



TRUST AND BUSINESS

Corporate Governance and Business Integrity

A Stocktaking of Corporate Practices

CORPORATE GOVERNANCE AND BUSINESS INTEGRITY

A Stocktaking of Corporate Practices

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Foreword

This report represents the results of a stocktaking exercise conducted under the OECD Trust and Business Project (TNB Project). The report: i) highlights the extent to which companies (and especially their boards and executive management) are organising themselves in order to integrate considerations of business integrity into their corporate governance frameworks, strategy, and operations; and ii) assesses what factors may influence business decisions to implement business integrity measures, including decisions requiring board-level consideration and approval. The report concludes with a summary of these findings.

While specific integrity risks are addressed in this report, the focus is on the role of the board and senior management and the extent to which business integrity considerations are integrated into their overall oversight of a corporation's strategy and operations.

This report was prepared by the Secretariat to the OECD Corporate Governance Committee on the basis of research undertaken from January to April 2015 and a literature review, and was developed in co-operation with the Secretariat of several other OECD bodies charged with overseeing implementation of a number of OECD recommendations and guidelines relevant to business integrity. These include the Working Party on State Ownership and Privatisation Practices, the Competition Committee, the Working Party on Responsible Business Conduct, the Working Group on Bribery in International Business Transactions, and the Committee on Financial Markets, all from the Directorate for Financial and Enterprise Affairs. The report was drafted by Mary Crane-Charef, Leah Ambler and Héctor Lehuedé, under the supervision of Mats Isaksson and Pierre Poret in the OECD Directorate for Financial and Enterprise Affairs.

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Acronyms and abbreviations

Business integrity policies	Business integrity policies, as defined for the purposes of this report, include internal company programmes, functions, people, processes or controls that seek to prevent, detect and/or address Serious Corporate Misconduct.
CCO	Chief Compliance Officer
CEO	Chief Executive Officer/President/Managing Director
Compliance	In the context of this report, generally refers to the functions, resources, and procedures implemented by a company to comply with the laws and regulations applicable to it. In general, the compliance function for each risk area could include due diligence and risk assessment/risk mitigation, audit, and internal investigations.
Defence	The case presented by or on behalf of the party subject to criminal, administrative or civil enforcement action
Enforcement (action)	The act of compelling observance of or compliance with a law, rule or obligation. In the context of this paper, investigating, prosecuting and punishing Serious Corporate Misconduct.
RBC	Responsible business conduct
SMEs	Small and medium enterprises are identified according to the EU Commission Recommendation 2003//EC, which defines SMEs as businesses with less than 250 employees.
SOE	A state-owned or state-controlled enterprise is one in which the government is the ultimate beneficiary owner of the majority of shares, or otherwise exercises an equivalent degree of control. An equivalent degree of control would occur, for example, in cases where legal stipulations or corporate articles of association allow the government to appoint a majority of the enterprise's administrative, managerial or supervisory body (board).
Self-report/ voluntarily disclosure	The practice, in some jurisdictions, of disclosing to law enforcement authorities, involvement in misconduct or criminal activity. Voluntary disclosers are usually made with a view to obtain leniency, plea negotiation or a settlement.
Serious corporate misconduct	Serious corporate misconduct, as defined for the purposes of this report and the OECD Survey on Business Integrity and Corporate Governance, relates to corporate conduct, whether directly or through business relationships, including in the supply chain, that violates national or international laws and regulations, including but not limited to anti-trust/competition, bribery of foreign public officials, private sector bribery, cybercrime, data protection and privacy, environment, fraud, human rights, industrial relations and labour, intellectual property, money-laundering, terrorism and proliferation-financing, product/service safety, sanctions and export controls, securities and finance, sustainability, tax and workplace safety.

Preface

This report is about better corporate governance as a way to prevent corporate misconduct and to rebuild trust in private business. It is a timely response to a succession of disturbing corporate scandals to which no industry or country appears to be immune. While these issues certainly have an ethical dimension they are also hard-wired to the very functioning of our economies. The purpose of corporate governance is precisely to create an environment of trust, transparency and accountability necessary for obtaining long-term investment, financial stability and sustainable growth. If nothing is done, the very fabric and foundation of doing business in an effective and sustainable fashion is at risk.

The report underscores that companies that seriously want to live up to their good intentions and public statements must support these ambitions with a well-defined internal structure of responsibilities, accountability and reporting. It also points to the important role of the board of directors and senior managers to ensure that these structures and practices remain updated and are effectively implemented.

The main building blocks of such a framework are laid down in the recently updated G20/OECD Principles of Corporate Governance. But the responsibility for preventing the next corporate scandal lies not only with policymakers and regulators; it is to a large extent the duty and in the interest of business itself. Boards and senior managers are also best placed to ensure that the right actions are taken on the ground, using incentives and monitoring to build a culture of doing business with integrity. This is why this report was developed with inputs from leading companies who embraced our invitation to identify and share their experiences.

Our results show that even top rank firms struggle with effective implementation and achieving the desired outcomes may take years of dedicated work. Improving corporate governance is a journey and one important condition for success is the ability to stay on course for the long run. This report makes the point that, for business leaders who are entrusted with the future of their firms and the welfare of their stakeholders, continuing with “business as usual” is not an option.

The OECD Trust and Business Project and this exploratory report are dedicated to supporting these efforts with a view to averting the kind of corporate misconduct that has eroded public trust. This is a crucial task that concerns firms, authorities, stakeholders and organisations such as the OECD. The public sector cannot legislate good behaviour, but it can help to encourage corporate actions with smart regulation and policies. Our ambition is to take this project forward and contribute to this important challenge.



Angel Gurría
OECD Secretary-General

Executive summary

The OECD is home to some of the most stringent global standards and recommendations for business integrity, particularly in anti-corruption, competition and other areas of responsible business conduct. Launched in January 2015, the OECD Trust and Business Project (TNB Project) aims to bridge the gap between these OECD standards for business integrity and their implementation in practice. The TNB Project is anchored in the G20/OECD Principles of Corporate Governance (the Principles) that put forward the expectation for the board and executive management on setting the ethical tone in a company and oversight of its business integrity policies.

The primary question the TNB Project attempts to address, in terms of bridging the implementation gap, is how—in practical terms using the Principles—the board and senior management can effectively discharge their corporate leadership responsibilities vis-à-vis standards and recommendations for business integrity. The broadest among the OECD standards and recommendations on business integrity is the OECD Guidelines for Multinational Enterprises (the OECD MNE Guidelines), which provide principles and standards for companies to ensure responsible business conduct in areas such as employment and industrial relations, human rights, environment, information disclosure, combating bribery, consumer interests, science and technology, competition and taxation.

It should be noted that the terms business integrity and responsible business conduct (RBC) are used interchangeably in this document although an argument can be made that these terms have different scope, as integrity is perceived to focus more on risk while RBC is seen as inviting companies to become actors of positive change, emphasising the opportunities, rather than the risks. For the sake of this report that aims to understand how companies can better implement the commitments to integrity and RBC adopted by their boards and senior managers (regardless if they adopted them thinking of risks or opportunities) the distinction has been deemed unnecessary.

This stocktaking exercise is intended to drill down into specific, principally economic and financial, areas of corporate misconduct that are covered in the OECD MNE Guidelines and other more specific instruments—including the OECD Anti-Bribery Convention and OECD anti-cartel recommendations—and examine how these areas of misconduct can be more effectively prevented using the recommendations offered by the Principles.

The results provide a snapshot, based on company input, of current practices and challenges companies face implementing these integrity considerations into their corporate governance frameworks, strategy, and operations, from the perspective of the board and senior management. The report also highlights drivers of effective implementation of business integrity standards in companies that have taken steps to integrate these considerations into how they do business.

The information presented in this report derives from the 2015 OECD Survey on Business Integrity and Corporate Governance, individual company interviews and a literature review (for more methodological information, please see Annex A). It does not purport to paint a complete picture of the state of implementation of business integrity standards but rather to provide a preliminary evidence-based indication, with a strong focus on the practical aspects of doing business with integrity. The

respondent companies were mainly large, privately-owned or publicly listed multinationals and hence the data in this report is not representative of the specific circumstances of SMEs and SOEs.

The findings in this report suggest corporate leadership is taking integrity more seriously after the financial crisis. Eighty percent of survey respondents indicated that their company's board was strongly involved in the design and implementation of their company's integrity policy; almost half indicated that the policy was established following a decision by the board. Increased prioritisation of integrity may well have led to an increase in investment in integrity: almost 20% of respondents considered integrity budgets to have increased from 25% to more than 50% over the last 5 years. The way that such budget use is perceived speaks volumes about a company's commitment to promoting a culture of integrity, and the results show that 60% of respondents characterised the use of such budget as an investment, as opposed to an expense. At the same time, some companies are exploring cost-efficient ways to a more holistic approach to the business integrity function, to address breakdowns in communication between the various independent business integrity areas in the company.

While the commitment of the board and senior management on "setting the tone from the top" is vital to a corporate culture of integrity, it also needs to be underpinned by effective direction and oversight. The processes and rules a board established to ensure corporate integrity reporting and oversight can be indicative of its level of engagement in and commitment to a culture of integrity. Almost two-thirds of company respondents to the TNB Survey indicated that their company's board had mandated a specialised sub-committee to oversee these issues. Most commonly this role was assumed by the pre-existing audit committee (57%), although some companies had created a dedicated compliance committee (22%) and, in some cases, oversight was shared between various board sub-committees. The structure, scope of responsibility and makeup of these sub-committees influence the quality of the oversight they undertake. This leads to how informed and aware various board members are of the importance of effective business integrity policies to the objectives of the company. Fewer than half the respondents to the TNB Survey indicated that the board had received in-person training on the company's business integrity policy and 39% had received on-line training. This could point towards a knowledge gap and potential barrier to effective oversight and direction of business integrity policies, but it is certainly not conclusive.

These findings also consider the actual impact of business integrity on broader corporate decisions. Approximately two-thirds of respondents indicated that the board or senior management had either severed a relationship with a business partner or decided to substantially revise a business project because of the risks of serious corporate misconduct involved. When considering the factors that drive increased implementation of business integrity standards, 47% of respondents indicated that the risk of reputational damage was the main reason for seeking to detect, prevent and address misconduct. These results suggest a balance between integrity and reputation, with financial bottom line.

With the aim of promoting more effective implementation of OECD standards and recommendations, the TNB Project also sought to develop a greater understanding of the various factors that drive business integrity, without purporting to endorse them. The drivers of integrity were grouped into three main categories: internal and external factors and government actions. With varying strength and applying in different manners across jurisdictions and even within the same jurisdictions for different types of misconduct, they all shape corporate behaviour and could be further used to help steer companies in the right direction.

Chapter 1

Introduction

This chapter presents the OECD Trust and Business Project (TNB Project) and delineates the perspective, ambition and scope of the report.

“The prevention of business crime should be at the centre of corporate governance.”

Angel Gurría
OECD Secretary-General

2 December 2014

The TNB Project is a multifaceted and multi-stakeholder OECD initiative that aims to bridge the gap between OECD business standards and their implementation, in order to promote business integrity. The Project aims to accomplish this by encouraging companies to adopt effective, more integrated business integrity policies rooted in efficient corporate governance frameworks, in order to help prevent a corporation from being used for, or engaging in, serious corporate misconduct. The TNB Project does not seek to create new standards or to duplicate existing ones. Rather, it serves as an opportunity for dialogue between governments, businesses, and other relevant stakeholders who seek to promote actionable and effective measures and best practices for business integrity, including those set forth in OECD instruments.

The Project's approach is grounded in the G20/OECD Principles of Corporate Governance (the Principles).¹ The Principles include specific recommendations on the role of the board and executive management in setting strategies and risk appetite and translate them into actions that lead to the success of the business, with a view to supporting economic efficiency, sustainable growth and financial stability. For this, their role in setting the ethical tone in a company and oversight of its business integrity policies is key.

Recognising how important it is to “set the tone from the top”, it is vital for a credible corporate culture of integrity to be underpinned by effective direction, processes, control and reporting. In trying to address the business integrity implementation gap, the TNB Project seeks to examine how—in practical terms and using the Principles' recommendations—boards and senior management can effectively ensure their enterprises conduct business with integrity. In this regard, the Project's findings presented here highlight ways in which boards and senior management discharge this responsibility, and what motivates corporate decision-makers to incorporate integrity considerations into their decision-making and concrete actions.

A good number of these business integrity standards are housed at the OECD. These include the OECD Guidelines for Multinational Enterprises (the OECD MNE Guidelines),² which provide a comprehensive framework for responsible business conduct. The OECD MNE Guidelines call on enterprises to support and uphold good corporate governance principles and develop and apply good corporate governance practices, including throughout enterprise groups.³ They also include reference to a

^{1.} First released in May 1999 and revised in 2004 and 2015, the G20/OECD Principles of Corporate Governance are one of the 12 key standards for international financial stability of the Financial Stability Board and form the basis for the corporate governance component of the Report on the Observance of Standards and Codes of the World Bank Group.

^{2.} The OECD MNE Guidelines are recommendations addressed by governments to multinational enterprises. They provide voluntary principles and standards for responsible business conduct consistent with applicable laws and internationally recognised standards.

^{3.} OECD (2011), See Chapter II.6 of the OECD MNE Guidelines and related commentaries 7-12.

number of additional OECD standards on business integrity⁴ including the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the OECD Anti-Bribery Convention),⁵ implemented via Parties' national laws criminalising foreign bribery, and the recommendations included in the Recommendation of the Council concerning Effective Action against Hard Core Cartels⁶ and the Recommendation of the Council on Fighting Bid Rigging in Public Procurement.⁷

For the purposes of this initial paper, the Project has focused on principally economic and financial areas of corporate misconduct (including anti-trust, anti-corruption and other predominantly economic aspects of responsible business conduct) addressed by the OECD standards described more fully in Annex B. Future work on issues discussed in this paper could expand on the scope of risks and standards addressed here.⁸

4. Whether they are adopted in the shape of legal instruments or not.

5. The OECD Anti-Bribery Convention establishes legally binding obligations for its parties to criminalise bribery of foreign public officials in international business transactions. It is the first and only international anti-corruption instrument focused only on the 'supply side' of the bribery transaction.

6. The Recommendation of the Council concerning Effective Action against Hard Core Cartels is available at www.oecd.org/daf/competition/recommendationconcerningeffectiveactionagainsthardcorecartels.htm.

7. The Recommendation of the Council on Fighting Bid Rigging in Public Procurement is available at www.oecd.org/daf/competition/oecdrecommendationonfightingbidrigginginpublicprocurement.htm.

8. Annex B also references examples of business integrity standards implemented at a national level, which include specific recommendations to companies' boards and executive management.

Chapter 2

The need to focus on business integrity

This chapter describes the rationale for the need to address corporate misconduct. It takes into account the role of business in our economies and the social and economic costs of misbehaviour, particularly in terms of the eroding of public trust. It also presents the compelling business case for investing in integrity and advocates for bridging the implementation gap.

2.1. The importance of business integrity to today's economy

The OECD was established more than 50 years ago on the belief that economic development and prosperity were the keys to preserving citizens' liberty and general well-being.⁹ The founding Members recognised that economic growth should be sustainable and bring the greatest amount of good to the greatest number of people. They agreed this required governments' commitment to work, both at home and abroad, to create the conditions for free, fair, and open markets. But this also entails that those who operate in such markets play by the rules.

Many of the standards, practices and recommendations developed at the OECD to promote fair and open markets have been reflected in national laws and regulations. However, implementation of these frameworks applicable to business conduct, in many respects, remains a challenge. Given the role business plays in everyday citizens' lives, it is integral to the OECD's goal of achieving a stronger, cleaner and fairer world economy that it focuses on corporate behaviour, as it is doing in a number of OECD Committees, including the OECD Corporate Governance Committee, the Working Party on State Ownership and Privatisation Practices, the Competition Committee, the Working Party on Responsible Business Conduct, the Working Group on Bribery in International Business Transactions, and the Committee on Financial Markets.

The importance of business integrity has never been as clear as it is in today's hyper-connected world economy. In the last half century, globalisation has resulted in significant positive impacts, including higher productivity and efficiency, increased average incomes, more competition and a greater variety of goods and services.¹⁰ The extent to which businesses are operating across borders is also increasing at an exponential rate. The share of trade in global GDP has tripled since 1950, and the level of outward FDI relative to GDP in OECD countries has quadrupled since the early 1970s. Most citizens live now in a global market where the level of activity generated by global businesses is unprecedented. In 1980, the world's 1 000 largest publicly listed companies had a total market capitalisation of USD 900 billion (equivalent to USD 2.4 trillion in 2012 dollars). By 2012, their market capitalisation had risen to USD 28 trillion.¹¹ A 2014 business survey shows that the top 100 listed companies have reached a

^{9.} Preamble to the Convention on the Organisation for Economic Co-operation and Development, 1960, available at www.oecd.org/general/conventionontheorganisationforeconomicco-operationanddevelopment.htm.

^{10.} OECD 2010, OECD Economic Globalisation Indicators, OECD Publishing, available at www.oecd.org/sti/ind/measuringglobalisationoecdeconomicglobalisationindicators2010.htm.

^{11.} See Serafeim, George, *The Role of the Corporation in Society: An Alternative View and Opportunities for Future Research* (May 27, 2013), Harvard Business School, available at <http://ssrn.com/abstract=2270579>.

combined market capitalisation of more than USD 15 trillion.¹² Many multinational enterprises' turnovers are now larger than countries' GDPs.

These figures indicate that many global companies have gained the capacity —and many are already showing a willingness— to play a positive role in efforts to address global challenges and “megatrends”. These include the challenge of providing basic services like health and housing to a growing population; addressing climate change and meeting basic human needs for food, water, and energy; or tapping into opportunities represented by “big data” and technology.¹³ But as companies can use their increasing potential to generate wealth, jobs and improve our world, serious corporate misconduct undertaken by a few may also cause negative externalities.¹⁴ These externalities can include undesired impacts on the environment and societies, including through damaging influence over rule-making processes and diverse forms of free-riding on societal inputs. In a recent essay Craig Calhoun¹⁵ groups these externalities under the term “*illth*” (as opposed to wealth), citing 19th century author John Ruskin.

Whether by error, neglect, or by choosing to engage in reckless risk-taking, some companies engage in corporate misconduct as newspaper headlines dealing with price-fixing cartels or bribery and corruption scandals remind us on a regular basis. In some cases, the limits of what is acceptable business behaviour are pushed so far that the boundary between the pursuit of profit and overtly criminal behaviour becomes blurred - or disappears. The misconduct of a few can undermine efforts of the many and erode trust in markets and institutions. Certainly most companies are not part of the problem, but the potential impact of corporate misconduct remains a challenge that many business organisations, governments and stakeholders are trying to address from varying angles.

2.2. Increasing cost of misbehaviour to firms

When detected, misbehaviour causes direct and indirect costs for companies, including reputational damage and loss of customers, among others. These indirect losses are harder to measure externally than direct penalties, for which there is more information available. According to Global Investigations Review, of the world's 50 largest corporate penalties imposed since 1990, most of them by US enforcement agencies,¹⁶ 42% of all cases and 64% of all fines were imposed only in 2013 and 2014

12. PWC, Global Top 100 Companies by market capitalisation, 31 March 2014 update, available at <http://press.pwc.com/global/global-market-capitalisation-tracker-shows-us-businesses-eclipsing-the-rest-of-the-world/s/4466f468-3015-4c41-8399-8df4ec88eb42>.

13. See OECD Global Strategy Group, “Megatrends: Policies for a Shifting World” [[GSG\(2014\)I](#)].

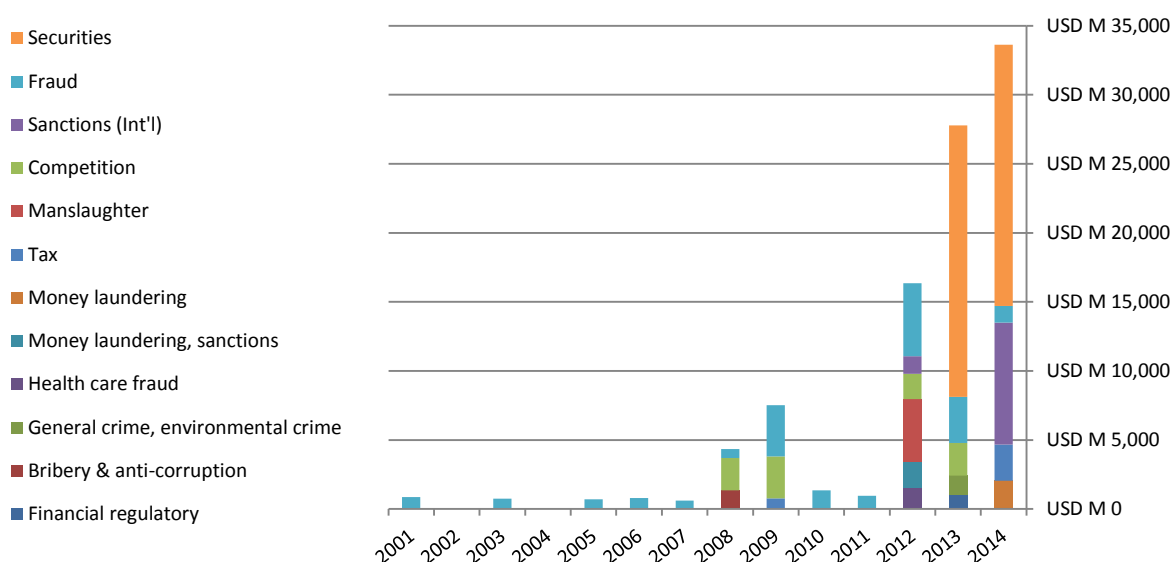
14. Negative impacts of globalisation include the increasing inequality in the distribution of wealth and the impact this has on societies, as highlighted in *Divided We Stand*, OECD Publishing, 2011, available at www.oecd.org/els/soc/dividedwestandwhyinequalitykeepsrising.htm.

15. See Calhoun, Craig (2013), What threatens capitalism now? In: Derleugian, Georgi, (ed.) *Does Capitalism Have a Future?* Oxford University Press, Oxford, UK.

16. A number of the largest fines imposed in this data set were imposed by the U.S. Government, with the US Department of Justice (DOJ) imposing 58% of the fines, followed by the US Federal Housing Finance Agency (who oversees the secondary mortgage markets in the US and applied large sanctions after the financial crisis) with 17% and the EU General Directorate of Competition, with 11%. The US DOJ statistics also show a path toward more frequent imprisonment and longer sentences for individuals involved in these violations, as the agency sees that holding managers accountable is an effective way to deter and punish misconduct. See the US DOJ 2015 Antitrust Division Criminal Enforcement Update, available at www.justice.gov/atr/division-update/2015/division-update-spring-2015.

(Figure 1).¹⁷ Six of the 41 companies on the top 50 list appear more than once; one appears four times and tops the list of total fines. Meanwhile, those that aim to behave responsibly pay the price by operating in distorted and distrustful markets, as well as by shouldering increased compliance costs caused by some of their competitors' wrongdoing.

Figure 1. Top 50 corporate fines, per type of infraction and year (2001 - 2014)



Source: Global Investigations Review, Enforcement Scorecard Database

A 2014 report on by the European Systemic Risk Board¹⁸ shows that penalties applied to banks for misconduct reached €163 billion over the past five years, arguing that they potentially create systemic risks on their own.¹⁹ The Basel Committee on Banking Supervision has stated that “more often than not,

^{17.} See Global Investigation Review’s annually updated Enforcement Scorecard Database for a full methodological description, available at <http://globalinvestigationreview.com/enforcement-scorecard>.

^{18.} The ESRB Report on Misconduct Risk, 18 December 2014, states that “misselling of financial products leads to suboptimal allocation of investments and risks, as for instance observed in the years preceding the financial crisis. Manipulation of markets distorts the proper functioning of these markets and gives banks undue rents. When misconduct is revealed, banks are faced with (high) penalties and redress costs. There are also actions that the providers, or users, of financial services might take when there is a risk of misconduct that could impose costs on the wider financial system, and need to be managed.” See <https://www.esrb.europa.eu/news/pr/2014/html/pr141223.en.html>.

