independently, the penalties will be even more severe. On the other hand, companies that disclose potential violations, and take steps to remedy them, can expect more lenient treatment. The US government’s 2012 FCPA Resource Guide cites six anonymised cases where the DoJ and the SEC have declined to take enforcement action against US companies: a common feature of all six cases was that the companies had taken the initiative to disclose suspected bribe payments and carry out an internal investigation.

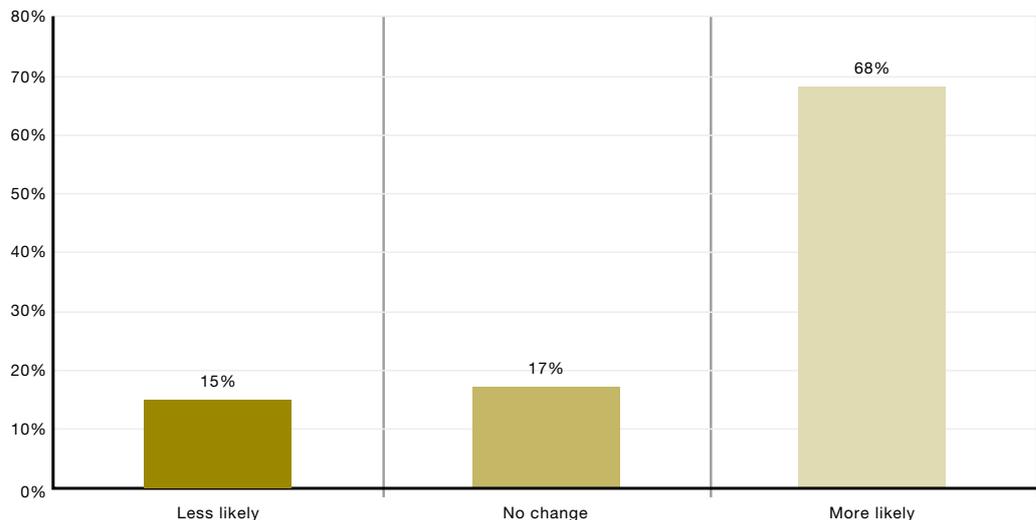


In the UK, former Serious Fraud Office (SFO) director Richard Alderman, who was in charge of the agency between 2008 and 2012, likewise encouraged companies to self-report. If they did so, he offered the possibility – though never the certainty – that the SFO might be willing to settle through a civil remedy rather than a criminal prosecution. His successor, David Green, has struck a somewhat harsher note: companies should by all means self-report, but the SFO will offer no advance guarantees.

An additional factor in the US and many other jurisdictions is that listed companies are required to disclose information that might materially affect the value of their securities. Such information could certainly include a major corruption investigation.

Against this background, respondents expressed a clear majority view (68%) that they were more likely to self-report than in the past. Only a small minority (15%) said they were less likely to do so.

Compared with three years ago, are you more or less likely to 'self-report' to regulators if you identify a suspected bribery case involving an employee?



TIMING: A SENSITIVE ISSUE

Even if companies take a decision that they should, in principle, self-report, they still need to consider when they should actually do so.

To gain a more nuanced view of what would happen in practice, we asked respondents to consider a scenario where a suspected violation of anti-corruption laws had come to their attention. It looked serious, but the details were uncertain, and a careful investigation would be required to establish the facts.

Just over half the respondents (53%) said that in this scenario they would report their suspicions to the regulators first and then conduct the investigation. However, 31% said they would conduct the investigation first and self-report only if the violation were confirmed. A smaller group (15%) said they would investigate and report the violation only if it were confirmed and likely to come to the attention of law enforcement in any case. Hiding the offence would be a very high-risk strategy, particularly in the US, where whistleblowers can now expect a financial reward if they report corruption cases to the authorities.

