BRIBERY ACT

Transparency International UK's submission of written evidence to the Select Committee on the Bribery Act 2010, 11 July 2018

EXECUTIVE SUMMARY

Transparency International UK (TI-UK) welcomes the Committee's consideration of the Bribery Act (*"Bribery Act"*). In the seven years since its commencement **the Bribery Act has provided a sound legal basis for prosecuting foreign bribery** by both natural and legal persons, and the corporate offence of failure to prevent bribery under Section 7 of the Bribery Act has proved **an effective incentive for businesses to adopt adequate corporate compliance measures and internal controls**.

TI-UK recognises the leadership the UK has demonstrated in passing and enforcing the Bribery Act, the strength of the Bribery Act itself, and the quality of the Government's corresponding Guidance. It is good news that some companies have improved in this area while those **companies that do pay bribes, however large, are more likely than ever before to be identified and prosecuted**. A welcome development, and in some cases a consequence of, the Bribery Act is that other countries have also updated their anti-bribery legislation, so that there is now a global framework of broadly equivalent legislation in line with the OECD Anti-Bribery Convention.

However, even without the pressure of post-Brexit trading, **British companies have too often paid bribes overseas.** TI-UK is concerned that some companies will return to the days when they lobbied against strong anti-bribery provisions instead of tightening up standards, and that the UK Government may renege on its commitment to consult on **extending existing corporate liability legislation** to other economic crimes, including money laundering. We also believe there is a danger that the use of discounted DPA settlements will encourage corrupt acts if companies come to see the fines as a calculable cost of doing business.

TI-UK engages constructively with UK companies as well as with foreign companies that have a presence in the UK, and we believe that the majority of these companies wish to conduct their business ethically. The Bribery Act protects such companies because it makes it **easier to resist demands for bribes including facilitation payments** when operating in high risk environments. It also **strengthens their hand in requiring their business partners to observe high ethical standards**. Through its extraterritorial application to foreign companies that have or conduct a part of their business in the UK, the Bribery Act helps to create a **level playing field for companies that are committed to zero tolerance of bribery**. In light of this, we look to the Committee to set a firm stance on the following issues in its review.

KEY RECOMMENDATIONS

1. The Government should **under no circumstance water down the Bribery Act** or its corresponding Guidance which form a central part of the UK's leadership in the global fight against corruption.
2. The Government should prioritise **awareness-raising and support for Small and Medium Enterprises** (SMEs) to enable them to do business in a way that does not break anti-bribery laws in the UK or other countries.
3. The Government should **prioritise enforcement** of the Bribery Act in order to ensure that bribery does not go unpunished. This includes both increasing the volume of cases, and ensuring that individuals, not only companies, are properly held to account for their crimes.
4. The Government should provide **clarification as to when use of section 13**, which provides a wide exemption for UK intelligence services and armed forces, would or would not be appropriate, in order to ensure that the exemption is used properly.
5. **Prosecutors need to make better use of the Bribery Act** to prosecute and track UK-based bribery crimes. This will provide the Government with a more accurate view of bribe-paying, as outlined in the UK Government anti-corruption strategy.
6. The Government should **extend the 'failure to prevent' approach** to corporate offending outlined in Section 7 of the Bribery Act to other economic crimes, including money laundering.
7. The Government should **support business** by continuing to collate and promote the most effective anti-bribery guidance and initiatives and should repeat its 2015 study into awareness of, and response to, the Bribery Act among SMEs in order to update the evidence base in this area.

RESPONSES

1. Is the Bribery Act 2010 deterring bribery in the UK and abroad?

1.1. In general, the Bribery Act is a **well-designed piece of legislation** which has been effective in improving corporate behaviour.

1.2. The introduction of the Section 7 'failure to prevent' offence has been invaluable as a tool to incentivise improvements in corporate behaviour and for prosecutors to hold companies to account within a criminal law framework.

1.2.1. TI-UK has not conducted research comparing rates of bribery before and after the introduction of the Bribery Act, as actual bribery rates – including bribery which has not been detected by law enforcement – are not measured and so are not possible to use in a comparison.

1.2.2. However, the UK's ranking in Transparency International's Corruption Perceptions Index has improved considerably since 2010, from ranking 20th in 2010 to 8th in 2017 – we believe this is in part, as a result of the positive global perceptions caused by the Bribery Act.

1.2.3. We quote Professor Dan Hough, Director of the Sussex Centre for the Study of Corruption (SCSC):

"The UK Bribery Act might sound like a relatively obscure piece of legislation, but in many ways it is ground-breaking, placing Britain in the vanguard of states that are trying to stamp out bribery as a way of doing business… The Act has made business leaders think and quite possibly change at least some aspects of business practice in ways that aren't immediately quantifiable."[1]

1.3. **The Bribery Act has set a new higher standard for business and governments globally** which helps to deter bribery both in the UK and abroad. It is common for global businesses irrespective of the jurisdiction of their headquarters to implement anti-bribery programmes which set their policies and procedures at the high watermark set by the act. They are typically motivated to do so because they either conduct some business in the UK or work with British companies. Additionally, **governments around the world look to the Bribery Act when considering their own legislative reforms**. For example, in Australia, through the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017 (Cth), the government plans to introduce a new offence of "failure to prevent bribery of foreign officials" along the same lines as Bribery Act.

1.4. **The Bribery Act is now part of a collection of post-2010 related OECD-compliant legislation,** including but not limited to Loi Sapin II 2017 (France), Law no. 12.846/2013 "Clean Companies Act" 2014 (Brazil) and the 2015 Amendment 3 to the Organic Act on Counter Corruption B.E. 2542 1999 (Thailand), and the Criminal Code of the Kingdom of Netherlands 1881, amended 2012 (Netherlands). This legislation collectively has a greater deterrent effect. In the context of Brexit, it is important not to hold up the Bribery Act as unique gold-plated legislation, as there is a risk that arguments will be made that 'Brexit is about taking back control from red tape and bureaucrats, not gold-plating legislation so as to 'free up businesses'. Such an argument fails to recognise that UK businesses who are exporting are now increasingly subject to this collection of OECD-compliant legislation, of which the Bribery Act is now just one piece.