^{19.} This paper recognises that risks faced by the financial sector are often not the same as those faced by companies operating in other sectors. “In the context of financial institutions, the focus naturally tends to be on financial risks, such as credit, liquidity or market risks, although there is also an increasing emphasis on operational risk. In the case of non-financial institutions, the same risks will also be present, although not always to the same extent as in financial institutions (...) Risk governance rules and practices appropriate for financial institutions therefore may not be directly applicable to non-financial institutions. At the same time, some more general lessons can probably be learned from risk management failures in the financial sector.” See: OECD (2014), Risk Management and Corporate Governance, Corporate Governance, OECD Publishing, available at <http://dx.doi.org/10.1787/9789264208636-en>.

excessive risk exposures, credit losses, liquidity problems and capital shortfalls stem from weaknesses in corporate governance (e.g. weak oversight by the board of directors, absence of an effective risk appetite framework), compensation policies (e.g. those focused on short-term earnings, without risk adjustments) and internal control systems.”²⁰ Both the Financial Stability Board²¹ and the Bank of England²² are currently working on projects to address misconduct within the financial sector, with deliverables due in the second half of 2015. The Group of Thirty, a private think tank focused on international economic and financial issues, has recently issued a report focusing on the role of conduct and culture in the governance of the world’s largest financial institutions.²³ The report identifies shortcomings but also good practice in promoting and maintaining a strong banking culture, making a series of recommendations that can be drawn upon by leaders as they seek to address culture in their firms.

Some regulators are no longer using only fines, but a wider range of tools to induce meaningful behaviour change. These include requiring increased liquidity or capital, forcing companies to abandon certain lines of business, curtailing their ability to trade in certain goods or services or even forcing firms to shut down. Thompson Reuters-Accelus 2014 report on the cost of non-compliance provides an example of the use of these tools in the case of Standard Chartered, which in 2012 paid a \$340 million fine for money laundering failings and agreed to a series of remedial actions.²⁴

20. Basel Committee on Banking Supervision, “Supervisory Guidelines for Identifying and Dealing with Weak Banks”, June 2014, p. 8, available at www.bis.org/publ/bcbs285.pdf.

21. The FSB also argues that “misconduct in financial institutions has the potential to create systemic risks by undermining trust in financial institutions and markets”, and to address this it has adopted a work plan that will examine: i) how the incentives created by reforms to risk governance, compensation structures and benchmarks have helped to reduce misconduct and whether any additional measures are needed; ii) whether steps are needed to improve standards of conduct in the fixed income, commodities and currency markets; and iii) together with the World Bank and other relevant bodies, the extent of potential withdrawal from correspondent banking, its implications for financial exclusion, as well as possible steps to address this issue. See the press release of the 26 March 2015 meeting of the FSB in Frankfurt, available at www.financialstabilityboard.org/wp-content/uploads/Press-Release-FSB-Plenary-Frankfurt-final-26Mar15.pdf.

22. See the June 2015 Final Report of the “Fair and Effective Markets Review” launched by the Bank of England, together with the UK Treasury and the UK Financial Conduct Authority, to reinforce confidence in the fairness and effectiveness of wholesale financial market activity in the UK and influence the international debate, available at www.bankofengland.co.uk/markets/Documents/femrjun15.pdf.

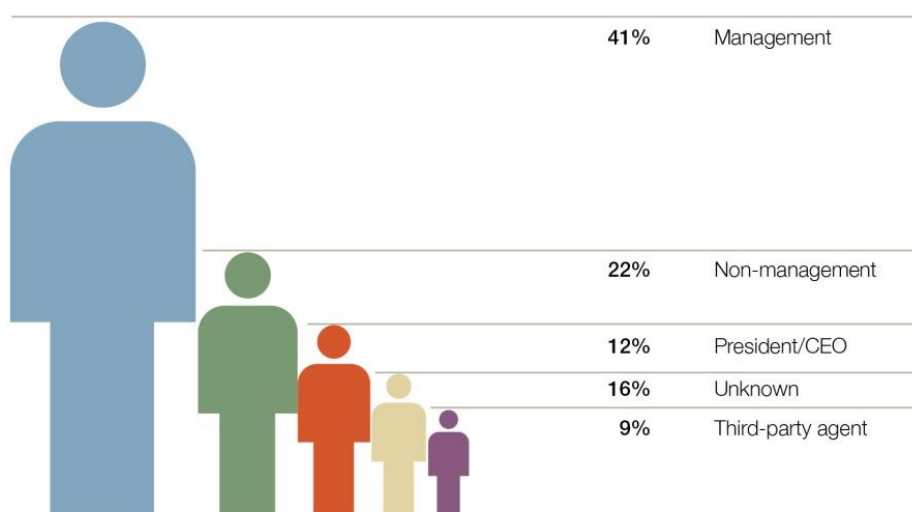
23. The report finds that banks are trying to address conduct and culture but implementation efforts are weak because of multiple and disconnected initiatives that lack meaningful follow-through. It provides examples of best practice within the financial industry and sets out recommendations, arguing that a change of culture must be industry-led rather than regulated. See *Banking Conduct and Culture: A Call for Sustained and Comprehensive Reform* is available online at <http://group30.org/images/PDF/BankingConductandCulture.pdf>.

24. These remedial actions included: i) its suspension from the dollar clearing through the New York branch for high-risk clients at its Hong Kong subsidiary; ii) its exiting high-risk client relationship with certain business lines at its branches in the United Arab Emirates; iii) not accepting new dollar-clearing clients or accounts across its operations without prior approval from the New York State Department of Financial Services; iv) the appointment of “a competent and responsible” executive reporting directly to the CEO for the oversight of remedies, and v) the implementation of a series of enhanced due diligence and know-your-customer requirements, among others. See Thomson Reuters - Accelus, *The rising cost*

The impact of misconduct and sanctions over firms' valuations is also visible, not always in the form of a clear drop in share price (Thompson Reuters-Accelus, 2014) but via increased volatility (Eccles, Ioannis and Serafeim, 2011) and a change in the landscape of investors, often leading a shift from long-term to more opportunistic and risk-averse shareholders. As stated by a high-profile fund manager in the face of allegations of misconduct in one of the companies in his portfolio, the decision to disinvest was based on this added risk.²⁵

Finally, senior managers and board members are also increasingly being held accountable for their company's misbehaviour in some sectors, particularly the financial sector, via personal liability, including the adoption of claw-back provisions to recover corporate bonuses paid for periods where misbehaviour is subsequently discovered, and forced changes to management teams²⁶ to add skills related to compliance and risk.

Figure 2. **Level of corporate management involved in foreign bribery cases**



Source: OECD Foreign Bribery Report (2014)

of non-compliance: from the end of a career to the end of a firm, November 2014, available at <http://info.accelus.thomsonreuters.com/Cost-Of-Non-Compliance?cid=Blog>.

^{25.} “The size of any potential fine is unquantifiable, so this represents an unquantifiable risk. Nevertheless, a substantial fine could hamper (the company’s) ability to grow its dividend, in my view. I have therefore sold the fund’s position in (the company), reinvesting the proceeds into parts of the portfolio in which I have greater conviction.” Neil Woodford, head of investment, Woodford Funds blog, September 2014, available at <https://woodfordfunds.com/bank-withdrawal/>.

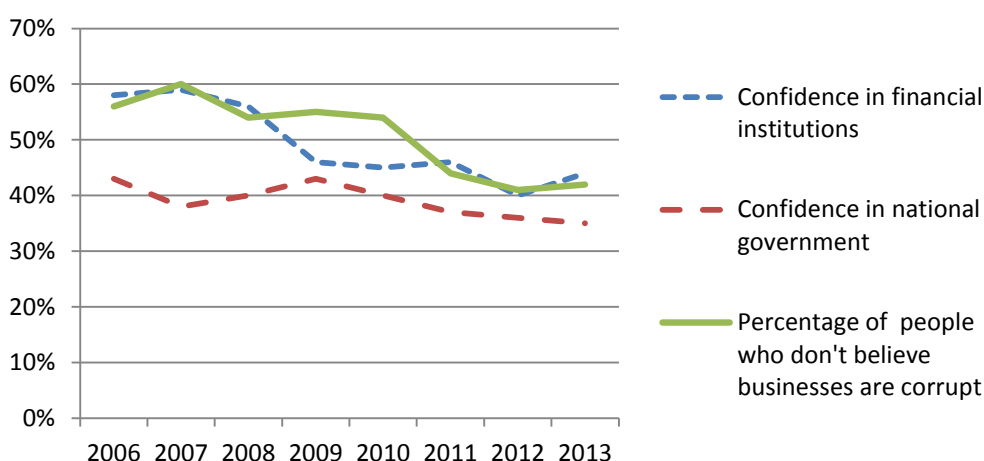
^{26.} For example, “BNP Paribas pleaded guilty in New York State Supreme Court to falsifying business records and conspiring to falsify business records. BNPP also agreed to a cease and desist order and to pay a civil monetary penalty of \$508 million to the Board of Governors of the Federal Reserve System. The New York State Department of Financial Services announced that BNPP agreed to, among other things, terminate or separate from the bank 13 employees, including the Group Chief Operating Officer and other senior executives”. See the US DOJ Press Release, 1 May 2015, available at www.justice.gov/opa/pr/bnp-paribas-sentenced-conspiring-violate-international-emergency-economic-powers-act-and.

According to a 2014 OECD analysis of the 427 foreign bribery cases concluded since the entry into force of the OECD Anti-Bribery Convention,²⁷ more than half were carried out with the involvement of some level of management—sometimes even the CEO (Figure 2). While there may be a selection bias in the cases brought to conclusion in certain jurisdictions, the report suggests that the prevalence of management involvement in corrupt transaction could show the ongoing need for executives to lead by example in implementing their companies’ compliance programmes.

2.3. Losing trust

These challenges of corporate misbehaviour are not new, but the potential scope of their impact is, particularly in terms of lost trust. Public mistrust perceptions about private institutions and government have not rebounded to pre-crisis levels. A 2013 EU survey concluded that Europeans are divided about whether the overall influence of companies is positive or negative, with an average of 41% of them saying it is negative, but with large difference across countries. About 85% of respondents in Denmark think the influence of companies on society is generally positive, but only 36% of those in Italy and Slovenia agree.²⁸

Figure 3. Trust in institutions



Source: Gallup World Poll, 2006-2013.

A multi-year Gallup opinion poll shows that, on average, now a majority of surveyed citizens feel that businesses are corrupt (Figure 3). Corruption also came on top of the list when Europeans were asked about the main negative effects of companies on society.²⁹ Further, CNBC and Burson-Marsteller, surveying 25 012 individuals and 1,816 business executives around the world reported that, in 2014, a

^{27.} OECD (2014), OECD Foreign Bribery Report: An analysis of the crime of bribery of foreign public officials, Foreign Bribery Report, OECD Publishing, available at <http://dx.doi.org/10.1787/9789264226616-en>.

^{28.} A low level of trust in the private sector does not mean there are necessarily increased instances of serious corporate misconduct. These perceptions may be due to a variety of different factors.

^{29.} See Flash Eurobarometer 363 “How Companies Influence Our Society: Citizens’ View”, April 2013, available at http://ec.europa.eu/public_opinion/flash/fl_363_en.pdf.

majority of citizens responded that, in addition to ‘profits’, ‘greed’ and ‘exploitation’ were the first things that came to mind when they think about business (executives mentioned ‘profits’ almost unanimously). When asked about government, both citizens and executives mentioned ‘corruption’ in a large majority of cases.³⁰

Low levels of public trust can undermine adherence to business integrity standards and compliance with laws and regulations, reduce investor and consumer confidence, and lead to uncooperative behaviour by citizens. On the contrary, high-trust level societies benefit from lower transaction costs and more collaborative entrepreneurship, but also reap benefits from social cohesion and integration.³¹ The OECD has identified rebuilding public trust as critical to the recovery of the post-crisis global economy, and called for decisive action.³²

2.4. The business case

Corporate governance frameworks and compliance mechanisms are tools to ensure that companies do business with integrity, but they should not be considered ends in themselves. They are tools that, if properly implemented and integrated, help to foster corporate accountability and serve to support consumer and investor confidence, which is necessary for the proper functioning of a market economy. Corporate misconduct and its impact on society undermine the basis of this model, which is enough reason to work to prevent it. The literature has started showing that there is also a business case to invest in business integrity.

The National Business Ethics Survey (2015), which reviews ethical behaviour in US corporations, shows that when companies invest in integrity they can not only better insulate themselves from the cost of non-compliance, but also present a good business case to their shareholders. The review tracks key indicators of ethical performance (including pressure to compromise ethics standards; observation of misconduct; reporting of violations, and retaliation for reporting); and shows that the results improve significantly after adoption of integrity programs.³³

In a recent paper for the Harvard University’s Corporate Social Responsibility Initiative, Davis and Frank (2014) recount their assessment exercise of the value of corporate benefits to establishing a comprehensive approach to business integrity in the extractives industry. They undertook a systematic review of the potential costs of non-technical risks connected to a number of projects and identified a potential value erosion of more than USD 6 billion over a two-year period.³⁴

30. See Corporate Perception Indicator, September 2014, available at <http://es.scribd.com/doc/240502296/CNBC-Burson-Marsteller-Corporate-Perception-Indicator-2014>.

31. See the OECD Background Paper Investing In Trust: Leveraging Institutions For Inclusive Policy Making, available at www.oecd.org/gov/ethics/Investing-in-trust.pdf, for a more general discussion about the social consequences of trust.

32. See remarks by OECD Secretary-General Angel Gurría, 2 December 2014, available at www.oecd.org/newsroom/scale-of-international-bribery-laid-bare-by-new-oecd-report.htm.

33. See the 2015 National Business Ethics Survey: A Research Report from the National Business Ethics Survey, Ethics Research Center, available at www.ethics.org/nbes/large-companies/.

34. Davis, Rachel and Daniel M. Franks, “Costs of Company-Community Conflict in the Extractive Sector”. Corporate Social Responsibility Initiative Report No. 66., 2014, Cambridge, MA: Harvard Kennedy School, available at www.hks.harvard.edu/m-rcbg/CSRI/research/Costs%20of%20Conflict_Davis%20%20Franks.pdf.

Eccles, Ioannou and Serafeim (2012), in turn, review the impact of corporate sustainability on organizational processes and performance using a sample of 180 US companies. Half of them were chosen because they had voluntarily adopted sustainability policies twenty years ago. These firms exhibited, by 2009, what the authors define as “distinct organizational processes” compared to the other half that had adopted none of those policies but had similar financial performance, size, capital structure and valuation at the time. According to their findings, boards in the first group were significantly more involved and responsible for sustainability issues than those in the second group. This was reflected in that companies in the first group more frequently considered sustainability metrics for compensating their top managers, had established processes for stakeholder engagement, were more long-term oriented and exhibited better measurement and reporting of nonfinancial information.³⁵

These distinct corporate processes of companies adopting sustainable practices can be correlated, according to Eccles, Ioannou and Serafeim, with higher performance and lower volatility. These companies:

“generate significantly higher stock returns, suggesting that indeed the integration of such issues into a company’s business model and strategy may be a source of competitive advantage for a company in the long-run. A more engaged workforce, a more secure license to operate, a more loyal and satisfied customer base, better relationships with stakeholders, greater transparency, a more collaborative community, and a better ability to innovate may all be contributing factors to this potentially persistent superior performance in the long-term”.³⁶

Similar research by Khan, Serafeim and Yoon (2015) highlights that companies are increasing their sustainability investments and that investors are integrating sustainability concerns in their investment decisions. Their study seeks to distinguish between those investments that they classify as material for each industry from those that are not, and measure their impact.³⁷ They conclude that firms that obtain high scores in their investment on material sustainability issues significantly outperform the return of shares of those that invest less on those issues, but also that firms that invest only in less material issues do not underperform firms that make no sustainability investments, which they interpret as these investments to be at least returning their own cost.

^{35.} See Eccles, Robert G., Ioannis Ioannou and George Serafeim, *The Impact of Corporate Sustainability on Organizational Processes and Performance*, November 23, 2011, *Management Science*, available at <http://dx.doi.org/10.2139/ssrn.1964011>. The paper focuses on organisations that voluntarily integrate environmental and social policies in their business model, which according to the authors are also characterised by a governance structure that in addition to financial performance, accounts for the environmental and social impact of the company, a long-term approach towards maximizing inter-temporal profits, among others.

^{36.} *Ibid*, p. 19. The authors find that the group with high sustainability outperforms the control group in 11 out of the 18 years and shows lower volatility. Annual abnormal performance is higher for the group with high sustainability by 4.8% (significant at less than 5% level) on a value-weighted base and by 2.3% (significant at less than 10% level) on an equal-weighted base.

^{37.} See Khan, Mozaffar, George Serafeim and Aaron Yoon, *Corporate Sustainability: First Evidence on Materiality* (March 9, 2015), available at <http://dx.doi.org/10.2139/ssrn.2575912>. The authors develop a “materiality (immateriality) performance score for each firm-year that measures performance on material (immaterial) sustainability issues in order to test the shareholder value implications of sustainability investments” (p. 3).

2.5. A new approach

The world is not lacking advice or tools to address the challenge of tackling corporate misconduct. As noted above, the OECD is home to some of the world's highest standards for promoting business integrity, a selection of which are considered in this report and described in Annex B. Various OECD instruments advise governments on how to create fair market conditions, and often provide companies with guidance on how to comply with the rules set by their governments. Yet misconduct prevails, even in large and sophisticated MNEs, with grave consequences. What is needed, this report argues, is to understand the distance between what expectations for responsible business behaviour recommend and how they are implemented. Given the stakes, for many firms continuing with “business as usual” is not an option.

Chapter 3

Business integrity in practice

This chapter provides an overview of corporate practices showing how businesses are organizing themselves to address the challenge of business integrity. Special emphasis is placed on the role of the board and executive management. Information draws on responses to the OECD Survey on Business Integrity and Corporate Governance, from nearly 40 interviews with private sector representatives, as well as case studies highlighting business integrity practices voluntarily provided by companies.

Increasingly, business leaders, board members and top executives recognise that effective corporate governance can ensure the checks and balances necessary to prevent corporate misconduct. They are devoting more time and resources to developing and implementing better business integrity practices, which are incorporated into a company's governance framework, operations, and strategy. Companies sharing these values foster a culture where misconduct and reckless risk-taking are not tolerated (nor rewarded) and where breaches are addressed and often also self-reported to the authorities. They endeavour to address the material and reputational risks of further misconduct related to their businesses, performing an important role in preventing, detecting and addressing serious corporate misconduct.

This chapter of the report provides an overview of how some companies are organizing themselves in order to address the challenge of business integrity, beginning with a focus on the role of the board and executive management. The next section focuses on factors influencing businesses' consideration of whether and how to implement business integrity policies and programmes within their companies. It also draws on information collected from the responses to the OECD Survey on Business Integrity and Corporate Governance and from nearly 40 interviews with private sector representatives, some of which were conducted on an anonymous basis, as well as case studies highlighting business integrity practices voluntarily provided by companies.³⁸

The following sections benefited from the results of TNB Project consultations organised on March 2015 in the context of the OECD Integrity Week and during June 2015 at the OECD Forum and Global Forum on Responsible Business Conduct.³⁹ They included government, private sector and civil society representatives that discussed recent trends in relation to board and executive-level engagement on business integrity, using a previous draft of this report as a reference. Participants recognised progress made in recent years, including a growing number of company-led initiatives. However, a number of participants acknowledged remaining challenges integrating business ethics and sustainability into a corporation's governance framework, strategy, and operations. Challenges highlighted during the discussion include ensuring that a company has the appropriate resources for implementing an effective

^{38.} The information collected and analysed for the purpose of this report comes from the 88 complete responses to the TNB Survey and nearly 40 interviews with private sector representatives between January and April 2015, which were mostly conducted on an anonymous basis, as well as case studies highlighting business integrity practices voluntarily provided by some companies. The results of the TNB Survey and the interviews for this paper represent mostly the views of companies from OECD countries, among which the awareness of business integrity practices and challenges is often high. Therefore, the views presented here are not necessarily representative of broader perceptions and approaches in this area within companies from economies beyond the OECD. The respondent companies were mainly large, privately-owned or publicly listed multinationals and hence the data in this report is not representative of the specific circumstances of SMEs and SOEs. Information included in this report deriving from the TNB survey and interviews should be considered only as a preliminary indication of the views held by some companies. For more methodological information, please see Annex A.

^{39.} See the summary records of the TNB Consultations at www.oecd.org/daf/ca/trust-business.htm.

business integrity programme that goes beyond meeting a minimum threshold of legal or regulatory compliance.

Participants in these consultations also noted the interconnected nature of the various categories of misconduct and an accompanying need for greater harmonisation of business integrity standards across jurisdictions and between different categories of offences.⁴⁰ In order to build momentum for promoting business integrity, a number of the consultation participants agreed that more could be done to align business, government, investors, and other stakeholders' interests in this area.

3.1. Business integrity: the view from the top

As noted, the Principles provide that the members of a company's board should be responsible for reviewing and guiding the company's strategic direction, the effective monitoring of management, and its accountability to the company and the shareholders. The OECD MNE Guidelines also emphasise the need for the board to take into account the interests of stakeholders and undertake continuous review of internal structures to ensure clear lines of management accountability throughout the organisation. In the context of business integrity, this translates into the implementation and oversight of internal controls, ethics and compliance measures designed to prevent, detect or address serious corporate misconduct.

Available evidence suggests that business integrity considerations are indeed increasingly being brought to the attention of boards. A 2013 Deloitte survey of over 300 board chairs and directors found that 77% agreed there is a greater focus on compliance compared to prior years. On anti-corruption matters, 61% of the directors surveyed agreed or strongly agreed that the board is more engaged with management on anti-corruption matters than before.⁴¹ Only 2% of directors, however, considered sustainability a 'top three' issue impacting the board in the past 12 months.

The TNB Survey asked company respondents about the role of the board in the establishment of business integrity policies.⁴² Almost half of respondents indicated that those policies were established following a decision by the board. In one-third of cases, the policy was established following legislative or regulatory changes, but in half of the respondents experience it was on a voluntary basis. Other factors

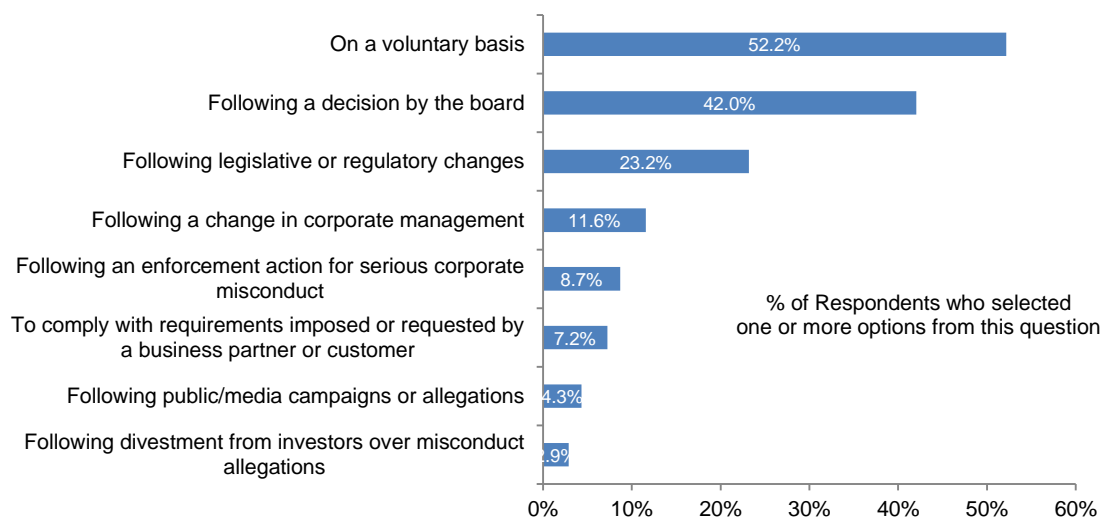
^{40.} Although not covered within the scope of this report, businesses repeatedly mentioned the need to also address the problems presented when these standards are implemented differently across jurisdictions or within the same jurisdiction for diverse categories of business conduct. These divergences can create challenges for MNEs operating on an increasingly global level and across sectors, of facing cases within their organisations that involves several jurisdictions or fall under the authority of several government agencies (i.e. a case of cartel that also involved bribing), leaving them at times exposed to conflicting incentives.

^{41.} Deloitte, Director 360: Growth from all Directions, 2013, available at <http://www2.deloitte.com/content/dam/Deloitte/global/Documents/Risk/gx-ccg-director-360-growth-from-all-directions-third-edition.pdf>.