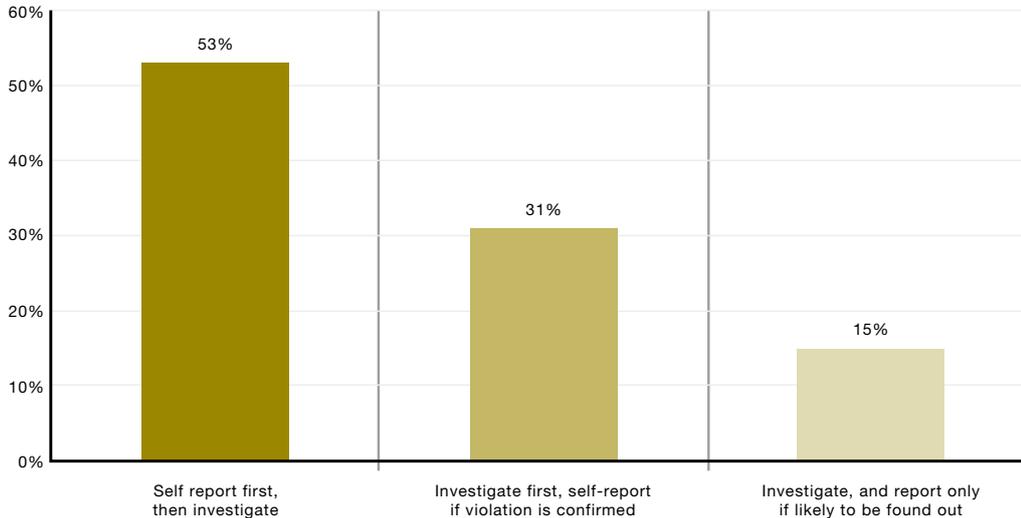


68% of respondents said they were more likely to 'self-report' a suspected bribery case than in the past



78% of respondents said that they were 'very' or 'somewhat' confident in their own ability to manage the requirements of an investigation

A suspected violation has come to your attention: it looks serious but you are not sure. What do you do?



The pattern was broadly similar across jurisdictions, except that the US respondents were more likely (46%) to conduct an investigation first, and disclose only if the violation was confirmed. This pattern may reflect the fact that US corporate lawyers are more likely to have had earlier experience of judging the merits and hazards of self-reporting.

Every case needs to be assessed on its own merits, and subject to expert legal advice, but as soon as companies self-report, they lose control over the investigation. If the case looks like a major one, and it is likely to come to the attention of law enforcement in any case, this would argue for prompt disclosure. In more minor cases, there will be less time pressure.

The essential principles are that companies must act promptly to follow up any reports of suspected violations, and keep a thorough record of the process so that they can disclose this when necessary. On the basis of the information outlined in our scenario, it will usually be wiser to conduct the investigation first, with a view to gathering the maximum amount of information as quickly as possible, and then report once the situation is clearer.

CONDUCTING INVESTIGATIONS

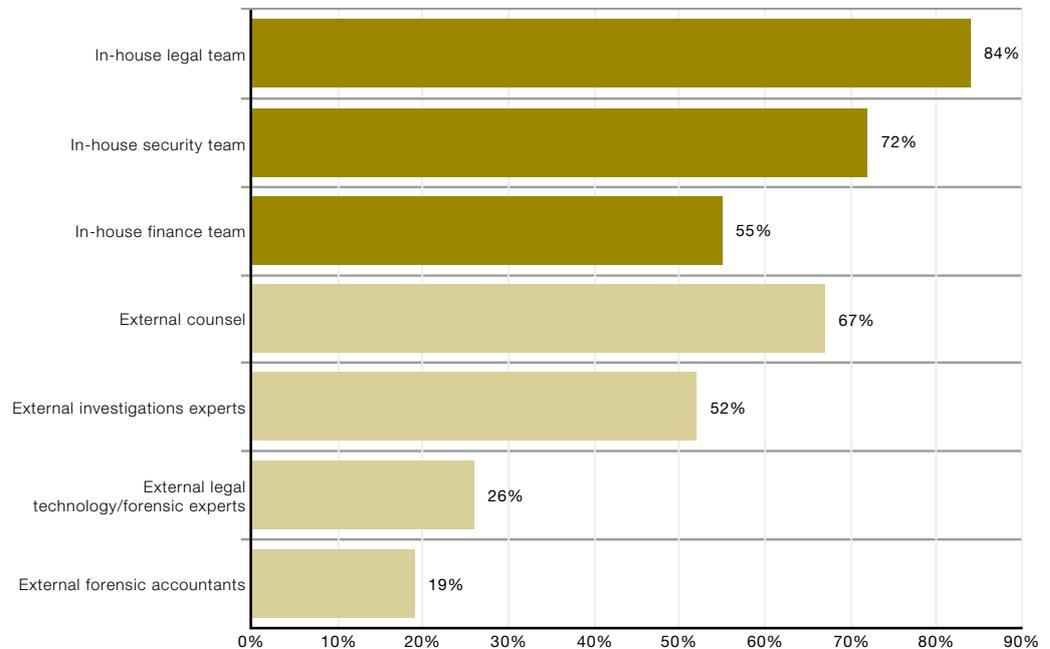
CONFIDENCE LEVELS

Overall, 78% of respondents said that they were 'very' or 'somewhat' confident in their own ability to manage the requirements of an investigation. However, there were striking differences in the responses from different countries. High levels of confidence in the US may owe something to the fact that compliance and investigation programmes tend to be better resourced than in other countries. Furthermore, US corporate lawyers operate in a tight enforcement environment and are more likely to have prior experience of running an investigation.