1.5. Since the introduction of the Bribery Act, UK companies have testified to its efficacy in deterring bribery, as the following statements illustrate:

1.5.1. **FTI Consulting**: "The hype surrounding the introduction of the UK Bribery Act has had a tangible effect – many companies have thought long and hard about compliance – and perhaps to a lesser extent business ethics generally – and our figures show that many believe that they have implemented the necessary compliance measures."[2]

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[1] www.sussex.ac.uk/broadcast/read/19639

[2] www.fticonsulting.com/~/media/Files/us-files/insights/featured-perspectives/the-realities-of-the-uk-bribery-act.pdf

[3] www.fticonsulting.com/~/media/Files/us-files/insights/featured-perspectives/the-realities-of-the-uk-bribery-act.pdf

1.5.2. **Deloitte**: "Companies have generally accepted that they need to take positive and tangible action to assure themselves of their ability to comply with the Act. Typically, organisations have embraced the requirement to conduct a bribery and corruption risk assessment."[3]

1.5.3. **Peter Lloyd, CEO Mabey Group**: "I do not believe that the new Bribery Act will prevent anyone from entering new markets and I also do not believe that the Bribery Act is draconian. Bribery has been illegal for many years in almost all countries worldwide and whilst I am advised that UK law was poorly defined, it was still illegal to bribe people in the UK and overseas. The Bribery Act does introduce new challenges, especially the need to have and enforce adequate procedures, but I would have advised any Board to implement such controls anyhow."[4]

1.6. The trends in PwC's *Global Economic Crime Survey*[5] show that until 2018 the overall level of bribery and corruption reported by UK companies had fallen over time, **with companies reporting more concern about other forms of economic crime.** However, in the 2018 Global Economic Crime survey, PwC found that, after steadily falling for the past few years, reports of corruption and bribery have increased. Significantly, 23% of organisations surveyed said that they had experienced bribery and corruption. This is an increase of 17% from the 2016 survey in which only 6% of companies reported that they have experienced bribery and corruption.[6] This does not necessarily indicate that bribery is increasing. An increased commitment to tackling corruption by UK business and the implementation of more formal ethics and compliance programmes across their organisations may have made businesses far better informed and more aware of potential instances of bribery and corruption in their global operations.

<u>Defence and security services – section 13</u>

1.7. Section 13 of the Bribery Act provides a broad defence for any person charged with bribery if they can prove their "conduct was necessary for the proper exercise of any function of an intelligence service or of the armed forces when engaged on active service." **Section 13 is not required, and its current drafting is too broad and open to abuse**.

1.7.1. Other mechanisms exist to protect intelligence or military personnel in those exceptional circumstances whereby bribery may be argued to be justifiable (for example circumstances in which it would avert a far more severe harm, such as serious human rights abuses). The Attorney General has prosecutorial discretion and in such cases would inevitably not bring a prosecution because such instances would likely fail the public interest test.

1.7.2. If section 13 is not removed **it should be narrowed in scope, as currently it is open to abuse,** and plausibly could be used as a defence in cases of bribery used to secure defence equipment exports, or to protect defence companies. Once narrowed, there should be clarification from the Government as to the circumstances in which reliance on section 13 is and is not be appropriate.

1.7.3. A key risk of abuse relates to the duties of the intelligence services. Under section 1(2) of the Intelligence Services Act 1994, the intelligence services have a statutory duty to further 'the economic well-being' of the UK. When this duty is combined with the section 13 exemption in the Bribery Act, this creates a risk of bribery being used by intelligence services to further the economic well-being of the UK, behaviour which we argue would be counter to the fundamental purpose of the Bribery Act.

1.7.4. There have been serious incidences of major UK defence contractors engaging in bribery abroad, For example, in the SFO's current investigation into GPT Special Project Management (a subsidiary of Airbus) and its former investigation into BAE Systems, both companies acted as prime contractors for government-to-government contracts signed between the Saudi Arabian and British governments – both defence companies were performing the contracts on behalf of the British

[3] www.uk.practicallaw.com/2-520-4185?q=&qp=&qo=&qe=#

[4] www.thebriberyact.com/2012/02/01/will-the-bribery-act-prevent-us-from-entering-new-markets-your-questions-answered-by-peter-lloyd-ceo-mabey-group/

[5] www.pwc.com/gx/en/economic-crime-survey/pdf/GlobalEconomicCrimeSurvey2016.pdf

[6] www.pwc.co.uk/forensic-services/assets/pwc-global-economic-crime-survey-2018-uk.pdf

government. Under such circumstances there is a significant risk that defence company personnel might avail themselves of the section 13 legal defence.

1.7.5. There are a **large number of secondments that occur between the UK defence and arms export departments and defence companies** exporting to high corruption risk countries. In a Freedom of Information request, received in April 2018, the Department for International Trade informed us that in the last year they have had 22 inward secondees from the private sector, twelve of whom were from major UK Government defence contractors.[7] This again creates a significant risk of secondees from either Government or defence companies engaging in bribery but under the protection of section 13.

1.7.6. Section 13 states that: 'It is a defence for a person charged with a relevant bribery offence to prove that the person's conduct was necessary for (a)the proper exercise of any function of an intelligence service, or (b)the proper exercise of any function of the armed forces when engaged on active service.' The risk of section 13 being abused is heightened when we consider there are no safeguards placed around the vague definition of "a person", and whether this could include secondees from defence companies.

1.7.7. To highlight the risks: 53 UK Ministry of Defence (MoD) staff are employed by the GPT-Airbus SANGCOM project, the export contract signed between the UK MoD and Saudi Arabia and which is currently under investigation by the SFO. Several of these MoD staff have been questioned by the SFO in connection with their probe – and could arguably avail themselves of the section 13 defence.[8] An even higher number of MoD and military staff, more than 200, are employed by MODSAP, which oversees the Al-Yamamah sale of Tornado, Hawk and PC-9 aircraft to Saudi Arabia and was investigated by the SFO and the UK Department of Defense.[9]

1.8. Section 13 mandates that the head of each intelligence service and the Defence Council have in place "arrangements designed to ensure that any conduct of a member of the service which would otherwise be a relevant bribery offence is necessary". However, in response to Parliamentary Questions, the Government stated it had no recorded instances bribery being necessary under section 13.[10] This suggests either that there is no bribery taking place or that neither service have safeguards and monitoring around section 13.

1.9. The current drafting is too wide and open to abuse. Indeed, the breadth of protection in section 13 is, quite probably, the only piece of written law in the world that expressly justifies bribery by agents of the state. The section 13 exemption was widely criticised at the time of the Bribery Bill, including by the OECD, whose Legal Director, Nicola Bonucci noted that these provisions may represent the only anti-bribery law in the world permitting bribery.[11] In a context in which there are high risks of corruption in forms of export business such as arms trading, it should not be acceptable that it is open to the military forces or intelligence services to use bribery or related offences to further such business interests on behalf of the UK.

1.10. In 2009, the Joint Committee on the Draft Bribery Bill recommended the removal of these exceptions, citing the following reasons:

> "We heard no persuasive evidence of a need for the domestic intelligence agencies to be granted an authorisation to bribe. Neither are we persuaded that this draft Bill is the appropriate vehicle to extend the security services' powers to contravene the criminal law. Finally, we note continuing

[7] Secondees have been from companies including AgustaWestland, Lockheed Martin, Rolls Royce, BAE, Babcock, AMEC and NCC Group.