^{42.} It is important to take into account the specific contexts of survey respondents. For example, the majority of respondents' companies had a two-tier board system (57% of respondents) while roughly a third had a unitary/one-tier board (34%). In terms of corporate governance requirements, 59% of respondents' companies were publicly listed and subject to listing rules and 90% of respondents said they followed a code of corporate governance (see also Annex B for more on corporate governance frameworks).

involved in the decision to establish a business integrity policy included a change in corporate management or following an enforcement action for serious corporate misconduct (Figure 4).⁴³

Figure 4. **Why companies create a business integrity function**



Source: TNB Survey 2015 (69 respondents)

More than 80% of respondents expressed some level of agreement that the board was strongly involved in the design and implementation of their company's business integrity policy. Equally, more than 80% of respondents indicated that the interest of the board and senior management in business integrity had increased over the last 5 years. A further 86% of respondents indicated that the board and senior management were concerned or very concerned about the liability of the company for their failure to adequately implement a business integrity policy.

There could be various reasons for this perceived increase in the board's concern about business integrity, including recent increases in enforcement against serious corporate misconduct.⁴⁴ In almost all individual interviews with companies, the business integrity function was described as having been adopted or significantly strengthened following an enforcement action.⁴⁵ For some, the initial impetus

^{43.} There could, of course, be overlap or inter-linkage in many of these factors influencing the creation of a business integrity function and it is worth noting that respondents could select multiple factors.

^{44.} See, for example, the OECD Foreign Bribery Report which demonstrates a general increase in enforcement of the foreign bribery offence since the entry into force of the OECD Anti-Bribery Convention in 1999 (Figure 1). See also the summary of global investigations legislation and enforcement provided in the October 2014 White & Case report, "Global investigations: reading the signals", available at www.whitecase.com/insight/102014/global-investigations-reading-the-signals/#.VWW1m_mUeVM.

^{45.} A 2008 OECD survey of business leaders' perspectives on how to apply the Principles at the boardroom, highlighted that rebuilding a company after corporate scandal "requires the board to focus first on regaining credibility in the eyes of employees, shareholders, regulators and the community – the 'save' phase. This requires the board and the CEO to agree on what needs to be done by whom and at what speed. The board is often allocated responsibility for governance processes, while the CEO is responsible

was bolstered by the recognition at the level of the board that a strong business integrity function could be considered a competitive advantage, thereby mitigating risk to the company's reputation (Box 1 offers an example from the pharmaceutical industry).

One company interviewed for this report, for example, provided “tangible benefits” for establishing and implementing a business integrity programme. These include: “improved awareness of risk areas leading to reduced instances of non-compliance; preparation for when (not ‘if’) non-compliance occurs; detection of non-compliance and consistent internal responses; and a defence (to the extent possible) from negative or legal or regulatory consequences”.

Box 1. Integrity as a question of long-term success

A European-based multinational healthcare company has, since its creation in the mid-1990s, grown from an industrial conglomerate into a leading global healthcare provider. The company's growth explains its recent appointment of a Chief Ethics, Compliance and Policy Officer and the need to redefine how it identifies and meets its business challenges. “Just pointing to whatever the leaders are doing is no longer good enough. We have become one of those leaders. We have to define what we stand for and what behaviours are no longer appropriate, regardless of whether the majority of the industry follows those practices,” says the Chief Ethics, Compliance and Policy officer.

In 2014, the company took several steps to strengthen its approach to integrity and compliance to meet its strategic ambition of being one of the most respected and successful companies in the field. In August 2014, the board of directors approved a programme to reinforce ethics in commercial practices across the company. “We saw the need for us to challenge ourselves on ethical questions because of the nature of what we do, and what we want to become. This is not a question of philanthropy; for us, it is a question of long-term success. In the healthcare business, with our risk exposure and the value of our products, we have to have an impeccable reputation. This focus is intimately linked to our business and for the benefit of our patients.”

Recent industry surveys of compliance professionals further suggest there may be a link between effective commitment to support the business integrity function and bottom-line growth. For example, results of a 2015 EY survey of 3 800 employees of large businesses in 38 countries in Europe, the Middle East, India and Africa show that businesses that have experienced revenue growth in the last two years are more likely to be seen as ethical by their employees, not only at head office but also across operations in different countries.⁴⁶ A separate 2015 business survey indicates that, on average, large

for operations. The board should begin by setting the right ‘tone at the top,’ by stating what the tone is and what the expectations of the board and management are. The board should work with management to develop or revise a code of ethical conduct and require every director and employee to read it and acknowledge that they are not aware of any ethical issues. The CEO and the board should publicise the code of conduct throughout the company to emphasise its importance.” OECD (2008), *Using the OECD Principles of Corporate Governance: A Boardroom Perspective*, OECD Publishing, p. 55.

⁴⁶ The survey found that management in companies that have experienced revenue growth are more engaged in monitoring compliance with policies and procedures. For example, 63% of businesses with increased revenues stated their company has an anti-bribery and anti-corruption policy (ABAC) and code of conduct, versus 53% of businesses with decreased revenues. Similarly, 69% of respondents from businesses with increased revenues stated they had attended an ABAC training, versus 58% of respondents from businesses with decreased revenues. For more, see: EY, *Fraud and Corruption – The Easy Option for Growth?: Europe, Middle East, India, and Africa Fraud Survey 2015*, 14 May 2015, available at www.ey.com/GL/en/Newsroom/News-releases/news-EY-fraud-and-corruption-risks-impact-corporate-international-expansion.

companies (90 000 or more employees) with effective programs face half of the rules violations as those without effective programs.⁴⁷

In companies surveyed and interviewed for this report there were also cases of business integrity functions that felt under-supported by the board and senior management. The causes for this lack of engagement were interrelated and included: a lack of awareness of the importance of corporate governance and business integrity in some jurisdictions or sectors; a perception that the risk of enforcement was lower than other business risks faced by the company; and/or the prioritisation of short-term profits over longer-term investment in integrity measures, most often during or just after a period of crisis. As a result, those tasked with monitoring those companies' compliance risks were often understaffed, under-resourced, and are seen as an obstacle to business. In general, most integrity officers face the need to make a convincing value proposition in the face of increasing compliance costs (Boxes 2 and 3).

Box 2. Making the business case for the business integrity function

“Corporate governance and compliance have only been a recent concern in our company. My biggest challenge, now, is to secure a budget to create a proper compliance function. This should be a job in and of itself, which has to be staffed with representatives throughout the company, in order to implement and monitor a proper compliance programme. Until this function is created, we are not handling our risks with sufficient care. But, when I try to make my case internally, it is not easy to immediately see the bottom line when it comes to investing time and money. The creation of a standalone compliance function is often seen as a drag on business operations—even though this is supposed to be something to protect the company and those working for it.” –General counsel for a major European transportation company

Box 3. Engaging the board on business integrity

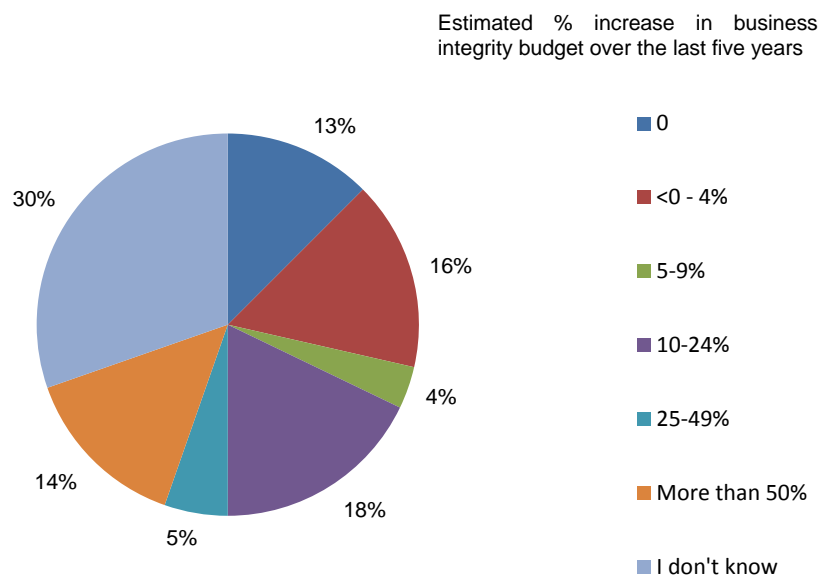
Following damaging media revelations of involvement in serious corporate misconduct in 2008, a Europe-based telecommunications multinational's board of directors approved the development of a robust and integrated compliance programme. In order to sustain the board's support for this programme, the compliance function regularly reports to the board making a “business case” for integrity. “We are constantly working on the effectiveness and the efficiency of our Group-wide Compliance Management System,” says the head of the company's compliance function. “We can show that the cost of potential risks—including liability risks for the company, including personal liability for directors—is higher than the cost of compliance. As part of our quarterly reports to the management board and the audit committee, we also report on key performance indicators, such as questions we receive on the compliance programme, how many tips we receive, and the number of trainings we conduct. So, the board is well-informed about what we're doing and the value that we generate for the company.”

⁴⁷.

For example, the study found that, in large companies that invested resources in ethics and compliance, workers are more likely to report the misconduct they see and they are far less likely to face retribution for reporting when companies have effective ethics and compliance programs. Further, one-third of workers observed misconduct in large companies with effective ethics programs, compared to a misconduct rate of almost 51% among all large companies and more than 62% for large companies that do not have effective ethics and compliance programs. The survey also indicates that pressure and retaliation fall to 3% and 4%, respectively in big companies that have established effective ethics and compliance programs. For more, see: Ethics Research Center (ERC), 2015 National Business Ethics Survey: The State of Ethics in Large Companies, available at www.ethics.org/nbes/large-companies/.

Industry experts estimate that the investment in compliance has increased as much as 25% since 2010, reflecting, in part, enterprises' efforts to cope both with an increasingly complex regulatory environment and to address the realities of doing business in a multifaceted world economy.⁴⁸ This is shown by responses to the TNB Survey, where there is a preponderance of respondents that indicate an increase in business integrity budgets over the last five years. Almost twenty per cent of respondents considered the expenditure on integrity to have increased from 25 to more than 50% (Figure 5). The TNB survey also researched into the relation between business integrity budget and net sales, finding a rather constant relation (Figure 6).

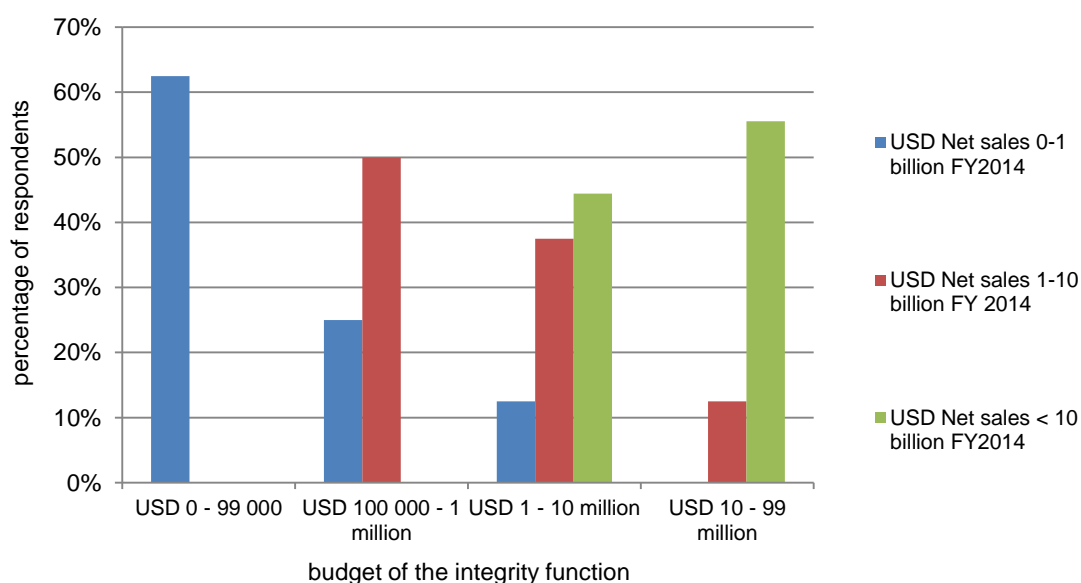
Figure 5. Evolution of business integrity budget over the last five years



Source: TNB Survey 2015 (56 respondents)

⁴⁸. The cost of corporate compliance is often higher for large, multinational enterprises, which have complex and decentralised corporate structures, cross-border operations often in high-risk sectors and/or jurisdictions, and extended supply chains. Small and medium-sized enterprises, which have fewer resources, have their own challenges. Many SMEs must implement business integrity measures not only to comply with laws and regulations, but as a pre-condition to partnering with larger enterprises. See the Forum for Private Business' 2013 survey of UK SME compliance costs, available at www.fpb.org/press/july-2014/cost-compliance-continues-rise-small-firms-forum-research-shows and PWC's State of Compliance surveys from 2013 and 2014, available at www.pwc.com/us/en/risk-management/state-of-compliance-survey/downloads.jhtml.

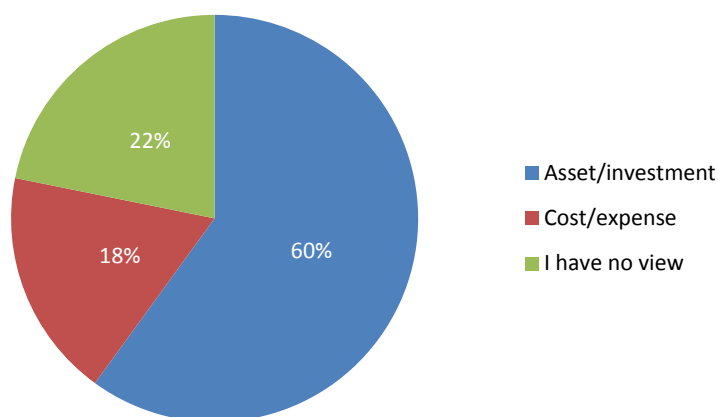
Figure 6. **Estimated business integrity budget relative to net sales (FY2014)**



Source: TNB Survey 2015 (25 respondents)

Regardless of how much budget is allocated to business integrity, responses to the TNB Survey indicate that a majority of respondents (60%) considered the provision of human and financial resources to this an asset or investment, whereas 18% considered them a cost or expense (Figure 7). These perceptions could also be representative of a more general, preventive and forward-looking approach to business integrity versus a more limited, reactive, approach focused only on complying with the relevant legislation.

Figure 7. **Business integrity budget: investment or expense?**



Source: TNB Survey 2015 (55 respondents)

3.2. Decision to create a business integrity function

Approving the adoption of a business integrity policy is an important step; defining its scope of responsibility, supporting its implementation and providing long-term oversight of an operative business integrity function are subsequent phases that create equal or even greater challenges (Box 4). The scope of responsibility for a business integrity function and the support that function receives varies significantly in practice. There is no one-size-fits-all model for how such functions should be developed, nor should there be. A company's business integrity function's scope of responsibility and resources will be influenced by the company's sector, size, jurisdiction, risk profile and importantly, the degree to which the function is supported by the board and senior management.

Box 4. Setting the risk appetite

"Whereas it is generally accepted that boards should be responsible for setting a company's risk appetite or tolerance, little guidance is available on how boards can go about setting risk targets, considering the various types of risks that modern corporations may be subject to. Aggregating all the risks into one number appears impossible, and even the existing models for aggregating financial risks (only) have largely been discredited during the financial crisis. Therefore, the only realistic option appears to be for boards to set risk appetite or tolerance with regard to each individual risk identified. At the same time, boards need to be aware of the possible interaction of different risk, notably the possibilities that they may reinforce each other.

An important conclusion from the Committee's 2010 report on Corporate Governance and the Financial Crisis was that the board's responsibility for defining strategy and risk appetite needs to be extended to establishing and overseeing enterprise-wide risk management systems. The report noted that in some important cases the risk management system was not compatible with a company's strategy and risk appetite."

Source: OECD (2014) Risk Management and Corporate Governance, p. 16.

The challenges to creating, implementing and sustaining an effective business integrity function included in this report are not new to those working in this field; they are presented here to provide an overview and to highlight, where possible, practices employed to address them (described more fully in this section and in chapter 4). It should be noted, also, that the companies providing input to this report were mainly large multinational enterprises that had business integrity policies (88% of respondents' companies had a business integrity policy, of which 40% had first been introduced more than 10 years ago).⁴⁹

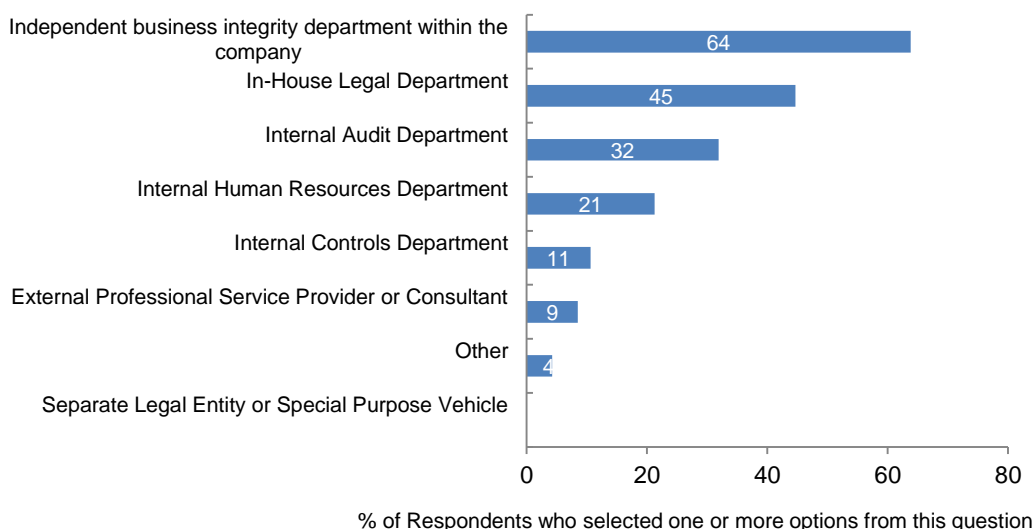
Organisation and scope of the integrity function

Once a board of directors approves the creation of a business integrity function, it is often up to senior management to define the scope of responsibility for the function, its organisation, and how the function reports to senior representatives within the company. More than a third of respondents to the TNB Survey indicated that their company had a standalone, independent business integrity function that was solely responsible for executing the corporate integrity policy, such as a compliance, risk or sustainability unit. Another third of respondents selected several possible responses, indicating that the

⁴⁹ Only 18% of respondents represented Small and medium-sized enterprises (SMEs) and almost all of these were external business integrity advisors such as law and accounting firms or risk management consultancies. SMEs were identified according to the EU Commission Recommendation 2003/361/EC which defines SMEs as businesses with less than 250 employees.

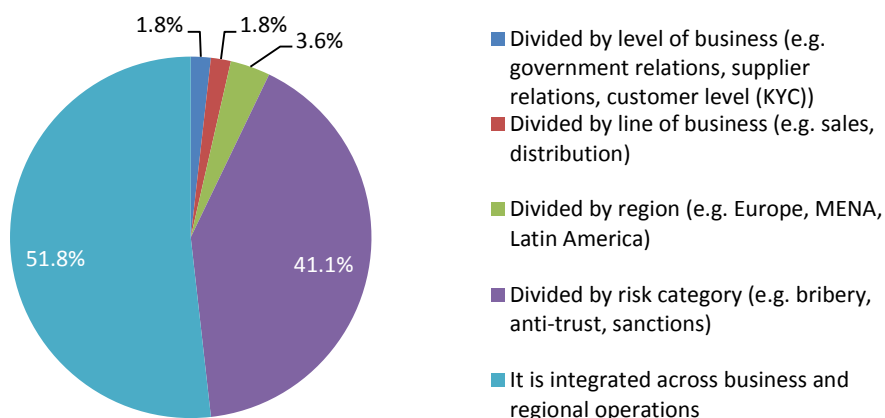
business integrity function was integrated across several areas of their company’s operations, including the in-house legal, internal audit, controls and human resources departments. A further fifth of those that responded the survey indicated that the business integrity function was housed uniquely within the company’s legal department (Figure 8).⁵⁰ In turn, the business integrity policy was either integrated across business and regional operations (52%) or divided by risk category (e.g. bribery, anti-trust, sanctions) (41%) (Figure 9).

Figure 8. Organisation of the integrity function



Source: TNB Survey, 2015 (47 respondents)

Figure 9. Scope of business integrity policy



Source: TNB Survey, 2015 (56 respondents)

⁵⁰. This Figure includes respondents’ indications of how the integrity function is organised, based on the total number of responses to each question -hence the different total percentages- noting that respondents could select multiple responses

Two interviewed companies took the approach of having a less defined scope of risks covered by the integrity function, preferring rather to focus on preventing violations of the law and internal codes of conduct, in general. In one of the companies, the compliance function is housed within the legal department; in the other, the function serves as a coordinating body for preventing misconduct across the company, operating in tandem with legal, internal audit, human resources, and other elements of the organisation whose functions are related to the integrity programme. In doing so, said one of the company representatives, “we wanted to change the perception of compliance and integrity, which are often experienced by management and employees as the 11th task of the day, and figure out how we handle our 10 tasks of the day with integrity.”

External business integrity advisors responding the TNB Survey, which included lawyers, accountants, external auditors and risk management consultants, were asked how they perceived certain categories of business integrity to be prioritised in their clients’ operations. Tax and bribery of foreign public officials were considered the highest priority (53%), followed by antitrust/competition (47%) and product/service safety (42%). The survey and the interviews to companies also inquired into whether and to what extent their business integrity function also included in the scope of responsibility considerations associated with the broader responsible business conduct agenda as outlined in the OECD MNE Guidelines. Over half the external advisors assessed human rights and sustainability concerns to be a low priority in their clients’ operations (Table 1).

Table 1. **Perception of prioritisation of business integrity categories by companies**

	High Priority (%)	Medium Priority (%)	Low Priority (%)	N/A (%)
Anti-Trust/Competition	47	37	16	0
Bribery of foreign public officials	53	37	11	0
Private sector bribery	37	37	26	0
Cybercrime	26	26	37	11
Data protection and privacy	26	37	32	5
Environment	26	37	21	16
Fraud	37	53	5	5
Human rights	21	16	53	11
Industrial relations and labour	21	32	32	16
Intellectual Property	37	42	16	5
Money-laundering, terrorism & proliferation financing	37	26	32	5
Product/service safety	42	26	21	11
Sanctions and export controls	32	37	21	11
Securities and finance	26	53	16	5
Sustainability	5	26	53	16
Tax	53	21	11	16
Workplace safety and health	32	58	5	5

Source: TNB Survey 2015 (19 respondents)

The results of the TNB Survey and company interviews suggest, however, that many companies may be taking a risk-specific, siloed approach to business integrity, with different organs of the company responsible for oversight and implementation of business integrity policies applicable to different risk categories. Often, this is the case in companies recovering from an enforcement action against a specific type of misconduct. For example, a company that has violated anti-trust provisions may focus on strengthening its compliance in that specific area. In a number of companies, this approach reflects the entity's prioritisation of compliance risk, where "traditional" compliance risks are more often included in the scope of responsibility endowed to the "traditional" compliance function. These functions, which often focus on strictly legal compliance, often do not include in their scope of responsibility the broader menu of integrity risks that are outlined in the OECD MNE Guidelines. Such an approach could result in a lack of sufficient cross-coordination on organisational risk management and result in the under-prioritisation of, and greater exposure to, certain integrity risks faced by the company.⁵¹

Based on the findings included in this report, it is impossible to definitively outline the reasons for companies' prioritisation of integrity risks. The TNB survey results and company interviews suggest that the lower prioritisation of some risks over others may result from the perception in some companies that not all risks are directly linked to the business's operations, that regulations and laws in some of these areas are not actively enforced, and/or that the benefits of implementing and enforcing measures to mitigate these types of risks are too intangible or too long-term to warrant the time and resources needed, particularly in the face of short-term business pressures. Chapter 4 of this report aims only to outline the drivers of business integrity but further understanding how corporations prioritise their integrity risks, and the extent to which they implement measures to effectively mitigate these risks, is an obvious candidate for future work.