RESOURCES USED TO CONDUCT AN INTERNAL INVESTIGATION

Our respondents pointed to a mixture of internal and external resources that they would use when conducting an investigation. As might be expected, the preference across jurisdictions was to call on the services of in-house colleagues in the first instance, while referring to outside specialists when needed.

Resources used to conduct an investigation



The preference for using internal resources is understandable. However, especially in smaller companies and in emerging markets, in-house lawyers are more likely to be experts in commercial law rather than litigation or criminal investigations. So it is scarcely surprising that they quickly turn to external counsel. A similar point applies to internal finance and IT teams, who may be highly competent in their main specialities, but could underestimate the complexities of an investigation and the need to avoid spoiling potential evidence. In many cases, one of the most important contributions of legal technology experts is to ensure preservation of vital forensic data at the outset of an investigation.

INVESTIGATION RESPONSE PLANS

A majority (68%) of respondents said they had an investigation response plan covering data identification and retrieval. At first sight, this seems like a high percentage, but in Control Risks' experience, many companies find their plans insufficient when faced with the complexities of a real-life cross-border investigation.

Among the minority of companies that do not have any plans, the most common reason – cited by 21% of all respondents – was that investigations needed to be case-specific, and therefore it did not make sense to prepare a plan in advance. A third (33%) of the US respondents took this view.

The sceptics in the US and elsewhere are no doubt correct in thinking that one cannot predict the outcome of a complex investigation in advance. Nevertheless, companies are better prepared to deal with unexpected contingencies if they have plans in place. At a minimum these should include effective information governance procedures so that companies can rapidly locate data relating to specific people, projects or entities.

PRESERVING DATA

The key requirement of an effective response plan is to ensure that all relevant documents and electronic data are safeguarded. The great majority (76%) of respondents said that they had procedures to set up a 'legal hold' (when normal processing or deletion of records are suspended) to guarantee that this happens. Among those that did not, the main reason given – by 13% of the total number of companies – was that they did not perceive a requirement. The remainder said that it was too expensive, or that they lacked the necessary resources and expertise.

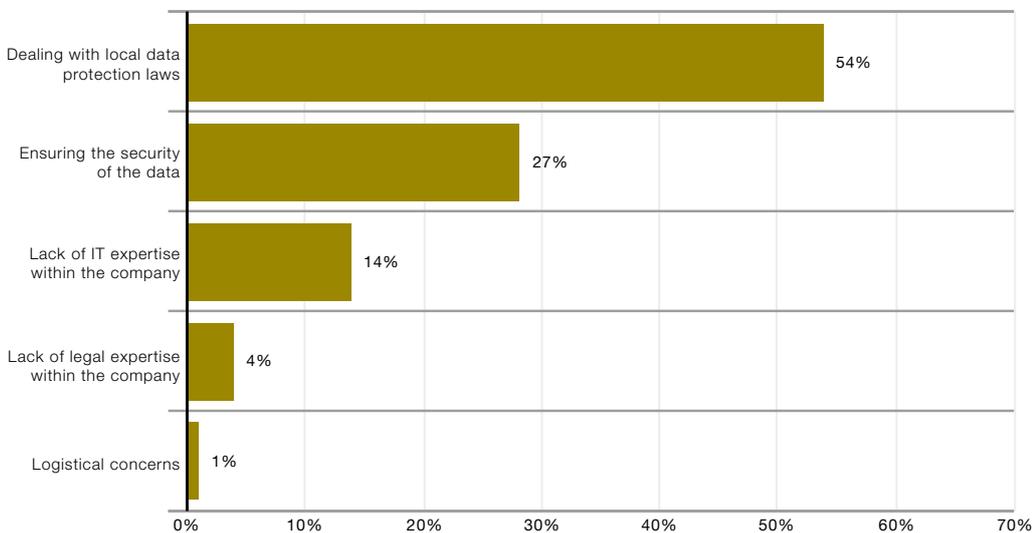


Dealing with local data protection laws is almost certainly the biggest challenge companies are likely to encounter when faced with a multi-jurisdiction investigation

But companies often underestimate the complexities of imposing a 'legal hold', particularly when dealing with US enforcement agencies, whose requirements are especially strict. It will not be sufficient simply to send out a message calling on employees to preserve data. Depending on the focus of the investigations, it may be necessary to secure formal written undertakings from particular groups of employees. Some companies have routine procedures to delete certain categories of information from their IT systems at regular intervals, and in these scenarios such procedures will need to be suspended. It is easier to do all these things if contingency plans have already been prepared in advance.