[8] These allegations were brought to the SFO and the US Dept. of Defense from a whistle-blower, formerly employed by GPT, who says that while he raised the issues with Airbus and the UK MoD, neither wanted to investigate. The Saudi Arabian government reimburses the UK MOD for these staff costs, confusing their reporting line and possibly discouraging UK staff from robustly and independently overseeing contracts, or feeling sufficiently empowered to raise issues.

[9] BAE paid $400m to US authorities in order to settle the bribery allegations.

[10] www.theyworkforyou.com/wrans/?id=2018-02-27.130012.h&s=section%3Awrans+speaker%3A10231#g130012.q0

[11] www.publications.parliament.uk/pa/jt200809/jtselect/jtbribe/115/11515.htm

doubt about whether clause 13 complies with the United Kingdom's international obligations, despite the fact that this issue was raised as long ago as 2003."[12]

1.11. More broadly, the breadth of section 13 illustrates the moral ambivalence of the UK when it comes to bribery overseas. This is in spite of the strengthening of the law more generally through the Bribery Act, in its application to overseas trade.[13]

1.12. TI-UK re-states its concerns at these clauses. We believe they should not be in the Bribery Act, but for so long as they remain in the legislation, there should be public accountability for the proper adherence to the legislation, and clarification from the Government as to when its use would or would not be appropriate. **We strongly recommend that the Select Committee should investigate this aspect of the Bribery Act.**

RECOMMENDATIONS

1.13. **Section 13 is not required to protect military and intelligence service personnel in the course of properly conducting their work and so it should be removed as it is open to abuse**. If it is not removed, it should be narrowed in scope, and the Government should provide clarification as to when use of section 13 would or would not be appropriate.

[12] www.publications.parliament.uk/pa/jt200809/jtselect/jtbribe/115/11515.htm

[13] These arguments have also been put forward by Professor Jeremy Hoarder, former Law Commissioner for England and Wales whose article, 'On Her Majesty's Commercial Service: Bribery, Public Officials and the UK Intelligence Services', provides a fuller background to this controversial extension.

2. Is the Bribery Act 2010 being adequately enforced? If not, how could enforcement be improved? Do the Serious Fraud Office and the Crown Prosecution Service have the right approach and the resources they need to investigate and prosecute bribery offences effectively?

2.1. In its 2015 *Exporting Corruption* report,[14] Transparency International assessed the UK to be an **'active enforcer'** of anti-bribery legislation.[15]

2.1.1. From 2014 to 2017, the UK commenced 16 investigations, opened nine cases and concluded 11 cases. Among those concluded by the Serious Fraud Office (SFO)[16] were five major cases with substantial sanctions against five legal persons (Rolls-Royce, Standard Bank, Sweett Group, Smith & Ouzman and one unnamed company – XYZ) and seven natural persons.

2.1.2. The SFO used deferred prosecution agreements (DPAs) to resolve three of the five cases: the first with Standard Bank Plc in 2015 over a payment made to obtain business in Tanzania[17]; the second with an SME anonymised as XYZ Limited ("XYZ") in 2016[18]; and the third (and largest) with Rolls-Royce[19] in 2017 in relation to alleged corrupt payments and failure to prevent bribery in connection with its operations in China, India, Malaysia, Nigeria, Russia and Thailand.

2.1.3. The SFO also convicted F.H. Bertling and six current and former employees in 2017 of conspiracy to make corrupt payments to an agent of the Angolan state oil company, Sonangol, although they have yet to be sentenced.[20]

2.1.4. In addition, the SFO charged four individuals with conspiracy to make corrupt payments to obtain contracts in Iraq for Unaoil's client SBM Offshore.[21] As of March 2016, according to various news sources, the SFO had charged seven people and two companies in connection with alleged offences concerning the supply of trains to the Budapest Metro between 2003 and 2008. The current position of this investigation is unclear.

2.1.5. The SFO and other responsible agencies[22] have a number of ongoing foreign bribery investigations at the pre-charge stage.

2.2. Not all of the enforcement activity identified above is enforcement of the Bribery Act as some cases has involved conduct which predated the act, so the figures relate to enforcement of anti-bribery legislation more widely. Whilst many companies have done much to implement anti-bribery programmes in response to the Bribery Act, enforcement of the act itself has only been observed from 2015 onwards. As such, it has lagged behind companies' efforts to implement contemporary anti-bribery programmes. Whilst we commend the UK's efforts to enforce the legislation, **there remains a relatively small number of prosecutions which have only recently reached a sufficiently high profile** for them to resonate with business. Unless the UK increases its level of enforcement, there is a real risk that businesses will cease to regard the Bribery Act as a serious piece of legislation. 'Compliance fatigue' is a phrase that is frequently used in businesses and if the Bribery Act is not adequately enforced, many businesses will take a commercial decision to reduce their investment in efforts to prevent bribery. This will undo the good that the act has achieved.

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[14] An updated report is due to be published in September 2018.

[15] Transparency International, Exporting Corruption: Progress Report 2015: Assessing Enforcement of the OECD Convention on Combatting Foreign Bribery: www.transparency.org/whatwedo/publication/exporting_corruption_progress_report_2015_assessing_enforcement_of_the_oecd

[16] The SFO is a specialist prosecuting authority tackling the top level of serious or complex fraud, bribery and corruption.

[17] www.sfo.gov.uk/cases/standard-bank-plc/

[18] www.sfo.gov.uk/2016/07/08/sfo-secures-second-dpa/

[19] Specifically Rolls-Royce plc and Rolls-Royce Energy Systems Inc.

[20] www.sfo.gov.uk/2017/09/26/sfo-secures-7-convictions-20m-f-h-bertling-corruption-case/

[21] www.sfo.gov.uk/2017/11/16/two-charged-sfos-unaoil-investigation/; sfo.gov.uk/2017/11/30/two-individuals-charged-sfos-unaoil-investigation/

[22] These include the NCA ICU, The Crown Office and Procurator Fiscal Service (COPFS) and the Financial Conduct Authority.

2.3. **We welcome the recent increase in core funding to the SFO, although we believe it remains under-resourced** compared to its main international peer, the Foreign Corrupt Practices Act Unit in the Criminal Division of the US Department of Justice. We are also concerned about the 'blockbuster' funding model for large and complex cases, which is approved at political level, and thus opens the door for decisions about which cases to be pursued being made on the basis of political considerations. This allows a perceived scope for political interference which could compromise the SFO's discretion in undertaking investigations.

2.3.1. Uncertainty regarding the SFO's future has long been a concern. For now, fears that it may be subsumed into the National Crime Agency have been abated by the announcement of a new National Economic Crime Centre as part of the 2017-2022 Strategy – although **the Crime Centre will be able to task the SFO to carry out investigations and may thus compromise its role as an independent prosecutor**.