The findings presented here match those offered by the existing literature on this subject. One recent study, for example, finds that companies with one-dimensional frameworks for understanding and responding to risk—focused on prevention and internal controls—often have a fragmented organisational response to risk.⁵² In addition, companies that divide business integrity policies and functions by risk category may incur increased compliance costs for maintaining separate functions and might also be at risk that potential misconduct may be overlooked if brought to the attention of the function not responsible for the type of misconduct in question. Such were the conclusions of a recent Thomson Reuters survey of 600 compliance professionals from financial services firms, which indicate that—while specific to the financial services sector—the interaction and alignment between control functions continues to show a lack of coordination: Nearly half of compliance functions spend less than an hour each week with internal audit.⁵³

^{51.} The already mentioned Harvard Corporate Social Responsibility Initiative study "Costs of Company-Community Conflict in the Extractive Sector" found that most extractive companies do not currently identify, understand and aggregate the full range of costs of conflict with local communities. It shows that costs were understood broadly as meaning any negative impacts on a company's tangible or intangible assets from failing to avoid, mitigate or resolve conflict at an early stage. However, the broader social and economic issues typically underlying costly and harmful situations of conflict are often overlooked. See www.hks.harvard.edu/m-rcbg/CSRI/research/Costs%20of%20Conflict_Davis%20%20Franks.pdf.

^{52.} See Control Risks (2014), *Risk: An Organisational Perspective*.

^{53.} Thomson Reuters, *Cost of Compliance 2015*, available at <http://accelus.thomsonreuters.com/special-report/cost-compliance-2015>.

Operationalising the integrity function

Integrity officers interviewed for this report said one of the greatest obstacles they face is ensuring that integrity is considered an important element of how a company does business. This means, on an operational level, including the integrity function in day-to-day operations, for example, consulting the integrity function as early as possible when considering engaging a third party through a partnership or joint venture,⁵⁴ or entering a new market. It could also mean linking integrity to a company's human resources practices (i.e., hiring, training, promotions, remunerations) and/or taking steps to involve the accounting and auditing functions in ensuring a company's books, records and accounts cannot be used to engage in, or hide, misconduct.⁵⁵

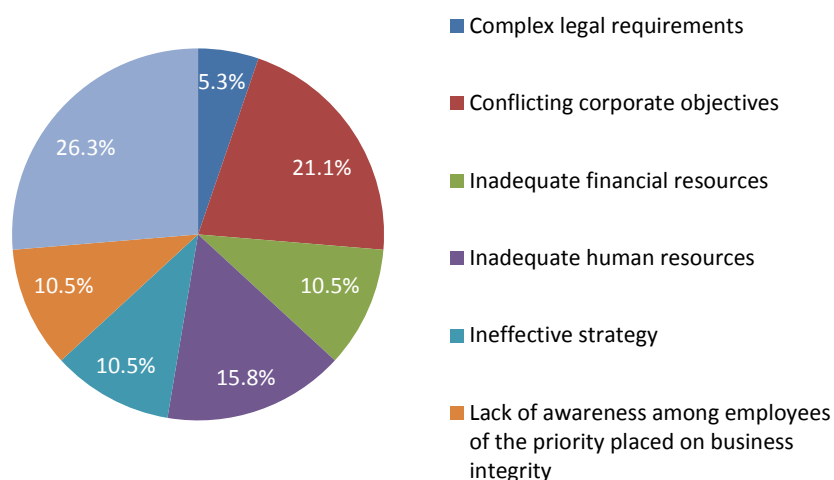
In practice, however, the TNB survey responses and company interviews indicate that integrity considerations may be seen in some companies as separate from business, or worse, an obstacle to business. For example, looking specifically at the issue of risk governance, an OECD assessment of the many failures detected during the financial crisis highlighted that, in many cases, enterprises did not take a firm-wide approach to risk, and risk management was considered non-essential to a firm's business strategy.⁵⁶ As a result, risk managers were often separated from management and not regarded as an essential part of implementing the company's strategy. Most important of all, boards were in a number of cases ignorant of the risk facing the company, particularly in the financial industry. These findings are consistent with the TNB survey responses. It shows that more than a quarter of the external business integrity advisors who took the survey cited unsupportive company leadership as the biggest obstacle to implementing a business integrity policy (Figure 10).

Responses to the TNB survey show that the role that the integrity function plays in business decision-making varies. About a third of respondents indicated that the integrity function has veto power in relation to certain decisions, whereas 31% of respondents indicated that its role was only to make recommendations (Figure 11). Despite this variance, 82% of respondents considered that the framework for reporting by the business integrity function properly informed the pursuit of integrity in their organisation.

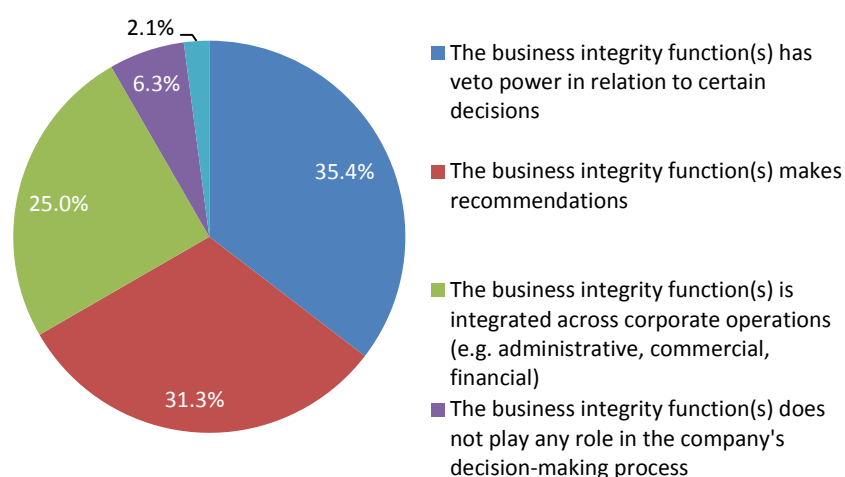
^{54.} The OECD Foreign Bribery Report found that 75% of all foreign bribery cases analysed involved payments through intermediaries. Tackling this challenge, the OECD Working Group on Bribery in International Business Transactions published in 2009 a typology on the role of intermediaries in international business transactions, available online at www.oecd.org/daf/anti-bribery/anti-briberytypologyreports.htm.

^{55.} For example, analysis of the application of anti-bribery accounting and auditing measures indicate that firms engaging in misconduct frequently apply internal accounting procedures in a way that do not identify fraudulent and corrupt payments in their books and records, freeing up these resources to be used for illicit payments. Parties to the OECD Anti-Bribery Convention are required to implement effective laws and regulations on the maintenance of books and records, financial statement disclosures, and accounting and auditing standards to prohibit such acts (Art. 8).

^{56.} OECD (2014), Risk Management and Corporate Governance, Corporate Governance, OECD Publishing, available at <http://dx.doi.org/10.1787/9789264208636-en>.

Figure 10. **Obstacles to an effective business integrity policy**

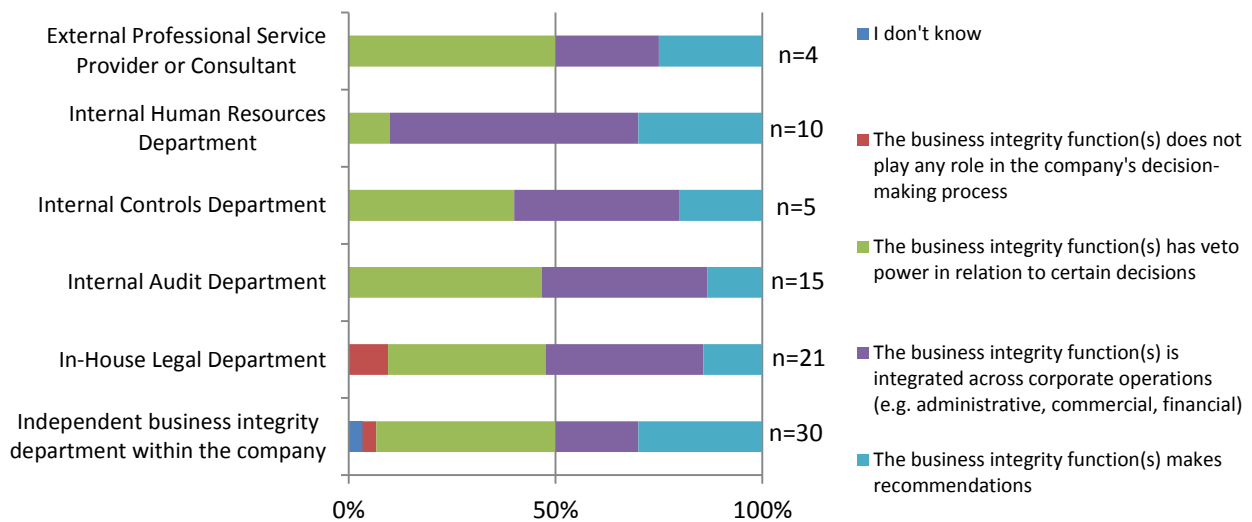
Source: TNB Survey 2015 (19 respondents)

Figure 11. **Mandate of the business integrity function**

Source: TNB Survey 2015 (48 respondents)

A correlation of the responses regarding the perceived responsibility of the business integrity function and where it is located within the company delivered mixed results (Figure 12). About half of the respondents who indicated that their business integrity function was housed in an independent business integrity unit or in their company's in-house legal department also said that it had a veto power. But these two categories were also the only ones where a couple of responses indicated that it did not play any role in the company's decision-making process. Business integrity units housed within internal audit departments were perceived by respondents to have the strongest mandate across respondent companies, compared with business integrity units housed elsewhere within the company. While each company has its own specific organisational and command structure, which are also heavily influenced by the character of people exercising the functions, the choice of location of the business integrity unit may have an influence on its influence and, therefore, on the effectiveness of the company's integrity efforts.

Figure 12. Position of business integrity function relative to responsibility



Source: TNB Survey 2015 (n = number of respondents who replied to both questions)

Recent business trends portray leading companies attempting to take a more holistic approach to the traditional business integrity function to address potential breakdowns in communication between the various independent integrity areas. Some are developing multi-disciplinary teams to implement business integrity policies and measures, with a broader range of skills and experience.⁵⁷ In one company interviewed for this report, the traditional risk management function performed by corporate finance was merged with the compliance function, which had been performed to a limited extent by the legal function. This created a stand-alone governance, risk and compliance (GRC) function, which the board saw as a way to exploit synergies in how the company was managing operational risks and legal compliance.

When asked whether the interaction between the business integrity function and other parts of the organisation was formalised, 56% of TNB Survey respondents indicated that it was. In most cases the formalised relationship took the form of reporting to relevant board sub-committees, or regional compliance committees, which was reflected in the minutes of those meetings, or that the organisation and mandate of the business integrity function was set out in internal corporate bylaws and policies (see Box 5 for one company's experience). One respondent indicated that the business integrity function operated on an open door policy and attended monthly leadership meetings and quarterly executive meetings.

⁵⁷. For example, these teams seek efficiencies through better collaboration between legal, compliance, internal audit and sales teams. These teams, industry surveys show, are generally more efficient and cost-effective. See, for instance, PWC's 2014 *State of Compliance Survey* and EY's 13th *Global Fraud Survey*, available respectively at www.pwc.com/us/en/risk-management/state-of-compliance-survey/assets/pwc-state-of-compliance-2014-survey.pdf, and www.ey.com/GL/en/Services/Assurance/Fraud-Investigation---Dispute-Services/EY-reinforcing-the-commitment-to-ethical-growth.

Box 5. Making the link between compliance and business

“Our competition-specific compliance function complements the company’s overall compliance function. I don’t believe that there is a one-size-fits-all perfect compliance structure; it varies according to each company, but what is important is a ‘top-down compliance culture’ and making sure that there is a link between the person managing compliance and the person managing business. What we have done is to make sure the system works. We do this by calling people up, by showing our business units that we have a system that works.” –In-house competition counsel at a multinational company.

Box 6. Integrating risk management and internal control

Following an earlier re-organisation of the company in 2005, a multinational consumer goods company realized that its risk management practices needed to be improved. The company-wide reorganisation in 2005 had focused on integrating the company’s independent operating entities into one operating unit in each country, which over the company’s century old history had developed as independent entities. However, the company’s senior management recognised that risk-management needed to be strengthened and embedded in its operating units and central functions to reflect the new ways of working across the group.

Engaging a new board on integrating risk management: The company’s reorganisation included changes to the company’s board of directors and executive management. The board of directors welcomed more independent non-executive directors, which gained influence on the board. The roles of Chairman and CEO were separated into a non-executive Chairman and an executive CEO. A “mind-set change” was installed with the new board, which equated stronger performance with improved governance. The board, via the audit committee and under the management of the CEO, tasked the company’s chief financial officer (CFO) to undertake an enterprise-wide risk management review, reporting to the audit committee of the board of directors.

The company’s new risk-approach: The risk management review, which started in 2009, resulted in the development of a new approach that would turn risk management into a fully integrated, simplified, risk management process. “This isn’t rocket science,” said the company’s former chief auditor who, together with the Group Controller, steered the team put together to lead the company’s risk management review, working closely with the CFO. “At the end of the day, our risk management was essentially about making sure everyone in the organisation took responsibility for managing risk and understood that every day they are making decisions and executing activities where there is a risk element. We wanted to make sure they understood and recognised that.”

While prior to the company’s risk review, risk management was often seen more of a compliance-driven, box-ticking exercise, with the new risk management approach, risk management became part of “everyone’s job, every day.” It is no longer managed as a separate standalone activity that is “delegated to others.” A small central risk management team was created to develop risk management practices and guide the operating units and central functions, and consolidate the overview for the executive management, audit committee and the board. The approach is rooted in the belief that risk management should be embedded in the company’s business and managed by people running the business, and that the company’s ability to manage risk should be assured by a strong and independent internal audit function. During the former chief auditor’s tenure, the chief auditor reported to the chair of the audit committee, but always maintained a strong link to executive management. The former chief auditor says that sustaining the board’s attention to, and support for effective risk management “comes from an understanding that, in order to be successful and to win, you need to take risk. But to take risk, we had to have strong risk management and effective governance. It is only by having these that it was possible to take the necessary risks to outperform”.

Finally, the company’s ability to develop, implement, and maintain its new risk management approach depended in large part on engagement from the audit committee, its chair, and ultimately a board characterized by strong, independent directors and a commitment to effective governance right from the top of the organisation.

Note: A version of this case study originally appeared in: IFAC, Integrating Governance for Sustainable Success: How Professional Accountants Integrate Governance into Their Organizations’ Drivers of Sustainable Success (October 2012).

Company interviews indicated that the success of a business integrity function is not necessarily contingent on financial and human resources. Some fairly lean business integrity teams have seen improvements in their companies' ability to prevent corporate misconduct. In these companies, there was strong support and commitment from the board and senior management for a business integrity function, with clearly defined responsibilities, staffed by a manager with sufficient authority and independence, and whose importance is regularly communicated from the highest levels of the company. Interviewees highlighted that under these circumstances special consideration had to be given to not impose overly onerous compliance requirements on business units, to avoid pushback.⁵⁸

In addition, if business integrity policies are integrated across all levels of the organisation and throughout its various business groups, then integrity becomes part of everybody's job, without requiring the recruitment of dedicated integrity professionals which could be more demanding on financial resources (Box 6 provides an example). This was also emphasised in the TNB Survey responses, where over half of the respondents indicated that middle-management was responsible for communicating the business integrity policy at the local/regional/business unit level. Fewer respondents indicated that middle-management reported regularly to senior management on implementation of the business integrity policy (18%) and that middle-management responded to requests from senior management to carry out specific business integrity activities (16%).

3.3. Oversight by board committees

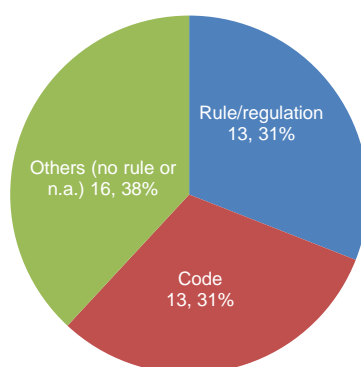
Board support for the implementation and review of a business integrity function is as important as commitment to establish and organise the function. This support can be manifested in the structures that a board creates to ensure oversight of business integrity functions and policies within the company, along with accompanying reporting frameworks.

To oversee, review and monitor implementation of their business integrity policy, companies often choose to mandate an existing board sub-committee, or create a dedicated sub-committee to carry out this task. In many jurisdictions, companies are required to delegate oversight to specific sub-committees, such as risk or audit committees. According to the 2015 OECD Corporate Governance Factbook, a survey of corporate governance practices in 42 jurisdictions, more than half of those jurisdictions set out board responsibilities with respect to risk management either in law / regulations (29%) or in codes (26%). Almost two-thirds of jurisdictions also require or recommend the implementation of an enterprise-wide internal control and risk management system (beyond ensuring the integrity of financial reporting) (Figure 13).⁵⁹

^{58.} Similar reflections on the need to avoid imposing overly onerous integrity procedures and requirements in order to ensure buy-in within the company were expressed by companies participating in a 2009 OECD survey of corporate governance practices in Latin America. See, in particular, the Atlas case study on pp. 55-56 of: IFC and OECD (2009), Practical Guide to Corporate Governance: Experiences from the Latin American Companies Circle, available at www.oecd.org/daf/ca/corporategovernanceprinciples/43653645.pdf.

^{59.} OECD (2015), Corporate Governance Factbook: 2015, OECD Publishing, available at www.oecd.org/daf/ca/corporate-governance-factbook.htm. The Factbook provides the most comprehensive catalogue to date of the legal and regulatory frameworks, institutions and practices in place OECD and partner jurisdictions. The survey of measures for ensuring governance of internal control and risk management referenced here included the 34 OECD members plus Argentina; Brazil; Hong Kong, China; India; Indonesia; Lithuania; Saudi Arabia; and Singapore.

Figure 13. Requirement to implement an internal control and risk management system



Source: OECD (2015), Corporate Governance Factbook: 2015.

The structure, scope of responsibility, and makeup of these sub-committees have an important outcome on the quality of the oversight they undertake. Creating a dedicated committee, while symbolic, can be ineffective in practice if it does not receive enough support and board attention, if its members do not have the adequate skills to oversee sometimes complex and technical matters, or if the sub-committee's scope of responsibility and reporting arrangements are not clear (see, for example, Box 7).

Box 7. Board structures that challenge effective oversight

Example 1—"With everyone in charge, no one is in charge": A multinational transportation holding company with subsidiaries and operations in over 100 countries has several boards dealing with integrity issues—one for the holding company and one for each of its major subsidiaries. Because of this layered board structure, there is no clear definition of responsibility for issues like governance and compliance. The lack of clarity on specific responsibilities also renders it difficult to nominate directors with specific skills (such as an accounting or legal background) in order to tackle issues related to integrity. At the time of writing, the company's board structure was under review.

Example 2—"Jack of all trades, master of none": In a large multinational construction company a governance review is undergoing at the request of its new Chair. Under its current structure, the company's head of ethics and compliance reports three times per year to a "catch-all" committee that dealt basically with any issue not related to audit or remuneration. The Chair is considering a reorganisation of the "catch-all" committee in order to ensure the board more effectively executes its oversight responsibilities, including in relation to ethics and integrity. As part of this reorganisation, reports on ethics and compliance may be made directly to the board of directors on a twice-yearly basis, complemented by twice-yearly meetings between the head of ethics and compliance and the Chair and Chief Executive Officer.

Almost two-thirds of company respondents indicated that their company's board had a specialised sub-committee to oversee the business integrity function. Most commonly, the board's audit committee took on this role (57%), but some companies had created a dedicated compliance committee (22%). In some others, oversight was shared between the audit committee and other committees such as the compliance, corporate social responsibility, public policy, risk or sustainability committees. In one case, an interviewee described the system of governance committees set up across product groups of a company. This system helped to achieve the buy-in of group executives across the company, but of course its success also depended on the attitude of such executives. It was something tangible that showed the company was taking integrity and compliance seriously. The importance of assigning

individual responsibility for integrity issues to a specific board member with background in these issues was emphasised.

The 2014 OECD Risk Management and Corporate Governance report describes the usual role of board committees in risk management:

“Typically, the risk management function within the board is found within the audit committee, reflecting common practice and/or legislative requirements. The EU’s Statutory Audit Directive requires audit committees to monitor the effectiveness of the company’s internal control, internal audit where applicable, and risk management systems, and similar rules exist around the world. In the US, for example, the New York Stock Exchange (NYSE) listed company rules, as they stand, require audit committees to discuss policies with respect to risk assessment and risk management.⁶⁰ The FSB considers it to be “sound risk governance practice” that financial institutions have a stand-alone risk committee, distinct from the audit committee, has a chair who is an independent director and avoids “dual-hatting” with the chair of the board or any other committee.”⁶¹

Interviewees carrying out business integrity functions noted that their role was made much easier when they had the support and buy-in of the board’s chair and/or the sub-committee chair. The role of the chair is emphasised, for example, in the UK and German corporate governance code provisions on the tasks and authorities of the board (see Annex B). Where integrity concerns are dealt with at the sub-committee level, having an engaged and informed chair can ensure that business integrity issues are effectively brought to the board’s attention when needed.

3.4. Integrity training

In order to ensure the support and buy-in of the board and senior executives, it is vital that they are aware of the importance of effective business integrity policies and risk-based due diligence to the long-term objectives of the company. A focus on short-term gains rather than long-term financial sustainability can also result in less board-level commitment and investment in business integrity. Aside from the significant financial risks involved in law enforcement actions and accompanying sanctions for corporate misconduct, there are other financial consequences that may affect the bottom line.⁶²

^{60.} Some have expressed concerns that audit committees may not be the right body to be charged with risk oversight. See e.g. Choi (2013) and NYC Bar, available at <http://www2.nycbar.org/pdf/report/uploads/20072409-NYSEListedCompanyRules.pdf>.

^{61.} OECD (2014), Risk Management and Corporate Governance, Corporate Governance, OECD Publishing, p 18, available at <http://dx.doi.org/10.1787/9789264208636-en>. The NYSE rules further comment that “while it is the job of the CEO and senior management to assess and manage the listed company’s exposure to risk, the audit committee must discuss guidelines and policies to govern the process by which this is handled. The audit committee should discuss the listed company’s major financial risk exposures and the steps management has taken to monitor and control such exposures. The audit committee is not required to be the sole body responsible for risk assessment and management, but, as stated above, the committee must discuss guidelines and policies to govern the process by which risk assessment and management is undertaken.” See NYSE, Listed Company Manual (Section 303A.07), available at http://nysemanual.nyse.com/lcm/Help/mapContent.asp?sec=lcm-sections&title=sx-ruling-nyse-policymanual_303A.05&id=chp_1_4_3_8.

^{62.} For example, as noted in the OECD Foreign Bribery Report, in the cases where such information was available, on average bribes equalled 10.9% of the transaction value and 34.5% of the profits obtained.

The need for greater board education on the returns of investment in business integrity is recognised in some of the guidance outlined above. This is where training and awareness-raising comes to the fore. Under half of the respondents to the TNB Survey indicated that the board had received in-person training on the company's business integrity policy and 39% had received on-line training. It goes without saying that an ill-informed board is not well-placed to oversee the implementation and monitoring of the company's integrity policy.

Interviewed company representatives highlighted that, as important as appointing the right sub-committee chair, it was to ensure that the right skills were represented there and on the board (i.e., directors with backgrounds in law, accounting and auditing, risk management, etc.). For example, one non-executive director from an international energy company reported that, in order to improve the sub-committee charged with overseeing compliance risk, the committee members had participated in a legal anti-bribery training, which was regarded as "absolutely vital" to their ability to fulfil their duties. Industry surveys indicate, however, that more could be done to ensure directors are equipped with the skills they need to execute their business integrity oversight function.⁶³

The 2014 OECD Risk Management and Corporate Governance report highlight that the use of training is becoming more frequent, but warned that it "is unclear how far such programmes are able to transmit a sufficient degree of knowledge about risk management. They may help, but are unlikely to fully replace the knowledge that is gained through long-term industry experience."⁶⁴

3.5. Reporting on integrity

Who reports to whom

As recognised in the Principles, "[i]n order to fulfil their responsibilities, board members should have access to accurate, relevant and timely information." This includes the effective execution of the board's responsibilities to oversee the company's business integrity policy. There is a need, therefore, for strong and clear reporting procedures.

The OECD Good Practice Guidance on Internal Controls, Ethics and Compliance (see Annex B), applicable to a wider array of risk beyond foreign bribery, recommends that companies ensure that "the authority to report matters directly to independent monitoring bodies such as internal audit committees of boards of directors or of supervisory boards, is the duty of one or more senior corporate officers, with an adequate level of autonomy from management, resources, and authority." The TNB Survey shows how this may occur in practice. In companies that have a dedicated business integrity function (e.g. compliance department; ethics department; sustainability department), 50% of respondents indicated that this function reports to either or all of the general counsel, CEO or directly to the board sub-committee

Additional and less quantifiable costs include a reduced appetite to invest on research and development, as contracts are not being gained on merits, which can have disastrous long-term effects for companies that end up being uncompetitive due to their neglect of innovation.