THE CHALLENGES OF CONDUCTING COMPLEX INTERNATIONAL INVESTIGATIONS

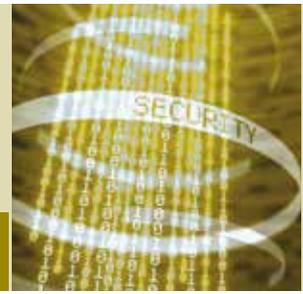
Respondents were asked to identify the greatest practical challenges when conducting an internal investigation that required the retrieval of data from multiple locations and across numerous international borders.



Experience suggests that the most popular answer – dealing with local data protection laws – is almost certainly the biggest challenge organisations are likely to encounter when faced with a multi-jurisdiction investigation. To date, US enforcement agencies have proved the most likely to require companies to conduct a cross-border investigation. With certain exceptions, US data protection laws generally favour corporate access to information – for example, on company computers – over employees' rights to privacy. However, in most European jurisdictions, there is a greater emphasis on personal data privacy, and this creates the potential for a conflict between the US enforcement agencies' demand for disclosure and local data privacy laws (Control Risks' 2013 white paper *Managing the Challenges of Cross-border Investigations* looks at these issues in more detail).

Other factors include national security regulations, notably in countries such as China and Russia. Typically, a number of factors come into play. First, companies will need to be able to demonstrate that they are complying with national regulations preventing third parties in other jurisdictions from gaining access to sensitive data. Secondly, companies need to take particular care over the timing of disclosures to regulators and shareholders, and therefore will wish to prevent news of an investigation seeping out prematurely, including to national intelligence agencies. Thirdly, legal professionals will always be aware of the need to preserve client privilege and confidentiality.

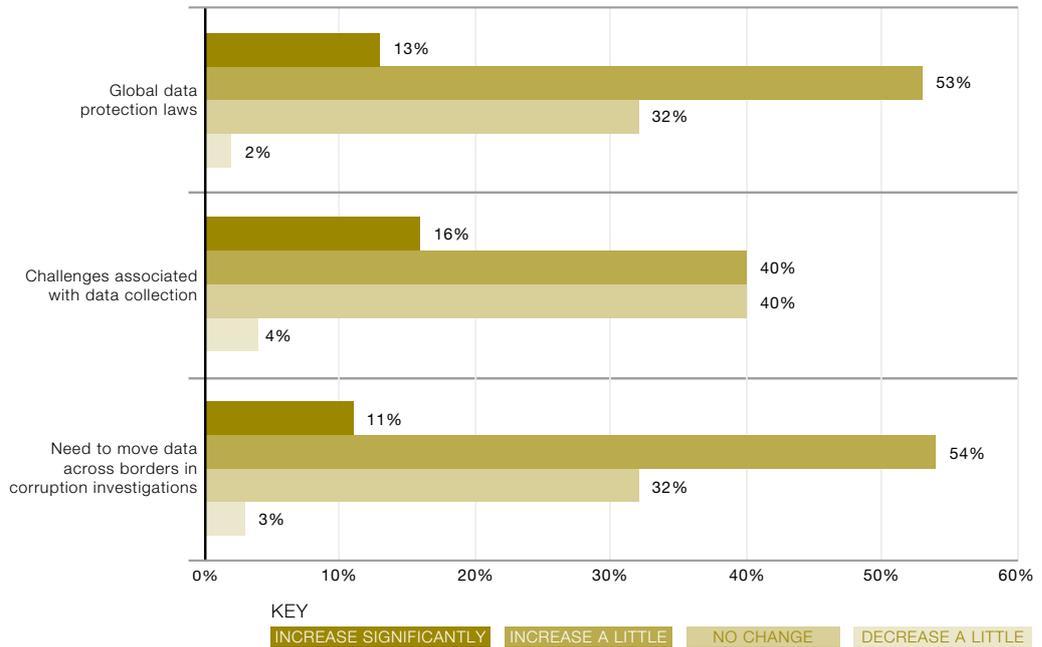
Some 14% of respondents pointed to a lack of IT expertise within their companies. In Control Risks' experience, the problem is not so much lack of IT expertise per se, but rather inexperience in the specialist requirements of an investigation. For example, it is essential to secure back-up copies of sensitive e-mails before opening them to review their contents. E-mails that have been opened after an investigation has started – and therefore are marked with a later review date – may not be admissible as evidence.