2.3.2. Further barriers to effective SFO enforcement include the **lack of dedicated crown courts** to try serious economic crime cases, which, coupled with **underfunding of the court system**, results in long delays. There is also a lack of tools for ensuring that courts can impose a review of compliance procedures within sentencing.

2.3.3. A lack of resources for Britain's police and prosecutors has led the number of white-collar crime prosecutions to fall by almost a third since 2011. Ministry of Justice figures show the number of individuals prosecuted for white-collar crimes has fallen every year since 2011 - from 11,261 in 2011 to 7,786 last year, a drop of 31 per cent. The SFOs remit is to focus on large, complex cases typically involving multinationals, and so funding must be restored to police and CPS to address these lower-level, but still serious, crimes.[23]

2.3.4. Bribery investigations are expensive. **The SFO needs more prosecutors and a bigger budget**, so that the agency, through the successful resolution of cases, can also pay for itself – Rolls-Royce are also reimbursing the SFO's costs in full (c. £13m).

2.4. Some of the Bribery Act prosecutions, including the first three, have been for non-corporate bribes paid within the UK. We believe this is an important and appropriate use of the act. Our own research (Global Corruption Barometer 2016 and Corruption in the UK 2011) indicates that bribe-paying does occur within the UK, although the scale, prevalence and type is broadly unknown. Prosecutions of this nature under the Bribery Act give greater visibility to the UK-based crimes, which helps the Government to design appropriate responses, as outlined in the UK Anti-Corruption Strategy (Section 4.1). Conversely, when UK bribery is not prosecuted (for example, when it is one of a number of offences, and the others are considered easier to prosecute) or is prosecuted using other routes with which law enforcement agencies are more familiar (such as the Fraud Act), this contributes to the Government having an incomplete picture of UK bribe-paying.

RECOMMENDATIONS

2.5. **Strong enforcement is critical to the UK's reputation internationally as a fair place to do business**, and the SFO is essential for maintaining the country's renowned global reputation as a leader in business and in the fight against corruption. TI-UK therefore recommends the continued independence of the SFO, and the continuance of sufficient core funding that enables the SFO to conduct its investigations. It is worthwhile noting that the additional annual funding required of up to £50 million is a fraction of the fines remitted to HMG as a result of SFO-led prosecutions and DPAs.

2.6. TI-UK recommends that, in respect of any enforcement action taken under the Bribery Act:[24]

2.6.1. **Full respect is given to Article 5 of the OECD Convention**, namely that national economic interest, the impact of relations with a foreign state, and the identity of the legal person involved will not influence investigations or prosecutions of any wrongdoing.

[23] Financial Times (citing MoJ figures) 'Fall in fraud prosecutions linked to police and CPS cuts: soaring cyber crime slips through net as SFO and FCA focus on biggest cases', 12 June 2018, www.ft.com/content/4e2bdc4c-6ca2-11e8-852d-d8b934ff5ffa

[24] See multi-stakeholder letter to the Director of the SFO, 11 June 2018: www.docs.wixstatic.com/ugd/54261c_07e69bf713e14298a8fe92b8e599b910.pdf

2.6.2. **Individuals responsible for any wrongdoing, including intermediaries, are actively prosecuted** irrespective of any settlement that may be reached with a company.

2.6.3. No formal or informal immunity prosecution is given as part of any enforcement action either to individuals or to a company and its subsidiaries for any wrongdoing outside of the terms of any enforcement action.

2.6.4. **A settlement is only given where there has been full and extensive cooperation** and where prosecutors have a high degree of certainty that full disclosure of all wrongdoing uncovered by the company and of individuals responsible has been made.

2.6.5. Any decision takes into account how widespread and egregious the nature of the conduct has been, and prosecutors consider the full scale of offending when reaching their decision, including that outside their jurisdictions, to ensure any penalty imposed truly reflects the company's conduct as a whole.

2.6.6. A settlement is given only if the company has committed to full and appropriate remediation, including the appropriate discipline of employees, and genuine change of corporate culture, to ensure that any future reoffending is highly unlikely, with any settlement requiring extensive monitorship to ensure this outcome.

2.6.7. **Any monetary penalty imposed upon the company ensures that the company is deprived of the full benefit of its wrongdoing.**

2.6.8. Compensation is given to countries and communities affected by any wrongdoing, and such **compensation is based on an analysis of the full harm of that wrongdoing** and not just the amount of any bribe payment made. (Such analysis should be subjected to in-depth analysis by the prosecutors and the courts with expert witness sought where appropriate.)

2.6.9. If applicable, affected countries are advised of legal avenues available to them to participate in investigations, and a comprehensive public statement of facts, covering the full range of illegality uncovered, is accompanied by any admission of wrongdoing.

2.6.10. **A greater number of individual prosecutions are necessary, as this works as the most effective form of deterrent.** Companies are able to write off even the largest fines as a 'cost of doing business', the incarceration of individuals can substantially alter the risk-reward ratio for individuals who may pay or condone bribes.

3. Is the statutory guidance on the Bribery Act 2010 sufficient, clear and well-understood by the companies and individuals who have to deal with it? Should alternative approaches be considered?

3.1. **The existing statutory guidance ("Guidance") on the Bribery Act is generally adequate.** When it was first published, TI-UK held misgivings about the Guidance which it made known[25] – particularly as we perceived there to be potential loopholes created by the Guidance. Some of those concerns remain, in particular in relation to the risk of UK companies being able to outsource bribery by building a chain of subcontractors sufficiently long to distance itself from bribe paying. We discuss this particular risk further in our response question 6.

3.2. TI-UK shares the Government's view that, whether an organisation had adequate procedures in place to prevent bribery in the context of a particular prosecution is a matter that can only be resolved by the courts, based on the particular facts and circumstances of the case. However, at present there is insufficient case law to shed light on what constitutes adequate procedures and in the absence of that case law, the Government should provide more guidance to organisations.

3.3. Some of the ways in which the Guidance could be improved are:

3.3.1. In places, the **Guidance assumes a level of understanding of the law which is rarely held by those outside the legal profession**. For example, paragraph 37 of the Ministry of Justice Guidance describes an associated person as "one who 'performs services' for or on behalf of the organisation". Similarly in paragraph 48 of the Guidance states "the common law defence of duress is very likely to be available". This are both legal terms which will require legal advice and explanation to a lay person. We recommend that any clarifications or amendments to the Guidance are drafted in plain English.

3.3.2. On the topic of **'facilitation' payments**, the Guidance rather unhelpfully cross references other guidance from the SFO without clearly signposting where that advice can be found. Today, most jurisdictions prohibit facilitation payments. Only a small number of active enforcement jurisdictions permit such payments, principally the United States. It is our view that the Guidance should do more than acknowledge that they can be an issue. It should provide clear and implementable guidance on how organisations should handle facilitation payments, while maintaining the clear stance that these payments are bribes and are treated as such within the Bribery Act.