^{63.} A 2013 Deloitte survey of over 300 directors found that less than half (47%) agreed that they are receiving sufficient training to effectively carry out their role. Deloitte (2013), Director 360: Growth from all Directions, 2013, available at <http://www2.deloitte.com/content/dam/Deloitte/global/Documents/Risk/gx-ccg-director-360-growth-from-all-directions-third-edition.pdf>.

^{64.} OECD (2014), Risk Management and Corporate Governance, Corporate Governance, OECD Publishing, p 17, available at <http://dx.doi.org/10.1787/9789264208636-en>.

charged with compliance oversight (multiple responses were possible). One fifth of respondents indicated that the function reports directly to the chair of the board (See Box 8 for an example).⁶⁵

Box 8. Reporting to the board

Following multijurisdictional investigations into potential foreign bribery at this multinational technology and engineering company, internal and external investigations initiated when allegations of corruption came to light found that the company's corporate culture had failed with regard to compliance and thus facilitated systematic corruption. The insight resulted, during the course of one year, in new appointments to key positions: the Chairman of the Supervisory Board, the President and CEO, the General Counsel, the Chief Compliance Officer and the Chief Audit Officer. Almost the entire management board was replaced. The enforcement action also led to a total overhaul of the company's compliance system, including how it is overseen by the supervisory board. The compliance system's overhaul was undertaken with assistance from the company's independent compliance monitor, engaged by the company as part of a settlement reached with law enforcement.

These changes included new systems for reporting compliance and integrity risks to the supervisory board at the company. After the announcement of legal proceedings for foreign bribery, the company initiated an independent investigation by an external law firm reporting directly to the supervisory board, in order to avoid conflict of interest, given that a number of members of the company's management board were under investigation. This system developed into the establishment in of a specialized board committee, the compliance committee, which is chaired by the chair of the supervisory board. Today, the compliance committee receives quarterly reports from the company's compliance function—and these are unfiltered from the reports provided regularly to the managing board. The compliance committee is part of the supervisory board, which also receives annual reports from the head of the company's compliance function.

The question of the independence of the business integrity function and direct reporting to the board is most often raised in the context of business integrity frameworks where the compliance function (i.e. CCO) is overseen by the in-house legal department, or where the same person or team is invested with the responsibility for carrying out both the compliance and legal functions. The issue is hotly debated and arguments are made on both sides. On the one hand, there are reasons to protect eventual issues of attorney-client privilege should a business integrity issue evolve into an internal investigation and/or enforcement action. On the other hand, there are reasons to avoid the inherent conflict of interest between the role of general counsel (acting in the interests of her/his client) and the role of the compliance office in detecting, preventing and addressing serious corporate misconduct (even when it may be committed at the highest levels of the company),⁶⁶ as well as broader issues of confidentiality and impartiality (Box 9). While the debate continues and considerations of reporting structures will depend on the specific circumstances of each company, the US Sentencing Commission Guidelines Manual (see Annex B) provides some clarification as to the minimum requirements of independent and direct reporting:

“Specific individual(s) within the organization shall be delegated day-to-day operational responsibility for the compliance and ethics program. Individual(s) with operational responsibility shall report periodically to high-level personnel and, as appropriate, to the governing authority, or an appropriate subgroup of the governing authority, on the effectiveness of the compliance and ethics program. To carry out such operational responsibility, such

^{65.} As stated above and in the methodology, the respondent companies were mainly large, privately-owned or publicly listed multinationals and hence the data in this report is not representative of the specific circumstances of SMEs and SOEs.

^{66.} Michael W. Peregrine, *New Guidance on Compliance Officer "Independence"*, AHLA Weekly, October 31, 2014; Donna Boehme, *When Compliance and Legal Don't See Eye to Eye*, Corporate Counsel, May 8, 2014;

individual(s) shall be given adequate resources, appropriate authority, and *direct access to the governing authority or an appropriate subgroup of the governing authority.*⁶⁷

Box 9. Should the compliance and legal functions be integrated or separated?

There appears to be no consensus in the business community as to what is considered good practice regarding the separation or integration of the legal and business integrity functions within a company. A number of companies interviewed for this report combined the functions; others were adamant that they should be separated. In still other companies, the functions are separated, but the compliance function reports directly to the general counsel. The views below provide examples of the rationales behind individual companies' decisions as to where the business integrity function should sit:

In favour of combining legal and business integrity functions:

- “In our company, the compliance function sits within the legal function. This works for us. Because I am the company’s general counsel, I am involved in all business decisions, including mergers and acquisitions. That means that compliance considerations are always integrated into business decisions. For example, we have divested in certain opportunities because of anti-bribery concerns. In another example, our marketing units need to get clearance from my team in order to roll out new marketing programmes, to ensure they do not infringe on our anti-trust code of conduct. I think that it could be harder to integrate compliance considerations at an early stage in business decisions if the compliance function was separate from legal.”

In favour of separating the legal and business integrity functions:

- “I believe separating these roles is important. Legal directors can be incredibly pressed for time, and there will always be something that seems more urgent than implementing measures to prevent potential misconduct. At our company, these functions have recently been separated, and as head of ethics and compliance, I feel I have more direct control, now, over the department. Legal and compliance do not always have the same views on things. For example, when advising a client on how to handle an issue, the legal solution might differ ever so slightly from the ethical solution—sometime acting with integrity means setting the bar higher than the strict letter of the law”.

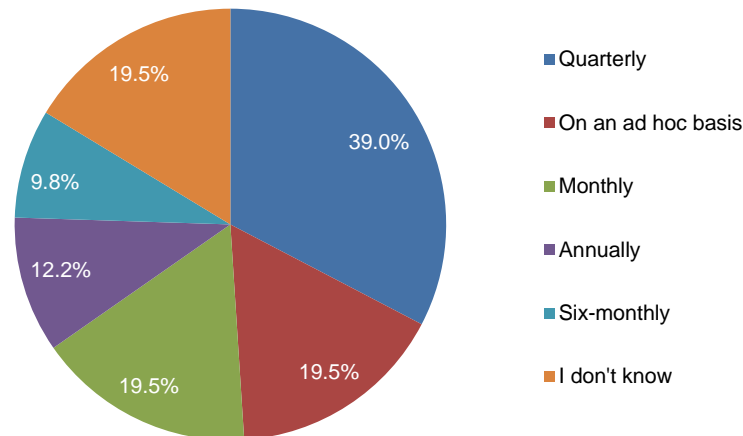
Frequency of reporting

One-third of respondents to the TNB Survey noted that the business integrity function reports quarterly within the organisation, whereas the rest were rather evenly distributed in groups saying that reporting occurred on an ad hoc basis, monthly or that they did not know how often the business integrity function reported. Two-thirds of respondents stated that their boards receive regular (i.e. at least quarterly) updates on risks of exposure to or engaging in serious corporate misconduct (Figure 14).

The TNB Survey also asked respondents how often risks of serious corporate misconduct were presented to the board in relation to projects requiring their approval. The most common responses were ‘always’ (27%), ‘frequently’ (25%) or ‘I don’t know’ (23%). The high number of respondents who could not describe how frequently the board was informed of project-specific business integrity risks could raise questions as to whether such risks were effectively presented or considered.

⁶⁷. US Sentencing Commission Guidelines Manual § 8 B2.1(b)(2)(A) (), emphasis added.

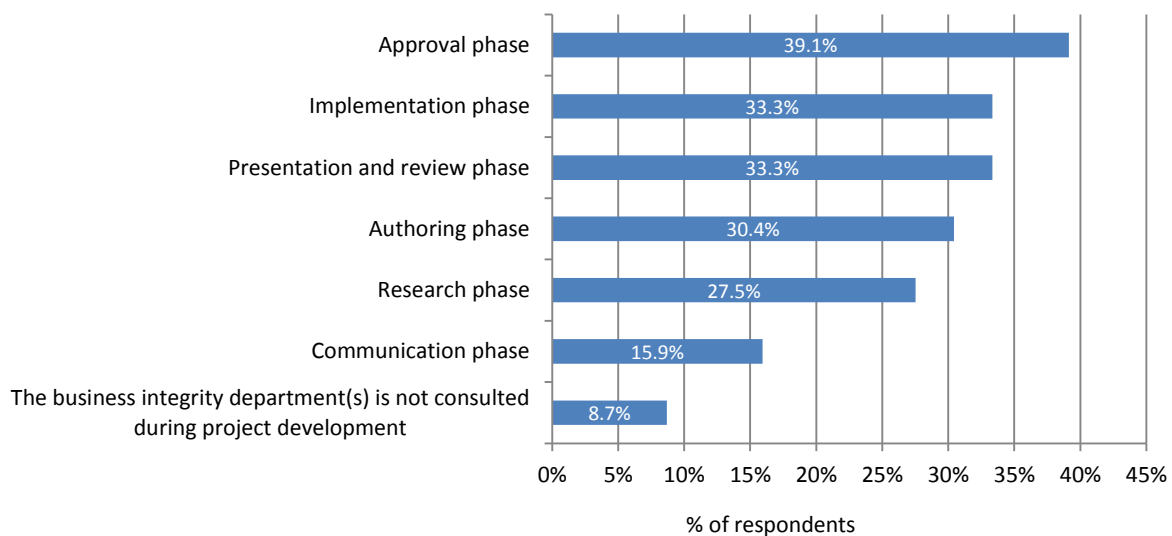
Figure 14. Frequency of business integrity reporting within the organisation



Source: TNB Survey 2015 (49 respondents)

When asked specifically at which stage during the business project development the business integrity function was consulted (the question did not specify whether such consultation would be by the board or relevant business unit involved), respondents to the TNB Survey answered that consultation occurred more or less throughout the process, from research to implementation, with a slight increase in consultation towards the end of the process, culminating in the approval phase and reduced consultation at the preliminary stages (Figure 15). Early communication of such risks to the board is seen as a way to ensure both a preventive and a remedial approach to business integrity (Box 10).

Figure 15. Consultation of business integrity function in project development process



Source: TNB Survey 2015 (69 respondents)

Box 10. Going beyond formalistic board updates on integrity

“We need to get out of a formalistic approach to engaging the board, and we need to make sure the board takes these issues seriously. Someone on the board might want one line where compliance says there are no critical issues as assurance. But, with that approach, how can you appreciate, understand, and assess a risk that apparently is not critical but could become critical?”—chief compliance officer from a major international company.

What is reported

Beyond clear, independent, and regular reporting on business integrity considerations to the board, an equally important consideration is the substance of the business integrity reports that the board receives. This should not be considered a passive exercise undertaken by the board; directors should be engaged in, and require information from executive management they feel necessary to properly execute their oversight responsibilities. As one governance expert stated in an OECD survey of business experts on the application of the Principles:

“to be prudent, directors can no longer rely entirely on management to determine what issues the board considers and what information is presented for board attention. Directors should assure that systems are in place for flagging relevant and material issues.”⁶⁸

Interviewees described periodic reports on the achievements and challenges of implementing the business integrity policy, including a description of the risks and measures to mitigate them, available resources, along with statistics relating to trainings and reports received through reporting mechanisms. Aside from business integrity-specific reporting, interviewees also noted how important it is for the board to be informed of project or jurisdiction-specific business integrity risks that may arise in the context of reporting by other areas of the business (Box 11).

Box 11. Reporting to board sub-committee

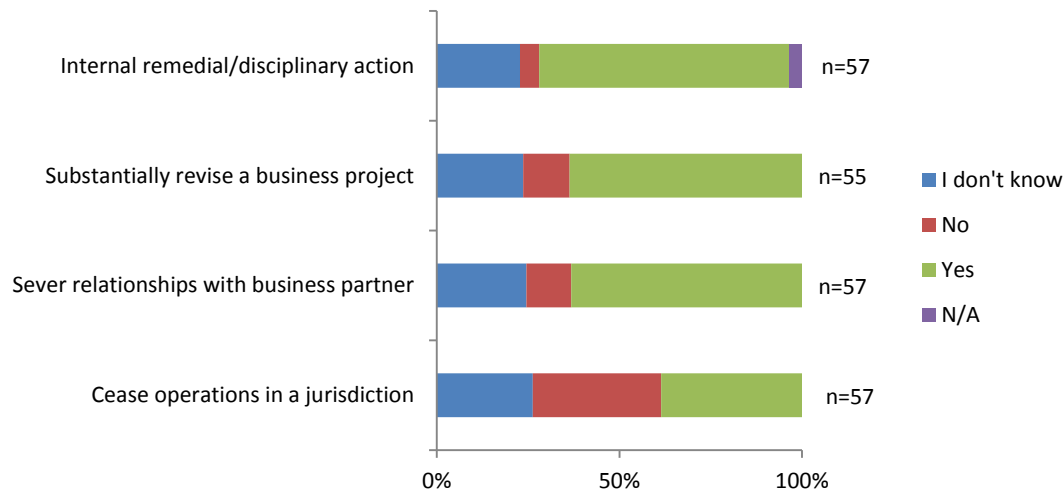
“Prior to our regular meeting with the sub-committee responsible for compliance, the compliance department prepares a progress report on the company’s compliance function and on trends and analysis related to implementation of the company’s code of conduct. This will include, for example, statistics on reports to the whistleblower hotline, whether there has been an increase in a certain type of violation, and why that might be happening. For example, could an increase in reports of potential fraud be because there is more fraud happening in the company, or are more employees able to recognise this type of misconduct and do more employees know where to report such misconduct? These papers are also made available to the entire board, as well as the external auditors, particularly when there are cases that may involve potential fraud.”

Regarding decisions actually taken by the board following reporting of the business integrity risks involved, approximately two thirds of respondents indicated that the board or senior management had either severed a relationship with a business partner or decided to substantially revise a business project because of the risks of serious corporate misconduct involved (Figure 16). Another 39% of respondents indicate that the board or senior management had decided to cease business operations in a particular jurisdiction because of the business integrity risks reported. This shows that business integrity

⁶⁸. OECD (2008), *Using the OECD Principles of Corporate Governance: A Boardroom Perspective*, OECD Publishing, p. 58

considerations are influential in board decisions to take remedial action in relation to established business relationships or projects, and to a lesser extent in specific regions of operation. It is unclear on the basis of these responses, however, whether other factors were also at play, including internal financial considerations for the company and external media or law enforcement authorities' attention to the risks of corporate misconduct in question.

Figure 16. **Board decisions taken in light of business integrity risks**



Source: TNB Survey 2015 (n = number of respondents who replied to both questions).

3.6. Reviewing business integrity policies

Putting a business integrity policy in place and establishing a business integrity function charged with executing that policy is not the end of the story. Ongoing monitoring and review of the business integrity framework is essential for the well-functioning of the function. As emphasised in the Principles, “monitoring of governance by the board also includes continuous review of the internal structure of the company to ensure that there are clear lines of accountability for management throughout the organisation” (Annotations to VI.D.2) (Box 12 describes one company’s approach to monitoring implementation of its business integrity programme).

When asked how frequently their companies’ business integrity policy was reviewed, respondents to the TNB Survey were fairly evenly split between ‘on an ad-hoc basis’ (32%), ‘annually’ and ‘every 2 to 5 years’ (26%, respectively), suggesting that there is no standard practice in companies in this regard. In addition, 71% of respondents indicated that the business integrity function was subject to audit, the frequency of such auditing varied from on an ad-hoc basis, to annually or biannually (Figures 17 and 18). These results are nonetheless positive, indicating recognition among the majority of respondent of the need to regularly review business integrity policies and functions.

Box 12. Monitoring implementation of an integrity programme

Upon discovery of a possible risk of bribery in connection with its business, a UK-headquartered multinational company conducted an internal investigation that led to a self-referral to the UK Serious Fraud Office and debarment from participating in World Bank transactions. One of the conditions of release from debarment by the World Bank was implementation of a satisfactory compliance programme. At the time, the company did not have a compliance programme. The first step was to appoint a Group Compliance Officer to conduct a risk assessment and establish appropriate policies and procedures and to educate staff. Thereafter, the company has engaged in a monitoring programme to ensure that such policies and procedures are well understood and adhered to throughout the group.

The programme involves internal audit and also comprises two additional components highlighted here: self-assessments and regular compliance reviews. Through these components, the monitoring programme is designed to give a cross-divisional and international picture of the current state of implementation of the compliance program. The results are used to identify areas which need more support and to share best practice across the group. Self-assessments require the head of office or business unit to reflect on his/her own unit's understanding of certain key issues (which may vary from year to year), to indicate whether in his or her opinion the business unit has understood and implemented the controls identified, and to affirm his or her own personal commitment to the standards required. The head of office or business unit is encouraged to seek clarification from his/her staff on any issue s/he cannot complete from his/her own knowledge and the form is then returned to the Group Compliance Officer for consideration. The results are used to focus and prioritise further education and guidance on the issues covered.

A minimum of six compliance reviews are conducted annually. The subject of the review can be a department, business unit, overseas office or business process. The review process is led by the Group Compliance Officer (a lawyer) or the Deputy Group Compliance Officer (an accountant) as appropriate to the subject matter of the review. The compliance reviews are intended to test implementation of the compliance program within the specific business unit, and are not intended to be a substitute for internal audit of financial controls and results in a qualitative assessment based on interview with relevant staff. Compliance reviews assess seven topics. They are areas of focus are intended to develop (and have developed) as the company's compliance programme matures. These include:

Governance – Assesses the tone at the top and middle. Questions include: Is active commitment and visible support given by management? Has there been clear, practical and accessible communication of the compliance programme and standards to employees? Has management established a trust-based organisational culture, adopting the principles of openness and transparency? Are appropriate levels of oversight of subsidiary operations established? What structures and processes are in place to enable oversight? What information is required by management in real-time or periodic reporting?

Risk assessment – Reviews management's engagement in the compliance risk assessment. Questions include: Are there any new areas of business which should be reflected? Does management engage in any other formal risk assessment process? If not, how does it assess its risk of fraud, corruption or other legal or regulatory risk?

Due diligence/management of business partners – Questions include: Have business partners been identified? What processes are in place for the selection and appointment of business partners? Are risk-based background checks in place? Do these extend to joint ventures? Has it been effectively communicated that entities are required to adopt the company's Code of Conduct or equivalent standards? How is risk assessed and kept under review?

Education and training – Determines the level of awareness and understanding of the company's standards, policies and procedures amongst employees (including casual staff) with over three months' tenure. Questions asked include: Have all relevant employees participated in required training? Has management identified high-risk employees, such as senior executives and business unit leaders? Has tailored training been requested and provided?

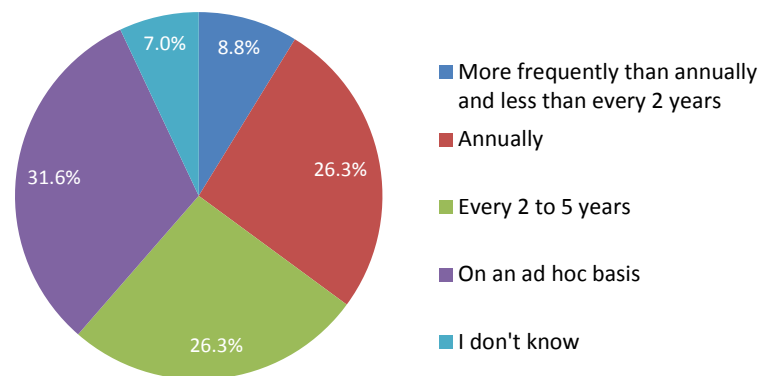
Controls and procedures – Questions include: Do HR practices reflect the company's commitment to the program? In assessing the integrity of employee data, are there any instances of duplicate employees or payments to spouses, associated persons/entities etc.? Assesses the business unit's processes regarding reporting of facilitation payments, as well as processes regarding gifts, entertainment, hospitality, lobbying, sponsorship, charitable/political contributions, reimbursement of expenses commission payments, petty cash, cash advances, etc.

Box 12. Monitoring implementation of an integrity programme (cont.)

Channels for questions, concerns and advice – Questions include: Has management established a culture in which questions will be raised? Does management regularly communicate the requirement for reporting concerns? Does the business unit have a clearly defined plan for response to such concerns? Are procedures in place to ensure that any issues are communicated to the appropriate group function?

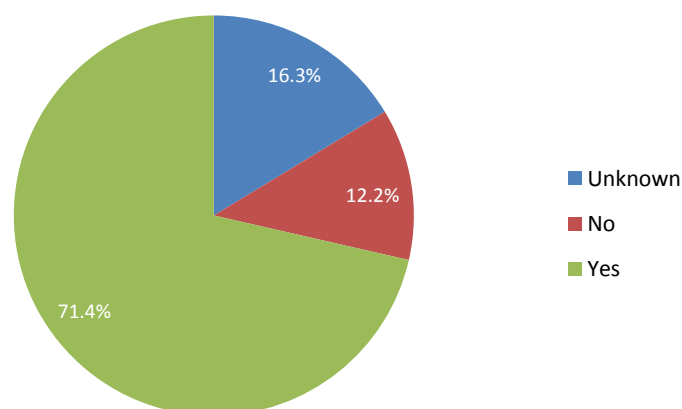
Monitoring and review process – Ensures that changes in compliance risks are identified and procedures reflect the current risks. Questions include: Have local policies/procedures been revised reflecting previous recommendations? Are any changes to the monitoring plan required to reflect issues identified in this review?

Figure 17. Frequency of review of the business integrity policy



Source: TNB Survey 2015 (57 respondents)

Figure 18. Audit or evaluation of the company's business integrity function



Source: TNB Survey 2015 (49 respondents)

3.7. Communicating on business integrity

The importance of communication to an effective business integrity framework should not be underestimated. The UK Adequate Procedures Guidance (see also Annex B),⁶⁹ for example, describes the actions to be taken by top-level management, including communication of the organisation’s anti-bribery stance. The ICC Antitrust Compliance Toolkit (2013), a “by business for business” guide, is designed to recommend practical antitrust tools for SMEs and larger companies wishing to build or reinforce a robust compliance programme.⁷⁰

Still, communicating on business integrity remains a major challenge for integrity officers as it often requires communicating about a company’s values across cultures, geographies, and along the business value-chain. This “is one of the toughest challenges for the board and top management,” said one corporate governance expert in an OECD survey of business leaders’ perspectives on how to apply the Principles in the boardroom: “The board should begin by adopting a set of values to guide the functioning of the corporation, and articulating them throughout all levels of the organisation, for example, through company-wide speeches by the CEO and/or directors, and company training programmes.”⁷¹

Moving down from the board, a recent survey of more than 600 anti-corruption compliance professionals tallied the three most difficult challenges they face in their jobs, all of which have applicability beyond corruption-specific risks: i) ensuring all employees understand and accept responsibility for ethical behaviour; ii) developing policies and procedures that can be practically applied in all countries; and iii) implementing effective anti-corruption training across the organisation.⁷² Strong commitment and communication from the top connects integrity officers’ ability to meet all three of these challenges. “You cannot underestimate the power of tone from the top and repeatedly over-communicating on these issues,” said one chief compliance officer. “If you don’t, it’s amazing how easily people will forget and integrity concerns get side-lined” (Box 13).

Box 13. Communicating integrity

“One of the companies we certified, which operates in a country whose Transparency International Corruption Perceptions Index score is between 35 and 40 (out of a top score of 100), printed its ethics charter on a large-scale poster. The poster was then displayed in the highly visible entry hall of its building. All employees (of which there are several hundred) signed their names in the margins of the poster. Newcomers to the company are also invited to sign. All visitors to the company (clients, subcontractors, public agents, etc.) can see that the commitment to ban corrupt practices is not only a corporate commitment, but also one of the entire staff.” –president of an agency specializing in the certification of anti-bribery programmes.

^{69.} UK Guidance about procedures which relevant commercial organisations can put in place to prevent persons associated with them from bribing. See www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf.

^{70.} The ICC Antitrust Compliance Toolkit (2013) is available online at www.iccwbo.org/advocacy-codes-and-rules/areas-of-work/competition/icc-antitrust-compliance-toolkit/.

^{71.} OECD (2008), Using the OECD Principles of Corporate Governance: A Boardroom Perspective, p. 27, available at www.oecd.org/corporate/ca/corporategovernanceprinciples/40823806.pdf.

^{72.} Control Risks 2014, International Business Attitudes to Corruption – Survey 2014/2015.