FUTURE CHALLENGES

In our concluding set of questions, we asked respondents to assess the future impact on their companies of the challenges posed by global data protection laws and data collection – particularly in cross-border investigations. For individual companies, the outcomes will depend on the likelihood of their being involved in such an investigation. But the majority of respondents (67%) expected the increase in global data protection laws to have an impact on their business, and of these, 13% expected the impact to be significant.

How will the impact of the following on your company change in the next two years?



For companies that are required to conduct investigations on matters such as suspected bribery offences, we expect the legal and practical challenges involved in data collection to increase sharply. The main reasons include:

- In jurisdictions such as China, Indonesia, Macao and Russia, the authorities are demonstrating increased will to apply existing data privacy laws.
- Many other non-European jurisdictions are still at an early stage in implementing their own data privacy laws. There is therefore no established body of practice on how to apply them, and this is bound to lead to a degree of confusion.
- In many countries, regulators have been sensitised by a series of public outcries following the loss of personal data by banks, smartcard holders and other entities with large client networks. They will therefore err on the side of caution when applying data protection rules to commercial investigations.
- The collection of data is becoming more complex because of the increased commercial usage of electronic communications tools such as instant messaging and Skype, rather than the now traditional e-mail. This means that it is harder for companies to enforce information security policies, and to gather data when needed for investigations.

The increased cost and complexity of investigations underline the need for effective compliance programmes to reduce the risk of violations occurring in the first place.

Control Risks

INTERNATIONAL BUSINESS ATTITUDES TO CORRUPTION SURVEY 2013



COMPANIES SURVEYED BY GEOGRAPHY

PREVENTION IS BETTER THAN CURE – ORGANISATIONS LACKING IN ANTI-CORRUPTION MEASURES | WHICH OF THE FOLLOWING DOES YOUR ORGANISATION NOT HAVE IN PLACE?



64%

A PROCEDURE FOR CONDUCTING ANTI-CORRUPTION RISK ASSESSMENTS WHEN GOING INTO NEW COUNTRIES



36%

A STANDARD CLAUSE IN AGREEMENTS WITH SUB-CONTRACTORS AND CONSULTANTS THAT THEY WILL NOT PAY BRIBES ON THE COMPANY'S BEHALF



50%

A PROCEDURE FOR INTEGRITY DUE DILIGENCE ON NEW BUSINESS PARTNERS



35%

A FORMAL POLICY STATEMENT FORBIDDING BRIBES



60%

A WHISTLEBLOWING LINE WHERE EMPLOYEES CAN MAKE CONFIDENTIAL REPORTS ON CONCERNS RELATING TO CORRUPTION



91%

SPECIALISED ANTI-CORRUPTION TRAINING FOR EMPLOYEES IN HIGH-RISK AREAS

THE RISK OF CORRUPTION REMAINS REAL - LIKELIHOOD OF BEING REQUIRED TO INVESTIGATE A SUSPECTED VIOLATION OF ANTI-BRIBERY LAWS IN THE NEXT TWO YEARS



30%
VERY UNLIKELY

26%
SOMEWHAT UNLIKELY

21%
POSSIBLE

19%
SOMEWHAT LIKELY

4%
VERY LIKELY

SUSPECTED VIOLATIONS: MOST ORGANISATIONS MORE LIKELY TO 'SELF-REPORT'?



15% LESS LIKELY

17% NO CHANGE

68% MORE LIKELY

WHERE ARE THE RISKS – TWO AREAS OF GREATEST CONCERN



58%

RISKS ASSOCIATED WITH ENSURING THE SMOOTH RUNNING OF THE BUSINESS (E.G. DEMANDS FOR BRIBES FROM CUSTOMS, POLICE OFFICERS, TAX INSPECTORS)



52%

RISKS ASSOCIATED WITH THE COMPANY'S RELATIONSHIP WITH THIRD PARTIES (E.G. COMMERCIAL AGENTS, CONSULTANTS)

INVESTMENT IN ANTI-CORRUPTION MEASURES



35%
MAKING ADDITIONAL BUDGET AVAILABLE



24%
INCREASING THE AMOUNT OF RESOURCE/NUMBER OF PEOPLE

DATA PROTECTION LAWS: A GROWING CHALLENGE



66%
IMPACT OF DATA PROTECTION LAWS ON MY ORGANISATION WILL INCREASE



65%
INCREASE IN THE NEED TO MOVE DATA ACROSS COUNTRY BORDERS

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