3.4. In addition to the statutory guidance, the Government should provide further guidance to organisations on how to mitigate bribery risk:

3.4.1. There is a wide range of guidance on the Bribery Act available from various sources. The Government is currently engaging in some projects to consolidate anti-bribery guidance from various sources and this is a valuable initiative. However, in doing so it risks increasing the number of sources of guidance - further confusing organisations, rather than consolidating and simplifying the process. Accordingly, it is important that the **Government's work in this space focuses clearly on consolidation, pragmatic signposting and simplification**. Additionally, multiple departments are working on anti-bribery and it is not always clear that these departments are working collaboratively or, in fact, with a clear picture of the others' work in the space.

3.4.2. It would be helpful to provide a range of **case studies that were relevant to various businesses, in particular for small to medium enterprises (SMEs)** which typically operate their businesses with less formal and structured policies and procedures and often will be less well set up to manage bribery and corruption risk.

3.4.3. Under the most recent leadership of the SFO, the organisation took a view that its role was to act purely as a prosecutor and not to provide guidance on how the legislation would be enforced or how companies and individuals could act in way that would be deemed acceptable. This approach was a source of considerable frustration for the business community. It remains to be seen what approach the new Director the SFO wishes to take during her tenure. However, the absence of commentary

[25] www.transparency.org/news/pressrelease/20110330_guidance_weakens_bribery_act

and guidance from the SFO has been a significant gap in helping companies make the right decision about how to behave. We recognise that if the SFO were to release guidance under its own banner, this would risk leading to two sets of guidance existing in parallel - at best leading to confusion and at worst with conflicting messaging. Accordingly, **we do not recommend that the SFO release its own guidance. However, we do recommend that the SFO provide significant input into guidance put out but the Ministry of Justice.** We further recommend that this input be updated periodically to draw on the experience of recent investigations and cases the SFO has undertaken.

RECOMMENDATIONS

3.5. In the absence of case law, **the Government should provide clear and concrete examples in the Guidance for companies to measure themselves against**.

3.6. The Government should provide clear and implementable guidance on how organisations should handle **facilitation payments**, while maintaining the clear stance that these payments are bribes and are treated as such within the Bribery Act.

3.7. In addition to the statutory guidance, the Government should provide further guidance to organisations on how to mitigate bribery risk. Both sets of guidance should be drafted in plain English.

4. How have businesses sought to implement compliance programmes which address the six principles set out in the Ministry of Justice's guidance on the Bribery Act 2010? What challenges have businesses faced in seeking to implement their compliance programmes? Are there any areas which have been particularly difficult to address?

4.1. **The Bribery Act has worked well to encourage companies to address the risk of bribery within their operations** and it is clear that many companies have taken steps to improve their corporate governance and risk procedures to minimise bribery risk.

4.2. The 2016 PwC Global Economic Crime Survey[26] presents a positive view of how UK companies are approaching bribery and corruption risk, with **98% of respondents stating their company's management were clear in their condemnation of bribery**, and 94% stating that management at their company would rather a business transaction fail than resort to bribery to secure it.

4.3. The 2018 PwC Global Economic Crime Survey found that **three-quarters of UK respondents said that their organisations had a formal ethics and compliance programme in place** supporting the view of the previous surveys that business have actively been implementing compliance programmes. It should be noted however, that typically the majority of respondents to these surveys are multinationals, with more than 1000 employees. **A repeat of the 2015 UK Government's study into awareness of, and response to, the Bribery Act among SMEs would be a valuable** exercise in order to update the evidence base in this area.[27]

4.4. Since the Bribery Act came into force, we have seen the development of industry norms and codified standards including the ISO37001 anti-bribery standard, which has its origins in British standards[28] and benchmarking tools, including TI-UK's Corporate Anti-Corruption Benchmark.[29] Many companies participate in a variety of fora to share best practice and to discuss developments, challenges and trends. TI-UK's Business Integrity Forum is one of these fora.[30] Increasingly, companies are now looking for ways to engage in collective action to further minimise their exposure to bribery risk and to reduce any unnecessary areas of compliance burden - for example through the Maritime Anti-Corruption Network which aims to address demands for bribes within ports and throughout the maritime industry.[31]

4.5. **Norms have developed within the business community as to what kind of a compliance programme addresses the MOJ's guidance.** These norms have been informed by guidance from professional services consultancies and other available guidance such as that provided by the OECD and TI-UK. Other factors, such the risks that the company is facing and industry and peer behaviour, also influence the development of the individual company's compliance programme.

4.6. TI-UK has extensive engagement with the UK businesses on anti-corruption matters, including through our Business Integrity Forum and other meetings. Through our Corporate Anti-Corruption Benchmark participating companies provide comprehensive information about how they seek to implement compliance programmes which address the six principles in the Ministry of Justice Guidance. Some of the ways businesses are seeking to ensure they prevent bribery, by reference to the Guidance are:

4.1.1. Top Level Commitment: Companies are demonstrating their top level commitment through various approaches; firstly by extensive internal and external communication on the company's approach to ethics and anti-corruption by executive management. This may be in the form of written statements, in-person presentations from the CEO, or videos to the wider corporate group. Secondly companies have developed organisational structures which ensure anti-corruption is not side-lined within the business, for example by ensuring that the individual or team responsible for the Anti-Corruption Programme have a direct reporting line to a member of the Board. Thirdly, governance arrangements are put in place so that the board is accountable both for the content of the anti-corruption programme but also for oversight of the programme.

[26] www.pwc.com/gx/en/economic-crime-survey/pdf/GlobalEconomicCrimeSurvey2016.pdf
[27] www.assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/440661/insight-into-awareness-and-impact-of-the-bribery-act-2010.pdf
[28] www.iso.org/standard/65034.html
[29] www.transparency.org.uk/our-work/business-integrity/corporate-anti-corruption-benchmark/
[30] www.transparency.org.uk/our-work/business-integrity/business-integrity-forum/#.Wz87Y9UlPX4
[31] www.maritime-acn.org/

4.1.2. Risk Assessment: Companies are conducting formal and detailed international corruption risk assessments, on a recurring basis, drawing on both qualitative and quantitative data to build a picture of their risk profile. Sources will include desktop research, interviews with key staff from the board and across a wide range of departments. External perspectives from NGOs, intergovernmental organisations, UK Government and law enforcement are often used to provide additional context. Some companies with extensive bribery risks seek assistance from external risk consultants or legal advisers. The assessments cover key areas of risk for the company including: procurement, sales and marketing, interactions with public officials, political donations and lobbying, sponsorship, donations and community investments, third party and jurisdiction-specific risks.