3.8. Special considerations for SOE boards

State-owned enterprises (SOEs) are on the ascendancy in the global economy. According to recent OECD analysis, the State in various countries yields dominant or significant influence in at least 22 of the world's 100 largest corporations.⁷³ SOEs are mostly active in sectors of the economy with a higher integrity risk incidence (utilities, oil and gas, power generation and transmission, transportation, telecommunications, defence, banking and finance, engineering and construction, and mining and steel), are often parties to large size contracts and they also appear to be more likely than their private peers to work in foreign jurisdictions with weak governance. Thus there is a strong case to be particularly vigilant regarding the risk of misconduct in SOEs.

Indeed, the OECD Foreign Bribery Report⁷⁴ showed that roughly one-quarter of all concluded cases involved bribery of SOE employees. They also received the most expensive bribes. More than 80% of the monetary total of all of the bribes in these cases were offered, promised, or paid to SOE employees. In addition, media allegations of foreign bribery cases informally compiled by the OECD indicate that SOEs are alleged to be involved in a substantial number of cases on the supply-side of bribery.⁷⁵

Allegations of widespread misconduct in SOEs can have vast consequences for trust in markets and support for governments, beyond investor confidence issues that are to be expected in similar cases involving listed companies. In particular, these cases call into question the mechanisms in place for supervising the business operations of state-owned and state-controlled companies, including procedures for nominating and evaluating members of the SOE's highest decision-making bodies, the board of directors and executive management. Moreover, SOEs should be held to at least as high a standard of business conduct as non-SOEs, and are in a position to be a good example to non-SOEs. If SOEs are involved in serious corporate misconduct, it may be perceived as unfair to expect non-SOEs to stand for higher integrity standards. It might also encourage non-SOEs to think that national governments may turn a blind eye to the misconduct of SOEs due to national economic interests.⁷⁶

^{73.} Christiansen, H. and Y. Kim (2014), "State-Invested Enterprises in the Global Marketplace: Implications for a Level Playing Field", OECD Corporate Governance Working Papers, No. 14, OECD Publishing, available at <http://dx.doi.org/10.1787/5jz0xvfv16nw-en>.

^{74.} OECD Foreign Bribery Report: An analysis of the crime of bribery of foreign public officials, OECD Publishing 2014, available at <http://dx.doi.org/10.1787/9789264226616-en>. The Report analyses data concerning all cases which have been completed or concluded with the imposition of sanctions (until its publishing in 2014).

^{75.} According to informal data on media allegations compiled by the Secretariat, around 14% of media allegations involving SOEs involve the supply of bribes to foreign public officials.

^{76.} This is an area where the OECD has been working under the label of competitive neutrality, understanding that state-owned and private businesses should compete on a level playing field, subject to the same rules, which is essential for the effective use of resources within the economy and thus the achievement of growth and development. See www.oecd.org/daf/ca/achievingcompetitiveneutrality.htm for more information.

The OECD Guidelines on Corporate Governance of State-Owned Enterprises (the SOE Guidelines) include specific recommendations for SOE boards, which

“tend to be too large, lack business perspective and independent judgment. They may also include an excessive number of members from the state administration. Moreover, they may not be entrusted with the full range of board responsibilities and can therefore be overruled by senior management and by the ownership entities themselves. Moreover, their function may also be duplicated by specific state regulatory bodies in some areas.”⁷⁷

The SOE Guidelines recommend that SOE boards should be independent, competent, and have clear and full mandate for their functions. The 2015 revision of the SOE Guidelines has included strengthened language on SOE boards’ particular responsibility for ensuring compliance and ethics within the enterprise and the need for SOE governance to reflect the highest standards of business conduct. The reason for this increased focus on integrity is the sizable influence SOEs have in many economies. For example, in Norway, the State’s SOE shareholding amounts to USD 100 billion, and SOEs in that jurisdiction pay back about USD 4 to 5 billion in dividends to the national government. The Government therefore believes that it is in the long-term interest as shareholders that SOEs are responsible—both at the level of the board, but also that SOEs are held accountable.⁷⁸

Even though the findings do not necessarily represent the specific situation of SOEs,⁷⁹ many of the respondents that work for, with, or are competitors of state-owned enterprises generally shared the view that, in some jurisdictions, SOEs may lag behind their private sector counterparts. This is perceived in their implementation of corporate governance frameworks and the way they address business integrity considerations. This difference is another obvious candidate for further research in line with the findings on this paper.

3.9. Special considerations for SMEs

The corporate governance practices described in this chapter may have limited application to SMEs and family-owned companies with different operational and governance frameworks from those of the mostly MNEs that have informed their description, though this has not been officially assessed by the OECD. SMEs may nonetheless be just as, if not more exposed, to the risks described in this paper, most clearly because SMEs often do not have the same resources as their larger business partners to invest in business integrity policies and functions. Others would argue that it is easier for SMEs to ensure business integrity, given that their smaller operations and workforces are easier to monitor than those of much larger companies with multinational operations. Only 16 of the 88 respondents to the TNB Survey represented SMEs and almost all of these were external business integrity advisors such as law and

^{77.} OECD Guidelines on Corporate Governance of State-Owned Enterprises, annotations to Recommendation VI, available at www.oecd.org/daf/ca/OECD-Guidelines-Corporate-Governance-SOEs-2015.pdf. For more on good practices for SOE boards of directors, see: OECD (2013), Boards of Directors of State-Owned Enterprises: An Overview of National Practices, Corporate Governance, OECD Publishing, available at <http://dx.doi.org/10.1787/9789264200425-en>.

^{78.} See the remarks of Mr Anders Berg, Chair of the OECD Working Party on State Ownership and Privatisation Practices, delivered at the 25 March 2015 Trust and Business Project consultation available at www.oecd.org/daf/ca/trust-business.htm.

^{79.} There was only a very small representation of companies with significant state ownership (though all with less than 50% shareholding) in the sample of companies responding to the TNB survey and participating in interviews.

accounting firms or risk management consultancies. Future work in this area could focus on the specific business integrity challenges for SMEs and their approach to implementing business integrity policies.

Some jurisdictions make specific provisions for small and family-owned companies in their corporate liability legislation and any related consideration of compliance programs. For example, Brazil's recently adopted Decree 8 420 of 2015 relating to implementation of its Clean Companies Act, the fact of being a small or micro enterprise will be taken into consideration when evaluating a company's integrity program for the purpose of a leniency agreement under the Act. Equally, Spain's recent modifications to its Criminal Code⁸⁰ establishing a defence or mitigated sanctions for companies that can demonstrate a management or organisational business integrity model, have specific provisions for SMEs. The new article 31bis provides that in small size legal persons, the monitoring function should be assumed by the administration/managing body.

⁸⁰. See Organic Law 1/2015.

Chapter 4

Drivers of effective implementation of business integrity

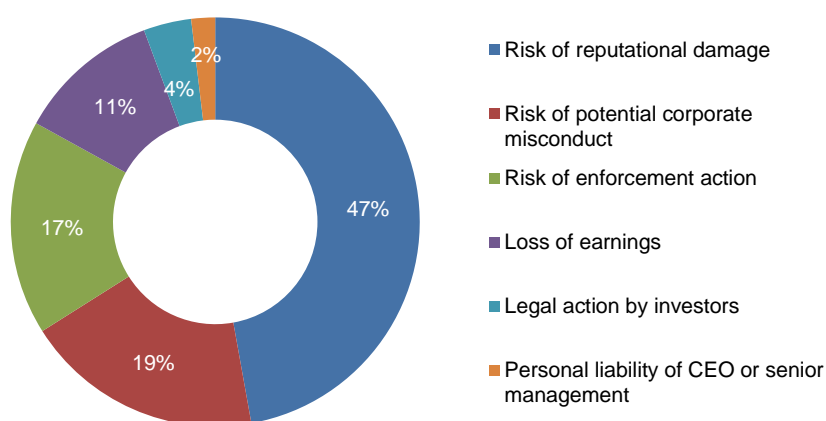
This chapter focuses on factors influencing businesses' consideration of whether and how to implement business integrity policies and programmes within firms. It highlights factors cited by companies as influential in their decision making. These factors are classified in three groups:

1. internal initiatives adopted by companies themselves,
2. external initiatives influenced by stakeholders, and
3. government actions.

Understanding the drivers of private integrity efforts is a central element of findings ways to address corporate misconduct and to promote business integrity.

For the public sector policy community, understanding the drivers of private integrity efforts is a central element of strategies to decide which tools they can use to better address serious corporate misconduct and to promote business integrity. According to the TNB Survey results, the primary reason cited by respondents for their company’s resolve to detect, prevent and address serious corporate misconduct was the risk of reputational damage (47%), followed by the related risks of potential corporate misconduct (19%) and the risk of enforcement actions (17%) (Figure 19).

Figure 19. Main reasons for seeking to detect, prevent and address misconduct



Source: TNB Survey 2015 (53 respondents)

Even before an official enforcement investigation is opened, media allegations of suspected corporate misconduct can have a damaging effect on a company’s reputation. This can have serious repercussions for a company’s relationship with investors, business partners, and stakeholders not to mention its ability to attract talent to the workforce. Most business surveys note that managers cite reputation as a key corporate concern and, in some cases as in the TNB Survey, as the main reason to address integrity. In a McKinsey survey of managers they report that building reputation is one the activities with “the most value potential for their industries”, even if many of them recognise that their companies “are not pursuing the reputation-building activities that would maximize that financial value”.⁸¹

⁸¹. See Sustainability’s strategic worth: McKinsey Global Survey results, June 2014, available at www.mckinsey.com/insights/sustainability/sustainabilitys_strategic_worth_mckinsey_global_survey_results.

A representative of a mid-sized construction company interviewed for this report described how the organisation was considering a restructuring of its board in order to better address the risk of being associated with corporate misconduct. “We couldn’t afford an ethical scandal,” he explained, adding that the company also sees a positive reputation as “work-winning”.

This section of the report builds on the TNB Survey results that show what factors and tools influence corporate behaviour. These results are indicative, by highlighting factors that companies engaging with the TNB Project cited as influential in their decision to develop and implement business integrity measures and programmes. These factors are not new, exhaustive, nor can this report be considered conclusive. This section aims, rather, to provide an overview of how corporate conduct is influenced by factors and tools related to (1) internal initiatives adopted by companies themselves, (2) external initiatives influenced by stakeholders (such as investors and shareholders, clients and customers, and competitors), and (3) government actions. A summary description of these drivers of business integrity—many of which are interlinked—is presented below.

4.1. Internal measures

The following sections describe, non-exhaustively, some measures voluntarily implemented by companies in order to strengthen their approaches to business integrity, as they were identified during the research for this report. They include whistleblowing channels and protections, incentivising compliant behaviour, sectorial initiatives, collective action, and certification.

Internal reporting mechanisms and protection from reprisals

Providing channels for whistleblower reporting and ensuring effective protections for those who report in good faith are essential elements to any effort to prevent and combat corporate misconduct, including fraud, corruption and antitrust violations.⁸² The annotations to the Principles note the importance of encouraging “the reporting of unethical/unlawful behaviour without fear of retribution” in fulfilment of the board’s oversight responsibilities.⁸³ They also acknowledge that “the existence of a company code of ethics should aid this process which should be underpinned by legal protection for the individuals concerned.” References to the importance of channels for reporting misconduct and protecting those who report in good faith are also included in the OECD MNE Guidelines⁸⁴ and the 2009 Recommendation for Further Combatting Bribery of Foreign Public Officials in International Business Transactions as well as Annex II to the 2009 Recommendation, the OECD Good Practice Guidance on Internal Controls, Ethics and Compliance (see Annex B).⁸⁵

When asked about reporting mechanisms in their organisations, 85% of respondents to the TNB Survey confirmed the existence of a mechanism whereby employees can report suspected instances of

^{82.} See also the G20 Anti-Corruption Action Plan – Protection of Whistleblowers: Study on Whistleblower Protection Frameworks, Compendium of Best Practices, and Guiding Principles for Legislation, presented by the OECD to the G20 Anti-Corruption Working Group in 2011, available at www.oecd.org/g20/topics/anti-corruption/48972967.pdf.

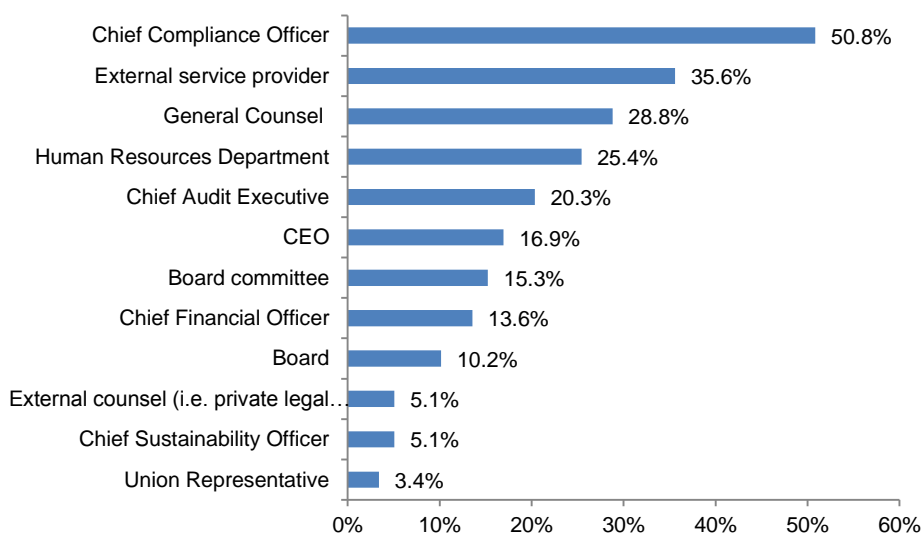
^{83.} G20/OECD Principles of Corporate Governance, Annotation VI.D(6).

^{84.} See par. 13 of the Commentary on General Policies (Section II).

^{85.} See Section IX of the 2009 Anti-Bribery Recommendation, as well as Section A.11 of Annex II to the 2009 Anti-Bribery Recommendation, the Good Practice Guidance on Internal Controls, Ethics and Compliance.

serious corporate misconduct. However, under two-thirds of companies that had established reporting mechanisms accompanied these with a written policy of protecting those who report in good faith from reprisals. It is doubtful that in the absence of such guarantees of protection, whistleblowers will feel confident coming forward. Respondents to the survey said that their whistle-blower protection policy was created, in the majority of cases, on a voluntary basis.

Figure 20. **Who receives internal whistleblower reports within the company**



Source: TNB Survey 2015 (59 respondents)

Reports received via their companies' internal reporting mechanisms were transmitted in the majority of cases to the Chief Compliance Officer (Figure 20). The next highest response rate related to external service providers, probably explained by the fact that a large number of respondents indicated that their company provided an external online (49%) or telephone (44%) reporting channel. As multiple responses were possible for this question, it could also be safely assumed that reports would go first to the external service provider managing the reporting channels, then be transferred to the responsible officer within the company. General Counsels received internal reporting in about a third of cases.

Relatively few respondents indicated that internal reports went to their company's board committee (15%) or board (10%). When the board or board committees do receive such reports, it is likely to be in aggregate format in the context of regular reporting. While it cannot be expected that all reports received through the internal reporting mechanism are brought to the attention of the board, it could reasonably be expected that reports involving alleged misconduct by senior management in the company would need to be addressed with board oversight.

Effectively implementing procedures to facilitate internal reporting and establishing protections for those who do was also highlighted by a number of interviewed companies as important to cultivating a so-called "speak-up culture" within a corporation. One interviewed company, for example, noted that this includes paying special attention to how a company is seen to respond to non-compliance:

"[The company] needs to ensure that it deals appropriately with the employees concerned, but it also needs to consider what response will increase the trustworthiness of the organisation. In other words, whether its response increases the likelihood that questions will continue to be

raised; increases the likelihood that employees will come forward with concerns; and ultimately increases the likelihood that employees will know what the right thing to do is and will do it consistently.”

Linking integrity to incentives

Within a company, some organisations have also sought to incentivise “compliant” behaviour within their human resources strategy, for example, by tying performance-based bonuses and remuneration to compliance with, and promotion of the company’s business integrity programme. The challenges for this exercise were discussed by the 2011 OECD paper on Board Practices: Incentives and Governing Risks (Box 14).

Box 14. The risk challenge and remuneration setting

The key challenge for boards is to understand how risk flows through the structure of remuneration and, as importantly, the remuneration metrics. This is not an easy process, since both the choice of remuneration components and the performance hurdles that attach will not have purely linear relationships to either risk or company performance. This is exacerbated by the fact that there will be a certain degree of information asymmetry between the board and executives, with the latter having a greater understanding of the drivers of chosen remuneration metrics. Taken together, this underlines the importance of boards treating remuneration and risk alignment as an iterative process. In terms of process, this suggests a number of steps that boards could take to improve remuneration arrangements:

- A key requirement (...) is for a better integration between risk management and compensation/incentive setting. It is important for boards to first set the strategic goals of the company and its associated risk appetite. One positive step that could be taken in this regard is greater use of risk committees together with cross membership of risk/audit committees and remuneration committees.
- Boards could adopt formal processes for mapping risk tolerance with the incentive structures. In particular, boards and compensation committees could make better use of scenario testing or modelling to check the compensation outcomes do relate to risk outcomes. This will particularly assist with choosing between various incentive instruments and their terms. Remuneration cannot just be set as a function of the risk policy; incentive arrangements create dynamic risks and it is important to ensure that control systems are in place to adequately monitor these risks.
- Boards could seek to extend the duration of performance targets and factor in greater ex-post flexibility (including clawback arrangements) to provide better longer-term focus in the remuneration setting process. Legal and code developments in many jurisdictions are already moving strongly in this direction.

Source: OECD (2011), Board Practices: Incentives and Governing Risks, OECD Publishing, p. 38.

Interviews with companies undertaken for this report indicated that a number were also applying or exploring measures to concretely link compliant behaviour with human resources measures; e.g. tying director remuneration to the effective execution of their duties to oversee a company’s business integrity programme or to complete risk-specific training;⁸⁶ setting performance indicators that are consistent with

⁸⁶. For more on remuneration and director oversight of governing risks, see: OECD (2011), Board Practices: Incentives and Governing Risks, Corporate Governance, OECD Publishing, available at <http://dx.doi.org/10.1787/9789264113534-en>. See, in particular, Chapter 2. Best Board Practices for Overseeing Executive and Director Remuneration.

expectations under the business integrity programme; and ensuring that sales agents are not under pressure to compromise integrity standards to meet their sales targets.⁸⁷ Other practices mentioned included adopting specific integrity-based performance indicators and appraisals (Box 15 provides an example), disciplinary action (as withholding annual bonuses when business integrity policies are violated), and creating “integrity champions” within the company to serve as role models for other employees.

Box 15. Linking performance to compliant behaviour

Following the opening of an anti-trust and an anti-bribery investigation into the practices of its subsidiaries and business partners, a multinational consumer goods company decided in 2011 to overhaul its existing approach to business integrity. “These investigations really got senior management’s attention, and our team was mandated with developing a stronger compliance function,” says the head of the company’s compliance function. The challenge: introducing a new compliance function and integrating new compliance procedures into a company with more than 150 000 employees in 25 countries worldwide.

The overhaul began with the company’s first globally coordinated compliance risk assessment. “2012 was the year I spent on an airplane visiting our offices, interviewing management committees and legal counsel in all of our zones,” says the company’s compliance officer.

Based on the results of the risk assessment, the team decided to take an incentives-based approach, setting specific compliance targets. Every legal department in all of the company’s business zones has specific key performance indicators (KPI) with compliance targets, which are set based on the zone’s specific risk profile (i.e., anti-trust, anti-bribery, etc.). Compliance KPIs are also set for internal audit, as well as some commercial teams. Anywhere between 5% to 10% of an individual’s yearly income may be dependent on meeting the compliance KPIs. The headquarters’ compliance team have so-called “skin in the game”: their KPIs are the average of their zones’ KPIs.

The benefits to this approach, says the company’s compliance officer, is that by setting clear compliance incentives helps communicate the company’s compliance expectations from the executive board down to the front-line business units. It also facilitates tracking and monitoring performance and fosters execution, which is always a point of concern in compliance programmes. Setting specific targets with financial incentives also ensures that the business integrity programme “has teeth”. Finally, setting, monitoring, and updating the KPIs also require coordination across all of the company’s functions that are related to business integrity.

Practices described by interviewees are consistent with the bribery-specific recommendations under the OECD Good Practice Guidance on Internal Controls, Ethics and Compliance, which encourages companies to have in place “appropriate measures to encourage and provide positive support for the

⁸⁷. Often, for example, commission-based remuneration is provided in the form of bonuses that are based on the value of contracts sales agents obtain for the company. Usually, the value of these contracts is already integrated in a company’s financial forecast, putting employees on the ground under pressure to meet their targets. As argued by anti-bribery consultant Richard Bistrong at a global anticorruption blog, available at <http://globalanticorruptionblog.com/2015/06/11/guest-post-the-role-of-compensation-systems-in-promoting-anti-bribery-non-compliance/>, “in a country or region characterized by high corruption risk and an unstable sales cycle, lucrative incentive plans indexed to quarterly forecasts and individual performance (as opposed to group or corporate earnings) may well make front-line teams wonder, ‘What does management really want, compliance or sales, as I can’t deliver both?’ Unfortunately, the strong monetary incentives these plans foster may lead salespeople to ‘irrationally’ calculate risk, as having a personal stake in short term bonus will outweigh an uncertain likelihood of either getting caught or facing the consequences of corrupt conduct.”

observance of ethics and compliance programmes or measures against foreign bribery”, as well as to have “appropriate disciplinary procedures to address, among other things, violations, at all levels of the company, of laws against foreign bribery, and the company’s ethics and compliance programme or measures regarding foreign bribery.”

One interviewee suggested that organisations could consider whether integrity breaches should have the same consequences for the remuneration of the work units and management as safety and environmental breaches have. This could be a significant driver in gaining internal support for the company’s business integrity policy and would encourage reporting of concerns by employees. In some companies, for example, where there is a safety or environmental breach the entire work unit or business group involved—including relevant managers—will be deprived of annual bonuses. This approach made employees very conscious of these issues. The interviewee suggested that a similar approach to integrity breaches would promote greater prioritisation of and compliance with the company’s business integrity policy.

Sectorial initiatives

In the face of large integrity challenges, businesses and other key actors have come together to develop sectorial initiatives. Their size, shape, and functions vary but, in general, they are designed in order to share experiences and develop common standards. Examples include the multi-stakeholder Forum on Responsible Mineral Supply Chains, which is jointly organized by the OECD, the International Conference on the Great Lakes Region (ICGLR) and the UN Group of Experts on the Democratic Republic of Congo to review and discuss the implementation of the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas.⁸⁸ In the financial sector, the Equator Principles provide financial institutions a risk-management framework for determining, assessing, and managing environmental and social risk in projects.⁸⁹ Similar multi-stakeholder initiatives to promote sustainable development and resource production include the Roundtable on Responsible Soy and the Roundtable on Sustainable Palm Oil.⁹⁰

Other examples include the Extractive Industries Transparency Initiative (EITI), which requires cooperating countries to fully disclose their taxes and other payments made by oil, gas and mining companies to governments in order to promote open and accountable management of natural resources. Also in the extractives industry, the Voluntary Principles on Security + Human Rights initiative brings together governments, companies, and NGOs to proactively implement or assist in the implementation of the human rights guidelines specifically developed for the sector. The Construction Sector Transparency Initiative (CoST) is another example involving stakeholders from the public, private, and civil society sectors in an effort to promote transparency and accountability in publicly financed construction projects.

^{88.} For more on the ICGLR-OECD-UN Forum on Responsible Mineral Supply Chains, see <http://mneguidelines.oecd.org/icglr-oecd-un-forum.htm>. For more on the OECD Due Diligence Guidance, see <http://mneguidelines.oecd.org/mining.htm>.

^{89.} See www.equator-principles.com/.

^{90.} The Roundtable on Responsible Soy (RTRS) brings together the main representatives of the soy value chain and members of civil society under the RTRS Standard for Responsible Soy Production, to ensure that soy production is environmentally correct, socially appropriate and economically feasible. See www.responsiblesoy.org. The Roundtable on Sustainable Palm Oil unites stakeholders from seven sectors in the palm oil industry—producers, processors or traders, consumer goods manufacturers, retailers, banks/investors, and environmental and social NGOs—to develop and implement global standards for sustainable palm oil. See www.rspo.org.

The AeroSpace and Defence Industries Association of Europe (ASD), in turn, has established a Business Ethics Committee whose members have developed Common Industry Standards, such as a supply chain code of conduct. Similarly, the Electronic Industry Citizenship Coalition (EICC), a non-profit coalition of more than 100 electronics companies, has developed a sector-specific Code of Conduct on social, environmental and ethical issues in the electronics industry supply chain, which was most recently updated in April 2015.⁹¹ Further work conducted on the issue of business integrity could include a closer analysis of sector-specific challenges and how specific sectors are addressing these challenges from a corporate governance perspective.

Collective action

Taking a similar approach to the abovementioned sectorial initiatives, collective action initiatives are, broadly, sustained multi-stakeholder initiatives aimed to increase the impact of individual action by bringing more players into an alliance of like-minded organisations in order to achieve a shared goal. Such initiatives have been established, for example, to promote responsible business conduct. They may include representatives from the private sector, public sector, and/or civil society, and collective action agreements, while always voluntary, may in some cases be binding, in which case violations of the collective action agreement may be pursued via arbitration. Initiatives can also be focused on a specific project, type of misconduct, sector, jurisdiction, region, or a combination of these.

Examples include the Consumer Goods Forum, which brings together companies in the consumer goods industry under a non-binding arrangement in order to collectively address four specific risks these companies face: sustainability, product safety, health and wellness, and end-to-end value chain and standards.⁹² Also, the Accord on Fire and Building Safety in Bangladesh, which is a five-year, independent, legally binding agreement, with arbitration as the nominated dispute resolution mechanism, between brands and trade unions designed to work towards a safe and healthy Bangladeshi garment industry, which was established in the immediate aftermath of the Rana Plaza building collapse in 2013 that killed more than 1 100 people and injured more than 2000.⁹³ Box 16 provides an in-depth review of one anti-corruption collective action initiative.

Another example is the global Siemens Integrity Initiative, which has committed USD 100 million over a period of 15 years to funding organisations and projects fighting corruption and fraud, including through collective action, as well as through education and training.⁹⁴ Collective action projects supported by the Initiative include project-specific integrity pacts, sector-specific codes of conduct (i.e., “compliance pacts”), and longer-term initiatives for market development. As of 2015, 55 projects from around the world are slated to receive Siemens Integrity Initiative support.

91. See www.eiccoalition.org/standards/code-of-conduct/.

92. See www.theconsumergoodsforum.com.

93. See <http://bangladeshaccord.org/>.

94. The Siemens Initiative is part of the comprehensive settlement between the World Bank Group and Siemens AG, which was announced on July 2, 2009. In addition, some projects may be funded on the basis of the European Investment Bank (EIB) – Siemens AG settlement, which was published in March 2013. See www.siemens.com/integrity-initiative. In full disclosure, it should be noted that some OECD projects promoting business integrity have received and are receiving financial support under the Siemens Integrity Initiative, including country-specific initiatives in the Middle East and North Africa (MENA) region, Morocco and the Russian Federation.

Box 16. Award-winning collective action: The Maritime Anti-Corruption Network

In one week in March 2015, one collective action initiative—the Maritime Anti-Corruption Network (MACN)—received the TRACE Innovation in Anti-Bribery Compliance Award and MACN’s Chair won “Compliance Officer of the Year” in the Women in Compliance Awards 2015.¹ These are two reasons for including MACN as an example, here, of how collective action initiatives work in practice.

The MACN was established in 2011, and formalized in 2012, as a collective action initiative involving vessel-owning companies within the main sectors of the maritime industry and other companies affiliated with the maritime industry, including cargo owners and service providers. BSR (Business for Social Responsibility)²—a non-profit business network and consultancy advising members on sustainability, business ethics and corruption—serves as the secretariat of MACN.

MACN and its members promote good corporate practice in the maritime industry for tackling bribes, facilitation payments, and other forms of corruption by adopting the MACN Anti-Corruption Principles, communicating progress on implementation, sharing best practices, and creating awareness of industry challenges. MACN also collaborates with key stakeholders, including governments, authorities, and international organisations, to identify and mitigate the root causes of corruption in the maritime industry and to develop sustainable solutions. Activities include program-specific collective action projects (for example, tackling port sector corruption in Nigeria and in Argentina) and an anonymous incident reporting mechanism to identify hot spot areas.

The network works to support concrete steps to combat corruption, together with local authorities and business and other types of partners. The mitigating actions are focused on capacity-building (integrity training, implementation of anti-corruption policies), grievance mechanisms and standardized written procedures, for example, ship and customs clearance both for authorities and for shipping companies. One of the founding members of MACN reports that collective action helps in pushing the anti-corruption agenda at a government level because MACN speaks as an industry voice, something that reduces individual companies’ risk of retaliation when rejecting illicit demands from officials. Representatives from the company’s compliance function add that the company’s management was engaged in and approved initiating the Network, and its success has generated attention from top management and the Board of Directors on the importance of collective action. For example, MACN and its successes were noted in the board chairman’s speech at the company’s 2015 annual shareholders meeting.

The company also reports that a number of its business units are also engaged in intra-group projects to combat demands for facilitation payments. Lessons learned are shared internally. Efforts are most successful when there is dialogue with service providers and when local offices are equipped with country-specific tools to combat illicit demands. These include, for example, local language anti-corruption messages, including references to local laws, and local language tips on effectively rejecting illicit demands. Further, timing is very important. Finally, anti-corruption projects have greater chances of success if the government of the country where the project is implemented is committed to combating corruption.

1. See online www.traceinternational.org/trace-recognizes-innovation-in-the-shipping-industry/; www.womenincomplianceawards.com/winners-2015/.
2. See online www.bsr.org/en/collaboration/groups/maritime-anti-corruption-network.

Collective action can also be seen as a form of benchmarking; for example, the B20 collective action hub and Basel Institute on Governance can involve civil society representatives and other third party partners in benchmarking codes of conduct and integrity policies and bringing together companies that have effective business integrity policies with those that need to improve including, in particular, SMEs.

Of note, questions have been raised surrounding the possible anti-trust implications of collective action between possibly competing companies.⁹⁵ In such cases, care must be taken to ensure that such contracts or discussions do not include the exchange competitively sensitive information.⁹⁶

Certification

In some jurisdictions compliance programme certification⁹⁷ is taken into account—either in legislation or in jurisprudence—in the attribution of corporate liability or mitigation of sanctions. At an international level, the International Organisation for Standardization (ISO) published ISO 19600 on compliance management systems in 2014.⁹⁸ According to one interviewee, accountants and external auditors are already preparing themselves to undertake ISO 19600 certifications for clients, including, in some cases, government agencies. This trend may continue with the forthcoming adoption of a new ISO standard on anti-bribery management systems.⁹⁹

Certification of performance in other areas of business integrity or in specific sectors is also commonplace. In the field of responsible business conduct, SA 8000 is an international certification standard created in 1989 by Social Accountability International (SAI) that addresses issues including forced and child labour, occupational health and safety, freedom of association and collective bargaining, discrimination, disciplinary practices, working hours, compensation, and management systems.

An internationally-recognised, sector-specific certification is the Kimberley Process Certification Scheme (KPCS), established following UN resolution 55/56 of 1 December 2000 calling on all concerned parties to support the creation of an international certification scheme for rough diamonds. Operational since 2003, it now has 54 participants representing 81 countries with a membership representing 99.8% of the global production of rough diamonds. The KPCS imposes extensive requirements on its members to enable them to certify shipments of rough diamonds as “conflict-free.”¹⁰⁰

^{95.} See Competition Law and Responsible Business Conduct, discussed at a the session on Competition Law and Responsible Business Conduct of the Global Forum on Responsible Business Conduct on 18-19 June 2015, available at <https://mneguidelines.oecd.org/globalforumonresponsiblebusinessconduct/2015GFRBC-Competition-Law-RBC.pdf>.

^{96.} For a description of Siemens’ anti-trust guidance for anti-corruption collective action initiatives, see Moosmayer, Klaus, “How Siemens manages collective action antitrust concerns”, *FCPA Blog*, 11 March 2015, available at www.fcpcbog.com/blog/2015/3/11/dr-klaus-moosmayer-how-siemens-manages-collective-action-ant.html. For more, see Aiolfi, Gemma, “Antitrust risks can be managed when competitors fight graft together”, *FCPA Blog*, 10 March 2015, available at www.fcpcbog.com/blog/2015/3/10/antitrust-risks-can-be-managed-when-competitors-fight-graft.html.

^{97.} The OECD has not officially assessed certification’s impact on driving effective implementation of business integrity standards, and the inclusion of this discussion here is not in any way an endorsement of certification mechanisms.

^{98.} ISO 19600:2014, Compliance management systems—Guidelines, available at www.iso.org/obp/ui/#iso:std:iso:19600:ed-1:v1:en.

^{99.} ISO/CD 37001, Anti-bribery management systems (under development), more information available at www.iso.org/iso/home/store/catalogue_tc/catalogue_detail.htm?csnumber=65034.

^{100.} For more information, see Kimberley Process available at www.kimberleyprocess.com.

Regarding consumer-oriented certifications, the relatively recent surge in organic and fair trade certifications—and national and international regulations and bodies overseeing such certification—is an indication of the power of the public and reputation, in influencing corporate behaviour and integrity policies.

4.2. External factors

This section of the report aims to outline some of the external factors that may influence the extent to which a corporation integrates integrity considerations into their governance framework, strategy, and operations. Factors included here are reputational risk related to potential corporate misconduct; shareholder and investor engagement; personal director liability; customer/client pressure; and benchmarking against practices employed by peers.

Investors and shareholders

Institutional investors today hold the majority of publicly listed stocks in most OECD countries, a trend which gives new impetus to their role as owners and how they choose to vote their shares. As noted in a 2013 OECD assessment of institutional investors as owners,¹⁰¹ the question of institutional investor engagement—including on a company's commitment to business integrity—matters because of the role these owners play in ensuring effective capital allocation and monitoring of corporate performance.

The potential of investor influence over the behaviour of companies is well recognised through initiatives like the development of stewardship codes in many jurisdictions as well as for high profile cases of shareholder activism. The jury is still out as to whether this influence is mostly positive or damaging, as companies are also incentivized to forego long-term goals, including sustainability goals, to meet quarterly earnings expectations. This issue is one far too large to address in full here, but the results of a 2013 Canada Pension Plan Investment Board and McKinsey global survey of more than 1 000 board members and C-suite executives produced the following results: 63% said the pressure to generate short-term results had increased over the past five years; 79% felt pressured to demonstrate strong performance of two years or less; 44% use a timeline of three years or less to set strategy though 73% said they should use a timeline of more than three years; and 86% agreed a longer horizon for making business decisions would improve company performance.¹⁰²

Despite these findings, some experts see investors wielding their influence in order to positively engage companies on issues related to ethics and integrity, specifically through increased due diligence and a focus on socially responsible investment (SRI). The pressure to disclose what companies are doing above and beyond the legal minimum in some cases, has led some companies to voluntarily address in their public disclosures a number of issues that go beyond compliance with national and international legislation. These include resource efficiency; release of regulated and unregulated pollutants; production of hazardous waste; impacts on biodiversity and ecosystem services; sourcing of materials;

^{101.} Çelik, S. and M. Isaksson (2013), "Institutional Investors as Owners: Who Are They and What Do They Do?" OECD Corporate Governance Working Papers, No. 11, OECD Publishing, available at www.oecd-ilibrary.org/governance/oecd-corporate-governance-working-papers_22230939.

^{102.} Barton, Dominic and Mark Wiseman, "Focusing Capital on the Long Term", *Harvard Business Review*, January – February 2014.

environmental performance; corruption; human rights; health and safety; employment and labour conditions; diversity; and stakeholder communications.¹⁰³

One example of integrity-related investor pressure comes from the UN-supported Principles for Responsible Investment (PRI),¹⁰⁴ which has undertaken a two-phased investor engagement programme on anti-corruption. The programme encourages PRI signatory groups to engage with companies on their anti-corruption standards and consider investment decisions accordingly. This resulted in three quarters of companies in phase one of the programme significantly improving their transparency in the area of anti-corruption risk management (Box 17).¹⁰⁵ A second example of integrity-related investor pressure comes from a group of investors organised under the International Corporate Governance Network's (ICGN), which since 2008 has included in its Global Governance Principles a reference to the expectation for boards to oversee the implementation of codes of conduct that engender a corporate culture of integrity.¹⁰⁶

Investors are also increasingly receiving advice that incorporates integrity issues into consideration via the service of proxy advisors that offer them recommendations on how to vote their shares. Some of the world's largest proxy advisory firms now include specific references to risk oversight as part of its criteria for choosing when to recommend withholding votes in uncontested director elections.¹⁰⁷ For example, Institutional Shareholder Services Inc. (ISS), one of the largest proxy advisors, recently recommended that shareholders vote against the election of two of Walmart's board members on the assertion that the board did not "provide meaningful information to shareholders about any specific findings on the FCPA-related investigations and whether executives will be held accountable for related compliance failures".¹⁰⁸

^{103.} Baron, Richard, *The Evolution of Corporate Reporting for Integrated Performance: Background paper for the 30th Round Table on Sustainable Development* (June 2014).

^{104.} See more about the UN-supported Principles for Responsible Investment (PRI) at www.unpri.org/.

^{105.} See *Fiduciary Duty in the 21st Century*, September 2015, available at www.unpri.org/publications/ which looks at fiduciary duty and the role of investors across eight large markets through a series of events, interviews, case studies and a legal review.

^{106.} The ICGN membership includes institutional investors responsible for assets under management in excess of US\$18 trillion. See more online at <https://www.icgn.org/best-practice>.

^{107.} Proxy advisors would recommend voting "against" or "withhold" in director elections when the company has experienced certain extraordinary circumstances, including material failures of risk oversight. Such failures of risk oversight can include, among other things, bribery, large fines or sanctions from regulatory bodies, and significant legal judgments or settlements. See Lipton, Martin, "Risk Management and the Board of Directors—an Update for 2014", *Harvard Law School Forum on Corporate Governance and Financial Regulation*, (22 April 2014).

^{108.} See Walmart's May 2014 Schedule 14A Proxy Statement Pursuant to Section 14(a) of the Securities Exchange Act of 1934, available at www.sec.gov/Archives/edgar/data/104169/000010416914000025/defa14a.htm.

Box 17. Investor Impact: The Principles for Responsible Investment Initiative

The United Nations-supported Principles for Responsible Investment Initiative (PRI) is a network of international investors working together to put the six Principles for Responsible Investment into practice. The six Principles provide a voluntary framework by which investors can incorporate environmental, social and corporate governance (ESG) issues into their decision-making and ownership practices.

In 2010, PRI worked with investor signatories and launched a two-phased investor engagement programme looking specifically at the issue of anti-corruption as an element of PRI's overall ESG investment framework. The first phase (2010-2013) was undertaken by a coalition of 21 PRI signatories representing USD 1.7 trillion in assets under management, who engaged with 21 companies in 14 countries to encourage them to demonstrate publicly that they had appropriate anti-corruption controls.

A second, two-year phase of the engagement program concluded in July 2015 and involved 34 PRI signatories representing USD 2.7 trillion assets under management engaging with 32 companies. The objectives of this second phase included:

- Pushing companies to achieve enhanced disclosure of anti-corruption strategies, policies and management systems, encouraging reporting in line with international reporting frameworks;
- Verifying that implementation and effectiveness of companies' processes are adequately aligned to protect against legal/regulatory concerns faced by the company; and
- Enabling investors to better assess and manage their exposure to the financial, operational and reputational impacts of corruption risks in their portfolios.

Companies are measured according to 18 specific scoring indicators, stemming mainly from the Transparency International TRAC 2 methodology. These are complemented by qualitative assessment criteria, such as:

- How the board keeps up to date with anti-corruption issues and whether all board members receive regular briefings and compliance training
- Whether the company provided the investor group with access to senior management for dialogue
- How anti-corruption initiatives are embedded into culture at all levels
- If performance appraisals and remuneration include elements based on business ethics and anti-corruption criteria
- If the company reports on actions taken as a result of their anti-bribery and corruption monitoring.

PRI's recent Report on Progress 2015 (September 2015) is available at www.unpri.org/publications/ which provides an analysis of the responsible investment activity of 936 investors from 48 countries across six continents.

Source: PRI

Personal director liability

Almost two thirds of company representatives participating in the TNB Survey indicated that the board and senior management were very concerned about the liability of the organisation for their failure to implement a business integrity policy under corporate liability regimes in certain jurisdictions. The risk of personal criminal and/or civil liability for the CEO or senior management was, for external integrity advisors, the third most significant factor driving integrity in their clients' companies—behind risk of reputational damage and risk of enforcement action.

Company interviews complementing these survey results indicated, however, that the perceived risk of directors being held personally liable for such failures, for example by way of a civil class action, is low. In cases where civil director liability has been applied, in only a few cases have directors been personally responsible for paying damages.¹⁰⁹ One interviewee stated that there will be true board and senior management commitment to integrated business integrity when there is potentially personal criminal liability for the board members and senior management for serious corporate misconduct, such as there often is for safety and environmental violations, and more recently for anti-trust violations in some jurisdictions; this sentiment was echoed by several other integrity officers interviewed for this report.

Customer/client-supplier pressure

Like investors, customers are increasingly portrayed as requiring companies to prove they have a business integrity programme that is actively implemented within the corporation. This can include customers requiring suppliers to produce evidence of a business integrity programme; the inclusion of a business integrity clause in any contracts signed between the supplier and the client; or even requiring adherence to the company's own business integrity code of conduct. Customer requests for evidence of an effective business integrity programme were cited by one interviewee for this report as a major motivating factor for the board to support the strengthening of the compliance function in that corporation.¹¹⁰

Peer benchmarking

Sometimes peer pressure helps motivate certain companies to implement, strengthen, or reorganize their business integrity function. For one interviewed company in the media sector, this came about when representatives from other companies in the sector joined the board as non-executive independent directors, bringing with them business integrity experiences and expertise from their own companies.

For another company in the energy sector, the organisation and scope of responsibility for the business integrity function was determined in part via peer bench-marking, particularly in relation to the question of whether the compliance function should be stand-alone or reporting under the legal function. Peer pressure and benchmarking can also occur in the context of business relationships, where joint venture partners or suppliers are required to adopt business integrity policies similar to those of their potential business partner.

^{109.} For example, among all class actions against directors and officers filed in the United States between 2000 and 2013, among the resolved cases, 1 001 (53.47%) were settled and 871 (46.53%) were dismissed. Among the settled cases, individuals paid out-of-pocket in 44 (4.40%), while in 95.6% of the cases the individuals involved were protected by some combination of insurance and corporate assets. See: Zipes, Greg Michael, Ties that Bind: Codes of Conduct that Require Automatic Reductions to the Pay of Directors, Officers, and Their Advisors for Failures of Corporate Governance (January 7, 2015) 15 J. Bus. & Sec. L. 105 (2015), p. 108.

^{110.} A 2014 Nielsen shows that 55% of global respondents in an on corporate social responsibility said they are “willing to pay extra for products and services from companies that are committed to positive social and environmental impact—an increase from 50 percent in 2012 and 45 percent in 2011.” The 2014 Nielsen Global Survey of Corporate Social Responsibility polled more than 30 000 consumers in 60 countries. See www.nielsen.com/us/en/insights/reports/2014/doing-well-by-doing-good.html.

Employee representation

The extent to which employees are represented within the governance of the firm may also have some bearing on the company's integrity policy. Representation can take various forms, including "works councils" as required by domestic labour laws in some countries, European works councils (EU Directive 94/45/EC), "international framework agreements" between trade unions and individual MNEs, employee share-ownership plans and board level employee representatives. Employee representation is relatively common in Europe although with wide divergence between countries.¹¹¹ Around one thousand MNEs with operations in Europe have a European Works Council, including over 150 US companies.¹¹²

The information channelled through these representation bodies may in theory help executive management better anticipate and hence mitigate the social risks to which the company is exposed to, such as industrial actions, occupational injuries, supply chain and labour rights issues. It has also been argued that such representation may create a workplace environment that is conducive of integrity behaviour and awareness that it facilitates whistle blower protection and reporting. It should be clear however that the literature on the impact and interaction between employee representation and corporate integrity is scarce. For their part, trade unions are making use of a narrative around "trust in the global corporation" to advance labour rights causes.¹¹³

Sustainability reporting initiatives

Some companies are voluntarily adhering to sustainability reporting initiatives, such as the Global Reporting Initiative (GRI), in part in response to mounting pressures by stakeholders but also a way to communicate their internal efforts on integrity. GRI's G4 reporting framework, launched in May 2013, references the OECD MNE Guidelines and requires reporting companies to disclose how they approach key issues such as governance, ethics and integrity. To date, the GRI Sustainability Disclosure Database includes nearly 19 000 GRI reports from almost 7 600 organisations,¹¹⁴ among them 95% of the Global 250.¹¹⁵

^{111.} By law, or by collective agreement with trade union organisations, board level employee representatives are present in over 90% of listed companies in Germany and in Austria, 70% in Sweden and Norway, 50% in France, but less than 2% in the UK. See Annual Economic Survey of Employee Ownership in European Countries, in European Federation of Employee Share Ownership (ed.), (Brussels: European Federation of Employee Share Ownership).

^{112.} See EWDCB database as of September, 2015, available at www.ewcdb.eu/statistics_graphs.php.

^{113.} It should be clear however that the literature on the impact and interaction between employee representation and corporate integrity is scarce. For their part, trade unions are making use of a narrative around "trust in the global corporation" to advance labour rights causes. In a submission to the G7 Summit in Schloss Elmau, Germany June 2015, the International Trade Union Confederation delivered the results of a global poll according to which 57% of the G7 surveyed people believed that "global companies cannot be trusted to look after workers in all countries that supply their business" (e.g. fair wages, rights and conditions), 20% believed the opposite, and 25% did not know. ITUC Frontlines Poll - Trust in global companies and supply chains - Prepared for the G7 Summit, Schloss Elmau, Germany - June 2015, available at www.ituc-csi.org/ituc-frontlines-poll-trust-in.

^{114.} For more on the GRI Sustainability Disclosure Database, see <http://database.globalreporting.org/>.

^{115.} See Boston College Center for Corporate Citizenship and Ernst & Young, Value of Sustainability Reporting: A study by the Center for Corporate Citizenship and Ernst & Young LLP, executive summary

Other sector-based initiatives, such as Publish What You Pay and the Extractive Industries Transparency Initiative (EITI) in the extractives sector, promote public reporting of payments to governments by project and have led to increased voluntary reporting by companies along with the adoption of national laws making such reporting mandatory.¹¹⁶

While broadly defined as non-financial reporting mechanisms, in making sustainability reports companies must assess the material impact such risks may have on their business. This could potentially incentivize some companies toward including such risks within the scope of the traditional business integrity function.¹¹⁷ Further, in some jurisdictions, domestic law has introduced binding sustainability reporting obligations, reflecting a shift in those countries from soft law (recommendations) to hard law (obligations). Examples include:

- The new EU Directive 2014/95/EU on disclosure of non-financial and diversity information by certain large undertakings, which entered into force in December 2014, requires concerned companies to disclose in their management reports information on policies, risks and outcomes as regards environmental matters, social and employee aspects, respect for human rights, anticorruption and bribery issues, and diversity in their board of directors.¹¹⁸
- France’s “Draft bill on the duty of vigilance of parent and subcontracting companies”, which was under consideration by the Senate at the time of writing and approved by the National Assembly on 30 March 2015, would require large parent and subcontracting companies, with respect to their subsidiary companies, subcontractors, and suppliers, to establish a “plan de vigilance” to monitor and respond to the potential impact of their business operations on human rights, the environment, and other potential impacts.¹¹⁹

available at

http://modulas.kauri.be/Uploads/Documents/doc_2260_thevalueofsustainabilityrepsummary.pdf.

116. For example, “Cardin-Lugar” Provision 1504 in US Dodd-Frank Act of 2010 requiring all US-listed companies to publish all payments to governments by country and project; EU Transparency Directive (Directive 2013/50/EU) requiring large non-listed companies and companies with extractives, logging or forestry operations to report on payments made to governments. For more information on voluntary and mandatory disclosure frameworks, see Publish What You Pay, available online at www.publishwhatyoupay.org.

117. For example, in a recent opinion on “human rights through a corporate governance lens” by a group of investors, the case for human rights risks being integral to business risks and business ethics is building and “cannot be simply framed as a reputational or ‘non-financial’ risk, as the consequences of poor human rights practices can materially impact a company’s stakeholder relations, financial performance, and prospects for sustainable value-creation.” ICGN, “ICGN Viewpoint: Human rights through a corporate governance lens”, April 2015, available at https://www.icgn.org/images/Viewpoint_Human_rights_through_a_corporate_governance_lens-2015Apr.pdf.