4.1.3. Training & Communications: Companies are ensuring that once an anti-corruption programme is in place, staff are receiving regular communication and training on it. Sophisticated compliance programmes involve a range of communication media and messages are issued on a regular basis throughout the year. With respect to training, companies are putting in place mandatory training for all relevant employees. In order to ensure training is treated with due seriousness, companies monitor the completion of anti-corruption training. Some companies extend training beyond staff to high risk third parties.

4.1.4. Due Diligence: Companies are putting in place a wide range of due diligence measures on third parties, including due diligence of agents, intermediaries, contractors and suppliers. Sophisticated companies see this as an opportunity to fully understand who they are working with and evaluate their standards on more areas than simply bribery risk – including modern slavery and human rights, financial reliability and litigation risk. Technology is increasingly playing a significant role in due diligence, with companies being able to conduct due diligence research via centralised risk intelligence databases, global public records research and where necessary companies use investigative due diligence techniques, often provided by specialised consultancy firms.

4.7. It is our observation that the area of the Guidance which **businesses find the most challenging to address with confidence is the Principle Six, Monitoring & Review**. This principle advises companies to monitor and evaluate the effectiveness of their bribery prevention procedures and adapt them where necessary. However, there is a lack of strong understanding among companies on how to effectively monitor and review the efficacy of their programmes.

4.7.1. The Government should provide further guidance to all companies on what effective monitoring and review of an anti-corruption programme looks like. For example, companies that participate in TI-UK's Corporate Anti-Corruption Benchmark consider that participation as activity within monitoring and review.

RECOMMENDATIONS

4.8. The Government should continue to **collate and promote the most effective initiatives, online guidance and fora** which allow companies to understand and share anti-corruption best practice, as it is currently doing as part of DfID's Business Integrity Initiative. The Initiative should particularly highlight **resources aimed at SMEs** who are less likely to be able to afford external advice. If no suitable guidance is available it should be created.

4.9. The Government should repeat its 2015 study into awareness of, and response to, the Bribery Act among SMEs in order to update the evidence base in this area.[32]

4.10. The Government should provide further guidance to all companies on what they can do to effectively monitor and review their anti-corruption programme.

[32] www.assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/440661/insight-into-awareness-and-impact-of-the-bribery-act-2010.pdf

5. What impact has the Bribery Act 2010 had on small and medium enterprises (SMEs) in particular?

5.1. SMEs may be disadvantaged under the Bribery Act as the underlying doctrine of corporate liability which it relies on theoretically allows **SMEs to be prosecuted more easily than large corporations**. We argue, as the SFO itself has done, that the 'identification doctrine' should be abandoned as the guiding principle of corporate liability.

5.1.1. The identification doctrine holds that for a company to be guilty of bribery it must be established that someone who can be described as its "directing mind and will" was involved in committing the bribery.

5.1.2. The doctrine makes it very difficult to prosecute large companies for bribery (as opposed to the lesser crime of failure to prevent bribery), as it requires evidence that a very senior person was complicit in the illegal activity. The principle can incentivise senior members of a corporation to turn a blind eye to criminal acts committed by its representatives, insulating the company (and themselves) from liability. The result is an unfair situation in which the 'low-hanging fruit' of small companies, with simpler corporate structures, are more easily targeted.

5.1.3. Problems with the identification doctrine have been highlighted extensively, and for several decades, by multiple authorities including the Law Commission, OECD, SFO, and the Government itself.

5.1.4. We argue that the UK ought to follow the US approach to corporate liability, in which a corporation is liable for the acts or omissions of an employee which take place in the course of that employee's employment (vicarious liability). In our view, this new statutory form of vicarious liability should retain the 'adequate procedures' defence in order to incentivise prevention of bribery as part of corporate good governance.

5.2. There is evidence that **levels of awareness and understanding of the Bribery Act among SMEs may be low**.

5.2.1. The single most important issue to emerge from both a 2015 informal consultation with business and a survey published by the Government in July 2015 is the need to raise awareness on the Bribery Act among SMEs.

5.2.2. The 2015 survey indicated that a third of SMEs had not heard of the Bribery Act. Of those that had heard of it, 74% were not aware of the Ministry of Justice Guidance to help corporations understand the procedures they need in place to prevent persons associated with them committing an offence.[33]

5.3. **Multinationals and governments should also be doing more to support SMEs in their implementation of programmes by providing support and guidance.** There is also a role for multinationals and governments to address the demands for bribes that SMEs may face, through collective action, an approach which SMEs themselves are typically not well placed to attempt due to their relative lack of influence.

RECOMMENDATIONS

5.4. The Government should devote more time, energy and resources on **awareness-raising of the Bribery Act with SMEs**.

5.5. The Government should engage in **collective action** with multinationals to address the demand side of corruption that SMEs face.

[33] www.assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/440661/insight-into-awareness-and-impact-of-the-bribery-act-2010.pdf

6. Is the Act having unintended consequences?

6.1. Whilst on the whole we are of the view that the Bribery Act is having an impact in the way it was intended, there are two areas in which some companies are taking a legalistic approach to the act rather than embracing its spirit:

Tick-box compliance

6.2. The Bribery Act was intended to minimise bribery by deterring and punishing bribery and encouraging strong anti-corruption programmes within the UK private sector. The 'adequate procedures' defence was intended to ensure that companies put in place an anti-corruption programme appropriate for their level of risk. The Bribery Act has however had the unintended consequence of **some companies taking a 'tick-box' approach to compliance**; whereby procedures put in place are minimal, perfunctory and not tailored to the company's risks. In this way some companies hope that, should a bribery incident occur, they will be covered under the 'adequate procedures' defence. Such an approach follows the letter of the law but not the spirit.[34] The prevalence of such an approach is unknown, particularly among SMEs, and as stated in question 4, it is advisable the Government repeat its 2015 study into awareness of, and response to, the Bribery Act among SMEs in order to update the evidence base in this area.[35]

6.3. A corporate culture in which it is clearly understood by all employees that there is a zero tolerance policy towards bribery is fundamental to an effective anti-bribery programme. Many companies that have been investigated and prosecuted for bribery have had in place tick-box systems, but these were inadequate and their systems not supported by a culture and tone from the top or values embedded in the company. It is important that in any future communications on the Bribery Act the Government emphasises the insufficiency of anything other than **a comprehensive, risk-based anti-corruption programme which demonstrates genuine intent from the top level downwards** to operate a zero tolerance policy to bribery.

Pushing bribery down the supply chain

6.4. The Guidance makes it clear that the definition of 'associated person' in the Bribery Act is considered only to apply to 'first generation' associated persons, that is, those who are performing services for or on behalf of the company. There is, therefore, a **risk of companies setting up structures where they can distance themselves from criminal behaviour** by working with a first layer of associated persons who then use a second or further layer of other third parties to pay or receive bribes. Indeed, the Guidance as it is worded almost seems to make allowances for companies to set up such structure stating that *"an organisation is likely only to exercise control over its relationship with its contractual counterparty [and] may only know the identity of its contractual counterparty."* This is an irresponsible way for an organisation to manage its supply chain from an ethical, and in many cases commercial, standpoint.

6.5. The situation is **analogous to modern slavery in supply chains** where global trends towards outsourcing and complex procurement processes are pushing risk further down supply chains, making it easy for human rights abuses to remain hidden, and easier for companies at the top of the chain to avoid accountability.[36] The Government should monitor this 'distancing' behaviour as it relates to bribery, as a potential unintended consequence.

RECOMMENDATIONS

6.1. **The Government should conduct research into the prevalence of companies using a 'tick-box' approach to bribery** for example by following our recommendation (made at 4.9) to repeat, and further develop, its 2015

[34] Such an approach would anyway be seen through by a sophisticated prosecutor, as happened in the SFO's prosecution of Skansen Interiors: www.dlapiper.com/en/uk/insights/publications/2018/03/taking-a-hard-line/

[35] www.assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/440661/insight-into-awareness-and-impact-of-the-bribery-act-2010.pdf

[36] Building A Fairer System: Tackling Modern Slavery In Construction Supply Chains, Chartered Institute of Building, 2016

study into awareness of, and response to, the Bribery Act among SMEs. In any future communications the Government should also emphasise the insufficiency of a tick-box approach.

6.2. The Government should monitor company behaviour to **ensure that companies are not engaging in bribery indirectly through third parties beyond those 'first generation' associated persons** already identified in the Bribery Act who are performing services for or on behalf of the company.

7. Has the introduction of Deferred Prosecution Agreements (DPAs) been a positive development in relation to offences under the Bribery Act 2010? Have DPAs been used appropriately and consistently? Has their use reduced the likelihood that culpable individuals will be prosecuted for offences under the Act?

7.1. TI-UK **supports the principle of DPAs** on the basis that they are a useful additional tool for UK prosecutors provided that they do not become a soft option for those guilty of corruption. However, we have concerns about some aspects of how DPAs are currently being used and how settlement amounts are being calculated.

Calculation of settlement amounts

7.2. There is **a very real danger that a discounted DPA settlement will, perversely, encourage corrupt acts if companies come to see the fines as a calculable cost of doing business** that can be factored into a risk-reward analysis. We are concerned by the fact that the DPA discounting threshold has been unilaterally reduced from 30% to 50% without any clear rationale and have further concerns that there will be ever-increasing discounting.

7.2.1. While we understand that there needs to be some sense for a company that there is a net advantage to proceeding with a DPA, there is also a danger that introducing both certainty and leniency pushes companies into the territory of a risk-reward calculation.

7.2.2. Ever-increasing discounting would pitch the DPA as a tool for transgressing – but cooperative – corporates to achieve easy and relatively painless closure on difficult issues, rather than fulfilling the intentions of the legislation.

7.3. The calculation of harm and benefit for DPAs are key to the size of the settlement and therefore the effectiveness of the deterrent. The size of the fine – which is the DPA's principle means of punishment and deterrent – flows from the calculations of the advantage gained. **Without transparency over how the advantage has been calculated, it is not possible to assess whether a sufficient fine has been applied.**

7.4. We perceive a **weakness in the calculation of harm and benefit** when it comes to assessing the impact of debarment or exclusion from public contracting. It is important that prosecuting bodies understand and properly scrutinise the financial impact of prosecution to a company. If they do not do so, there is a risk that companies may exaggerate the potential harm of debarment or exclusion from public contracting in order to minimise the size of the financial penalty and to substantiate the public interest in a DPA over a prosecution. For example, in the recent Rolls-Royce DPA, the financial 'impact of prosecution' submissions were not scrutinised. This opens up the possibility that other companies who find themselves the subject of an investigation could simply present a 'best-guess' estimate of future trade losses in order to avoid prosecution. There needs to be more transparency around how the anticipated financial consequences to a company are assessed in order to provide public confidence that they have been properly assessed.[37]

7.5. An additional question to be asked is: should the SFO and the UK Courts actively be helping a company which has engaged in corruption avoid debarment? After all, the purpose of debarment systems is to protect public spending from companies with a track record of corrupt activity. Indeed the UK Government has been at the front of efforts during the UK Anti-Corruption Summit to encourage other governments to implement debarment systems.[38]

Procedural Concerns

7.6. It is our view that the **DPA process is unnecessarily and unhelpfully opaque**.

7.6.1. We do not agree with the SFO's previous argument that revealing certain details within the DPA documents – whether individuals are being investigated, the approximate number of individuals,

[37] SFO Settlement: Did Rolls Royce exaggerate the impact of debarment to avoid a criminal prosecution? www.transparency.org.uk/our-work/business-integrity/rolls-royce-case-dpas/#.WzoB39JKhRY and A Failure of Nerve: the SFO's Settlement with Rolls Royce, www.cw-uk.org/single-post/2017/01/19/A-Failure-of-Nerve-The-SFO%E2%80%99s-Settlement-with-Rolls-Royce

[38] The Lawyer, 'Is the risk of debarment a legitimate defence?' Eva Anderson, Senior Legal Officer Transparency International

whether they are company employees and/or external parties and the level of seniority – would compromise investigations.

Clearly some details would compromise an investigation and should not be revealed. However it is not uncommon during other types of criminal investigations for certain details to be revealed. For example, the number of suspects under investigation to be published along with their sex, age and location.

7.7. We are concerned that the use of DPAs as a 'disposal decision', whereby the case is resolved without prosecution, will reduce the likelihood of individual accountability (and therefore deterrence). **The concern is that DPAs will be used as an almost automatic way of getting cases resolved off the books, which will lead to a fine for the company but will not result in individual prosecutions.**

7.7.1. Taking the corruption offences as a whole, it is only possible to assess whether the interests of justice have been served when both companies and individuals have been punished.

7.7.2. It is clear that if corruption has occurred, individuals must be involved, both actively and complicity. Punishing senior individuals is the best possible deterrent to others.

7.8. We have **concerns surrounding the independence of the investigative and prosecutorial decision-making process** of the SFO. For example, the NCA has the ability to task the SFO to investigate cases, which seems to undermine its statutory independence from any other agency, and which is vital to its work. There are also concerns about reported instances of political interference with charging decisions.[39] It is central to the continuing importance of the SFO's work that it operates with maximum independence.

RECOMMENDATIONS

7.9. **Individual prosecutions must be pursued** irrespective of any decision to award a DPA.

7.10. **Victim impact should be a core consideration** in the decision to award a DPA both for the prosecutor and the court.

7.11. **Transparency and independence in investigative and prosecutorial decision-making must be enhanced** when a DPA is under consideration to ensure confidence in the administration of justice.

7.12. The calculations in several areas, which affect the assessments of both the seriousness of the crime and the penalty, should be significantly more **transparent**.

7.13. To maintain public confidence in the independence of investigative/prosecutorial decision-making, **greater transparency is needed during the investigative phase**.

[39] www.independent.co.uk/news/uk/politics/court-condemns-blair-for-halting-saudi-arms-inquiry-807793.html

8. How does the Bribery Act 2010 compare with anti-corruption legislation in other countries? Are there lessons which could be learned from other countries?

8.1. Transparency International does not have current comparative data on the relative merits of new anti-corruption legislation. Two broad points can however be made:

8.1.1. **Since the introduction of the Bribery Act, a raft of international laws have been put in place broadly modelled on the act.** This has effectively established an *international norm* which companies cannot now easily evade. Accordingly, any attempt to water down the Bribery Act, would not only be regressive, but would not be effective in lessening the requirements placed on companies operating or exporting abroad, as legislation and enforcement is already tightening across the globe. The UK has led the way, and the rest of the world has followed, and it is now too late to attempt to lower standards in a bid to lessen compliance requirements on companies.

8.1.2. Among those countries with comparable legislation, it is ***enforcement*** **that is the key differentiator of countries' approaches to bribery and corruption**. Without an effective and well-resourced enforcement agency, legislation in itself will not create change.

8.2. The Bribery Act is a robust piece of anti-bribery legislation and a strong model for the 'failure to prevent' approach to corporate offending. It does not however cover the spate of corruption-related wrongdoing, and is not a substitute for legislation that enshrines such wrongdoing into criminal law. Such wrongdoing includes other economic crimes, including money laundering, and the UK should take the opportunity to **broaden its 'failure to prevent' approach** to cover these crimes, as it has done with tax evasion, and to bring it in line with developments in Europe:

8.2.1. The European Parliament has proposed a directive on countering money laundering by criminal law, which lays out corporate liability standards ensuring legal persons can be held accountable for "lack of supervision or control".[40]

8.2.2. Although the UK has committed to opening a consultation on corporate liability for economic crime[41], it has yet to do so, having only opened a call for evidence.[42] This call for evidence closed on the 31 March 2017 and has yet to publish its results.

8.2.3. The UK has never prosecuted any company or bank for money laundering despite the NCA estimating that "many hundreds of billions of pounds" are laundered through UK banks each year.[43]

RECOMMENDATIONS

8.3. The Government should **extend the 'failure to prevent' approach to corporate offending** outlined in Section 7 of the Bribery Act to other **economic crimes, including money laundering**.

9. What impact has the Bribery Act 2010 had on UK businesses and individuals operating abroad?

9.1. Parts of the private sector have argued that UK business is disadvantaged by the Bribery Act. In July 2015, the National Security Council and the Export Implementation Framework ordered an informal consultation with business groups as to whether the Bribery Act was considered 'a problem' and whether it could be made 'simpler' and 'less costly' to follow. **The message that the Government received from large parts of the business community was that there was no perceived problem with the Bribery Act**.

9.2. It is possible that with **Brexit**, concerns may be raised again and gain traction as to whether the Bribery Act disadvantages UK business. The UK will lose automatic access to EU databases and joint investigations with Brexit and this could be seriously catastrophic for the fight against corruption and economic crime.[44]

9.3. The UK Government needs to send a strong signal that the Bribery Act is not up for negotiation in a post-Brexit world and that the UK intends to meet its international commitments with regard to having the right legal instruments to fight corruption. With other countries putting in place new anti-corruption legislation, such as France, Germany and Ireland, **any move to weaken the Bribery Act would also undermine the emerging global process of levelling up anti-corruption standards.** A weakened Bribery Act in fact would put the UK behind emerging global standards for anti-corruption, effectively giving UK companies a competitive disadvantage compared to companies in those countries that have enhanced their legislation.

9.4. TI-UK consults widely in order to inform our advocacy positions with heads of compliance and general counsel at multinational UK companies. Larger companies recognise that compliance requirements will not go backwards or be reduced. On the question of whether the Bribery Act makes companies less competitive, a General Counsel from a multinational oil company stated that:

> "The Bribery Act has worked well; it has encouraged companies to review their systems and make sure staff aren't paying bribes. It has had the benefit that companies have really raised their game to combat bribery. It is a very poor argument to say 'if we weren't allowed to commit these crimes, we'd have to limit ourselves."

9.5. **Reputable and ethical companies do not propose the argument that the Bribery Act is limiting their business abroad since ultimately complying with the law protects corporate reputation and supports a sustainable business model.** Ultimately reputable companies believe that they should be acting responsibly and the Bribery Act helps to encourage this. There are concerns around whether the Bribery Act is deterring **SMEs** from exporting to higher risk countries. The 2015 Government study in to insight and awareness of the act among SMEs emphasised, however, that the Bribery Act was not generally deterring export activities:

> **"The majority of SMEs aware of the Bribery Act (89%) felt that the Act had had no impact at all on their ability or plans to export**. Furthermore, when prompted as to whether they had any other concerns or problems related to the Bribery Act, nine in ten (90%) reported they had no specific concerns or problems."[45]

9.6. The report summarised that 'SMEs are generally taking a proportionate, pragmatic and low-cost approach to winning business without bribery.' The 2015 study is now three years old, but it is likely that with increases resources aimed at SMEs and general embedding of the Bribery Act, SMEs are likely to be more familiar than ever with the legislation and understand how to export alongside it.

RECOMMENDATIONS

9.7. The Government **should under no circumstance water down the Bribery Act or its corresponding Guidance**. A weakened Bribery Act in fact would put the UK behind emerging global standards for anti-corruption, effectively giving UK companies a competitive disadvantage compared to companies in those countries that have enhanced their legislation.

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[44] www.europa.eu/rapid/press-release_SPEECH-18-4213_en.htm

[45] www.assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/440661/insight-into-awareness-and-impact-of-the-bribery-act-2010.pdf

ABOUT TRANSPARENCY INTERNATIONAL UK

Transparency International (TI) is the world's leading non-governmental anti-corruption organisation. With more than 100 chapters worldwide, TI has extensive global expertise and understanding of corruption.

Transparency International UK (TI-UK) is the UK chapter of TI. We raise awareness about corruption; advocate legal and regulatory reform at national and international levels; design practical tools for institutions, individuals and companies wishing to combat corruption; and act as a leading centre of anti-corruption expertise in the UK.

We work in the UK and overseas, challenging corruption within politics, public institutions, and the private sector, and campaign to prevent the UK acting as a safe haven for corrupt capital. On behalf of the global Transparency International movement, we work to reduce corruption in the high risk areas of Defence & Security and Pharmaceuticals & Healthcare.

We are independent, non-political, and base our advocacy on robust research.

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