118. See http://ec.europa.eu/finance/accounting/non-financial_reporting/index_en.htm.

119. Available online at www.assemblee-nationale.fr/14/ta/ta0501.asp. More examples are available in Nieuweknamp, Roel, Legislation on responsible business conduct must reinforce the wheel, not reinvent it, *OECD Insights Blog*, 15 April 2015, available online at <http://oecdinsights.org/2015/04/15/legislation-on-responsible-business-conduct-must-reinforce-the-wheel-not-reinvent-it>.

- The United Kingdom's new Modern Slavery Act,¹²⁰ which entered into force in March 2015, provides that commercial organisations must prepare a slavery and human trafficking statement annually detailing, among other matters, their due diligence processes in relation to slavery and human trafficking in their operations and supply chains.
- India's new Companies Act of 2013 includes a new provision (clause 135) that requires companies of a certain size to set up a corporate social responsibility (CSR) committee, which must have at least one independent director and which is responsible for recommending to the board a CSR policy for adoption and for monitoring its implementation. The new clause also requires concerned companies to spend at least 2 percent of their average net profit in the previous three years on CSR activities.¹²¹

Other, sector-specific examples of national legislation introducing sustainability reporting obligations include the US Securities and Exchange Commission's Final Rule on Section 1502 of the Dodd-Frank Act on Conflict Minerals, which accepts the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High Risk Areas as a "nationally or internationally recognised due diligence framework" for fulfilling Dodd-Frank requirements of conflict mineral due diligence.¹²² At the time of writing, the European Union was also considering introducing similar obligations in a proposal aimed at regulating the import of conflict minerals into the EU.¹²³ The proposed initiative will go through three separate reviews within the EU Parliament before being submitted to the EU Council level later in 2015. Examples also exist of risk-specific trends in sustainability reporting, for example the increasing trend in voluntary and mandatory carbon emissions reporting requirements.¹²⁴

4.3. Government actions

This section outlines drivers of effective implementation of business integrity standards that stem from government actions. First and foremost, this section highlights companies' views on enforcement as a significant factor in their decision to have a business integrity programme in place. Next, this section summarises a number of measures that stem from or are related to enforcement, including: incentivising integrity for fear of enforcement actions and accompanying sanctions; considering business integrity measures or policies in mitigation of a sentence; encouraging companies to come forward to law enforcement when corporate misconduct is discovered and reaching a settlement arrangement; and 'white-listing' companies with demonstrated good practice in business integrity.

^{120.} See <http://services.parliament.uk/bills/2014-15/modernslavery.html>.

^{121.} See www.mca.gov.in/SearchableActs/Section135.htm.

^{122.} Available at <http://sec.gov/rules/final/2012/34-67716.pdf>.

^{123.} Available at http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152227.pdf.

^{124.} A 2012 OECD survey of government schemes for corporate greenhouse gas emission reporting indicates that, over the past 15 years, a number of governments have established voluntary or mandatory GHG carbon measurement and reporting schemes under which enterprises report GHG emissions and, in some cases, also other climate change-related information. For more information, see: Kauffmann, Céline, Cristina Tebar-Less and Dorothee Teichmann (2012), "Corporate Greenhouse Gas Emission Reporting: A Stocktaking of Government Schemes", *OECD Working Papers on International Investment, No. 2012/1*, OECD Investment Division, available at www.oecd.org/daf/investment/workingpapers.

These measures are not available in all jurisdictions, and some are also new developments. Most also address a company's business integrity after there has been an integrity breakdown, but the existence and application of these measures in some jurisdictions help inform efforts within companies, which may not be the subject of an investigation or enforcement action, to prevent future misconduct. Where such measures are available, the level of their application also varies. A number of private sector and civil society representatives providing input to this report recommended the OECD undertake a comprehensive catalogue of government measures for promoting and incentivizing business integrity, as no such catalogue currently exists and could be a useful reference for companies and governments alike. This is another area where further research in line with these findings could be pursued.

The OECD also has not officially assessed, on a horizontal basis¹²⁵, the consistency with which such measures included in this section are applied across jurisdictions and offences, nor the impact they may have on deterring corporate misconduct and/or promoting the adoption of business integrity measures and programmes. These measures are included in this section simply to highlight factors that companies and relevant literature have cited as factors influencing corporate business integrity considerations.

Enforcement

The risk of administrative, civil or criminal enforcement actions against the company and/or its employees, accompanying sanctions and necessary remedial action was cited by respondents to the TNB Survey as the main reason, behind risk of reputation damage, for companies seeking to prevent, detect and address serious corporate misconduct (see above, Figure 19).¹²⁶ Companies either changed their behaviour as a result of an enforcement action for past misconduct or took preventive action following enforcement action against competitors or companies operating in the same sector or jurisdiction. Respondents also disclosed whether their companies had been the subject of media allegations, legal or criminal proceedings or other law enforcement actions for certain categories of serious corporate misconduct. Most of the instances concerned antitrust violations, followed by bribery (Figure 21).

For some of the companies that had been the subject of an enforcement action, the business integrity function already existed but had not received sufficient attention or support from the board and senior management prior to the enforcement action. The immediate reaction in many cases was to develop a risk-specific code of conduct to prevent the type of misconduct that had led to the enforcement action (i.e., anti-trust or data protection codes of conduct); for others, the enforcement action led to a broader approach to improving the company's overall approach to business integrity.

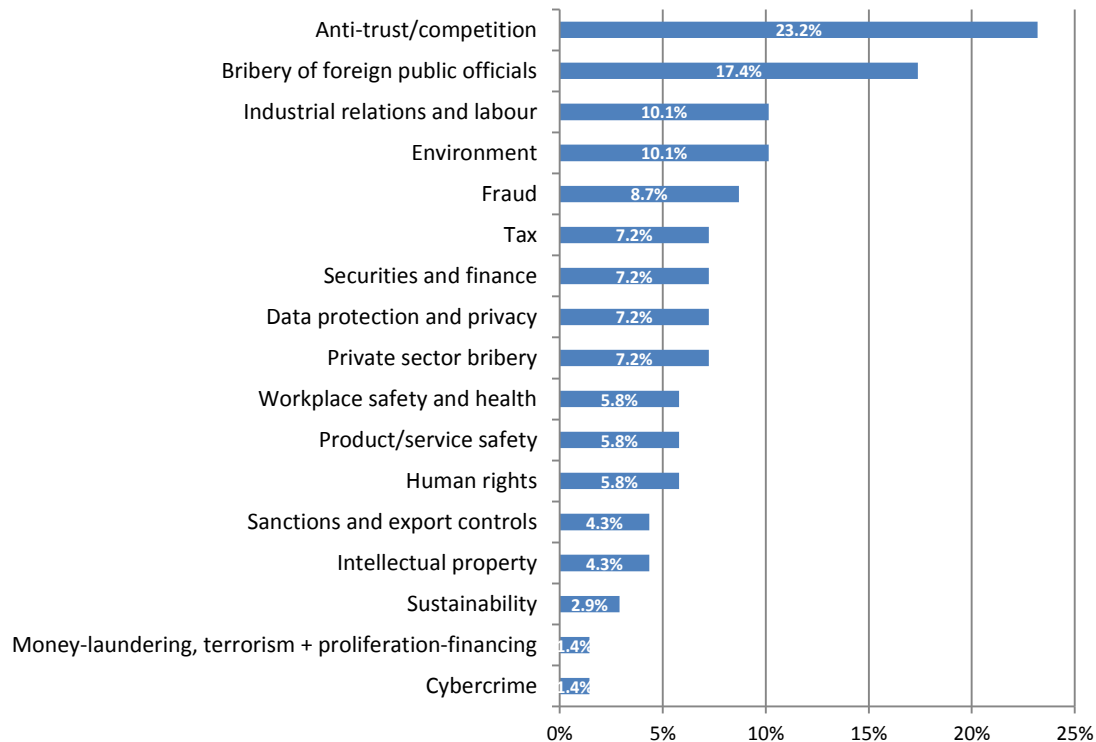
As mentioned in section 2 of Chapter II, enforcement in many risk areas is recently showing some common trends towards: i) higher, heftier sanctions and fines for misconduct; ii) a diversification of the

^{125.} OECD peer reviews, including those adopted by the OECD Working Group on Bribery in International Business Transactions, have assessed some of these issues on a country-specific basis. References, where possible, are included in the ensuing sections.

^{126.} Here, enforcement refers to enforcement action undertaken by public authorities including for example law enforcement or securities regulators. This section does not refer to private enforcement, which can be carried out, for example, by individual shareholders and stakeholders, self-regulatory organisations and institutions to which supervision and regulation is delegated, private-sector stock exchanges, associations of industries, shareholder associations, etc. Other actors of private enforcement may include judicial courts, lawyers and associations of minority shareholders. See also: OECD (2013), *Supervision and Enforcement in Corporate Governance*, Corporate Governance, OECD Publishing, available at <http://dx.doi.org/10.1787/9789264203334-en>.

types of sanctions, adding new measures that force the company to change the way in which they do business, on top of fines; iii) progressively focusing on remedial action and including compliance programmes as part of remedial commitments, iv) targeting not only companies but more often also individuals at the management level and, at times, also at the board level; and v) increasingly addressing cross-border violations involving extradition cases.

Figure 21. **Company respondents subject to media allegations or law enforcement proceedings, per category of misconduct**



Source: TNB Survey 2015 (31 respondents)

Compliance incentives

So-called “compliance incentives” are measures taken by governments with the aim of recognising a corporation’s efforts to put in place business integrity programmes. These range from taking the existence of business integrity programmes into account as a mitigating factor in sentencing; compliance as a complete or partial defence to an offence of failure to prevent misconduct; and taking into consideration the remedial actions taken by companies when deciding to award public advantages and/or lift debarment measures. These measures are available in jurisdictions where corporations can be held liable (administratively or criminally) for certain types of corporate misconduct.¹²⁷ The following section

^{127.}

For example, Art.2 of the OECD Anti-Bribery Convention requires Parties to take such measures as may be necessary, in accordance with its legal principles, to hold legal persons liable (administratively or criminally) for the bribery of foreign public officials. Inclusion of a corporate liability provision was meant to ensure that a corporation could be held liable for the crime of foreign bribery in addition to individuals, or even in cases where individuals could not be held criminally liable for this behaviour,

seeks to provide a non-exhaustive list of the measures identified in the preparation of this report, rather than endorsing or recommending any such measures.

Compliance as a mitigating factor for corporate liability

In a number of jurisdictions the fact of a pre-existing and demonstrably effective business integrity programme can be considered a mitigating factor in sanctioning a legal entity for corporate misconduct. Likewise, a company's efforts to cooperate and self-report in the face of misconduct with law enforcement authorities, before the authorities initiate an investigation into the same conduct, can be considered in mitigation of sanctions.

While the focus on compliance as a mitigating factor has, to date, been relatively limited to specific types of corporate misconduct, there is evidence to suggest that compliance incentives may be employed for other types of corporate misconduct as well. One example is the consideration of integrity programs in the context of enforcement actions against anti-competitive and cartel-like behaviour.

Recently, the Italian Antitrust Authority began recognising compliance as a mitigating factor in antitrust actions and, in January 2015, published Guidelines on calculating fines for serious breaches of national or EU competition law. The Guidelines provide for the existence and implementation of an adequate compliance program to count as a mitigating factor in sentencing. What will be considered 'adequate' is defined in the guidelines and includes incentives to encourage compliance with the program and a system to deter non-compliance.

In France, reductions are available for companies settling antitrust enforcement actions who commit to take compliance measures. Similar provisions exist for example in Australia, Canada, Chile, France, India, Israel, Singapore and the UK. In Brazil, the antitrust authority is considering issuing regulations related to compliance programs, which might reward effective programs with a lower fine.¹²⁸ Further analysis of the differences in standards and incentives across categories of misconduct and across jurisdictions could be an area for future work.

Compliance as a complete or partial defence for corporate liability

There are various approaches to how jurisdictions recognise compliance as a complete or partial defence for corporate liability. The first approach includes those countries that have chosen to recognise the efforts of companies to put in place integrity programs as complete or partial defences to overall corporate liability provisions in the legal framework. These incentives are implemented across jurisdictions and types of risks in different modalities. In general, a company can be held liable for crimes committed by employees, agents, board members acting in their capacity as such, but the company may escape liability if it can demonstrate that it had exercised due diligence to prevent the offence, or the authorisation or permission of the offence. In some jurisdictions, a company may also be liable if it failed to create and maintain a corporate culture that required compliance with the relevant law. Some jurisdictions require companies to meet requirements of due attention and proper supervision, while others are more formal and demand proof that prior to the misconduct the company adopted and implemented an organisational and management model to prevent crimes.

given the complexity and decentralised nature of today's corporate structures and international business transactions.

^{128.} Snapshot: Credit for antitrust compliance programs around the world, Douglas Tween, Global Compliance News, Baker & McKenzie, 19 October 2014.

Integrity considerations in the award of public advantages

When deciding on granting access to public advantages, many governments and international bodies take business integrity considerations under both a “carrot and stick” approach. These may include systems allowing for disqualifying, suspending or debaring companies that have been convicted for certain offences from access to such measures, including public subsidies, licences, public procurement contracts, contracts funded by official development assistance, and officially supported export credits. Public agencies may also consider making the existence of a robust compliance program a criteria for being eligible to receive such measures, as part of their overall due diligence on providers.

The OECD has recognised the importance of such practices in the specific context of corruption in its Recommendation on Bribery and Officially Supported Export Credits and Recommendation of the Development Assistance Committee on Anti-Corruption Proposals for Bilateral Aid Procurement. The 2009 Anti-Bribery Recommendation recommends that Member countries’ laws and regulations should in some cases permit authorities to suspend, to an appropriate degree, from competition for public contracts or other public advantages enterprises determined to have bribed foreign public officials.¹²⁹ Reviews of Member countries’ implementation of this provision have also included assessing the extent to which government agencies consider internal controls, ethics and compliance programs in their exercise of due diligence when deciding to grant public advantages, as well as whether companies that have been convicted for corruption offences have been subject to provisional debarment from public procurement tender processes.¹³⁰

In addition, the 2012 Recommendation of the Council on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence¹³¹ recommends that OECD Members “consider any statements or reports made publicly available by their National Contact Points (NCPs) at the conclusion of a specific instance procedure under the OECD Guidelines for Multinational Enterprises” when undertaking an environmental and social review of projects officially supported by export credits.

Beyond OECD standards, the 2014 Council of Europe public procurement directives¹³² call on governments to conduct due diligence on companies competing for public awards in order to prevent

^{129.} This is foreseen when the conduct takes place in contravention of that Member’s national laws and to the extent a Member applies procurement sanctions to enterprises that are determined to have bribed domestic public officials. The Recommendation for Further Combating Bribery of Foreign Public Officials was released on 9 December 2009, it was adopted by the OECD in order to enhance the ability of the States Parties to the Anti-Bribery Convention to prevent, detect and investigate allegations of foreign bribery and includes the Good Practice Guidance on Internal Controls, Ethics and Compliance, available at www.oecd.org/daf/anti-bribery/oecdantibriberyrecommendation2009.htm. Good Practice Guidance on Internal Controls, Ethics and Compliance, available at www.oecd.org/daf/anti-bribery/oecdantibriberyrecommendation2009.htm.

^{130.} As noted in the OECD Foreign Bribery Report, however, only two of the 427 foreign bribery enforcement actions since 1999 resulted in debarment from national public procurement contracting. OECD Foreign Bribery Report: An analysis of the crime of bribery of foreign public officials, OECD Publishing 2014, available at <http://dx.doi.org/10.1787/9789264226616-en>.

^{131.} See [www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=tad/ecg\(2012\)5&doclanguage=en](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=tad/ecg(2012)5&doclanguage=en)

^{132.} These include Directives 2004/17/EC (procurement in the water, energy, transport and postal services sectors) and 2004/18/EC (public works, supply and service contracts), as well as the adoption of a

conflicts of interest, corruption, and to ensure that winning companies can execute the contract with respect to environmental, social and innovation rules and standards. Violating these rules constitute grounds for provisional exclusion from public procurement procedures.¹³³ The Directives provide that EU member countries should make it possible for companies who self-clean by adopting measures aimed at remedying the consequences of misconduct to be considered for re-inclusion in competition for public advantages.

The World Bank and other multilateral development banks use administrative sanctions against individuals or companies involved in fraud, corruption, coercion, collusion, or obstruction in connection with bank-financed projects. One of the most dissuasive of the sanctions available to these institutions is provisional cross-debarment from future projects.¹³⁴ Since 2001, more than 400 firms and individuals have been publicly sanctioned by the World Bank.¹³⁵ The World Bank's Sanctioning Guidelines list an effective compliance program as a mitigating factor in sanctioning decisions. These Guidelines provide that the timing, scope and quality of the action may indicate the degree to which it reflects genuine remorse and intention to reform, or a calculated step to reduce the severity of the sentence.¹³⁶

Investment treaties –which include special substantive and procedural provisions to protect covered foreign investors from certain host state conduct – may also help foster the integrity of business behaviour. In some treaties, compliance with host state law is explicitly required for covered investors to benefit from the treaty.¹³⁷ At least one treaty also requires compliance with the law of the investor's home state. There may also be an implicit legality requirement for protection in the absence of explicit treaty language.

directive on concession contracts. See online at http://ec.europa.eu/growth/single-market/public-procurement/modernising-rules/reform-proposals/index_en.htm.

133. See the European Commission's Fact Sheet No 8: Social Aspects Of The New Rules, available at http://ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/reform/fact-sheets/fact-sheet-08-social_en.pdf; and Fact Sheet No 10: Transparency And Anti-Corruption, available at http://ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/reform/fact-sheets/fact-sheet-10-transparency_en.pdf.

134. Cross debarment is carried out in accordance with the Agreement for Mutual Enforcement of Debarment Decisions, concluded between the African Development Bank, Asian Development Bank, the European Bank for Reconstruction and Development, Inter-American Development Bank, and the World Bank. See www.ebrd.com/downloads/integrity/Debar.pdf.

135. Visit www.worldbank.org/debarr for the full list of debarred firms and individuals.

136. World Bank Sanctioning Guidelines, V. Mitigating Factors, available at <http://siteresources.worldbank.org/EXTOFFEVASUS/Resources/WorldBankSanctioningGuidelines.pdf>. In 2010 the World Bank Integrity Vice Presidency created an integrity compliance office to monitor sanctioned entities and assist them to put in place business integrity frameworks that satisfy World Bank integrity requirements and could lead to ending a debarment (or conditional non-debarment); or in the case of some existing debarments, early termination of the debarment. The integrity compliance office assesses the compliance programs of sanctioned entities based on the World Bank's Integrity Compliance Guidelines. See the World Bank Integrity Compliance Guidelines available at http://siteresources.worldbank.org/INTDOII/Resources/Integrity_Compliance_Guidelines.pdf.

137. See, e.g. Agreement between the Kingdom of Spain and the Republic of El Salvador for the Promotion and Protection of Investments (signed 14 February 1995) article III: "Each Contracting Party shall protect in its territory the investments made, in accordance with its legislation', by investors from the other Contracting Party ...".

Both treaty practice and investment tribunal outcomes relating to illegality have been recently addressing the consequences of covered investors engaging in illegal activity in connection with an investment. There is the risk of a tribunal declining jurisdiction over a claim¹³⁸ thus excluding the investor from treaty benefits –or considering the illegal behaviour in the context of considering the overall merits of the case.¹³⁹ Moreover, covered foreign investors that engage in bribery may also face uncertainty in seeking to enforce investment arbitration awards under the New York Convention (which provides for refusal of enforcement of awards that violate public policy); governments that participate in the OECD Working Group on Bribery have underlined that foreign bribery is contrary to international public policy.¹⁴⁰ While the value that investors attach to investment treaty protection is uncertain, these potential consequences could provide covered investors with stronger incentives to ensure they comply with national law in order to benefit from treaty protection.¹⁴¹ Investment treaties may also place some restrictions on integrity policies. Business groups have reportedly lobbied against certain strengthened sanctions for bribery (in the form of broader debarment from access to public procurement) on the grounds, inter alia, that such sanctions would expose the government to investment treaty claims.¹⁴²

Company “white-lists”

Brazil engages in a proactive exercise to “fame and acknowledge” (as opposed to “name and shame”) companies with good practices to encourage business integrity. There, in conjunction with civil society, the Brazilian Office of the Comptroller General (CGU) evaluates and publishes the names of companies with good ethics practices on its Pro-Ethics Company Register.¹⁴³

Certification by governments

As described among the private sector led initiatives, certification is a powerful integrity tool. Governments also make use of it in diverse risk areas. For example, to reduce the risk of antitrust violations and to raise awareness about possible misconduct (e.g. bid rigging) as part of public procurement procedures, some jurisdictions have put in place a special certification regime. It issues Certificates of Independent Bid Determination (or CIBDs) to those bidders that disclose all material facts

^{138.} See *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, ICSID Case No. ARB/11/12, Award, 10 December 2014.

^{139.} See *Inceysa Vallisoletana SL v Republic of El Salvador*, ICSID, Award (2 August 2006) § 257 (“[B]ecause Inceysa’s investment was made in a manner that was clearly illegal, it is not included within the scope of consent expressed by Spain and the Republic of El Salvador in the BIT and, consequently, the disputes arising from it are not subject to the jurisdiction of the Centre”).

^{140.} See OECD, *OECD to conduct a further examination of UK efforts against bribery* (14 March 2007), available at www.oecd.org/general/oecdtoconductafurtherexaminationofukeffortsagainstbribery.htm. The Working Group on Bribery underlines “that bribery of foreign public officials is contrary to international public policy and distorts international competitive conditions.”

^{141.} Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. V(2)(b) (enforcement of an arbitration award may be refused if it would be contrary to the public policy of the state where enforcement is sought).

^{142.} See McKenna, Barrie, *Ottawa could face lawsuits for strict corruption rules: report*, *Globe and Mail* (24 Nov. 2014), available at www.theglobeandmail.com/report-on-business/international-business/ottawa-could-face-lawsuits-for-strict-trade-corruption-rules-report/article21739211/.

^{143.} See *Empresa Pró-Ética*, available at www.cgu.gov.br/assuntos/etica-e-integridade/setor-privado/empresa-pro-etica.

about communications they have had with competitors in relation to the invitation to bid and the bidding process.¹⁴⁴

Self reporting and voluntary disclosure

Some jurisdictions incentivise companies and individual defendants to disclose to regulatory and law enforcement authorities their own or other companies' involvement in misconduct or criminal activity. In many jurisdictions, in recognition of the company's willingness to come forward and to subsequently cooperate in the resolution of the case, self-reporting companies can obtain mitigated sentences, the ability to negotiate plea or settlement, or in some cases exemption from prosecution or sanction. There is also a reputational benefit, as companies that come forward can be seen to demonstrate a commitment to doing business with integrity despite specific instances of failure. In addition, speedy resolution of the enforcement action may result in savings on time and resources.

It should be noted that under some criminal justice systems, particularly those applying the legality principle that requires a formal criminal investigation once a complaint is received, self-reporting is not possible. In other criminal justice systems, self-reporting by companies raises the question of the privilege against self-incrimination¹⁴⁵ of the individuals involved, particularly when companies may be approached with a request to cooperate in the context of criminal proceedings for their own misconduct, the misconduct of competitor or related companies, or to produce evidence against individuals within the company. A large number of jurisdictions around the world incentivize self-reporting of cartel behaviour via leniency and immunity applications. In the European Union, for example, the leniency programme offers companies involved in a cartel—which self-report and hand over evidence—either total immunity from fines or a reduction of fines.¹⁴⁶

Settlement arrangements

Settlement procedures involve an arrangement between governments and corporations in the event of corporate misconduct that stops short of a full trial or adversarial procedure. An admission of guilt for settling short of a full trial for corporate misconduct is not required for all settlement arrangements. A government's decision whether to enter into a settlement arrangement with a corporation in many jurisdictions may factor in the existence and application of a business integrity programme, as well as other elements, such as whether the corporation voluntarily disclosed its misconduct and the extent to which the corporation cooperated in an investigation.

Arrangements can apply to various types of corporate misconduct, including violations of anti-trust and anti-bribery laws.¹⁴⁷ Settlement procedures are increasingly being used to conclude complex

^{144.} For more information, see the 2009 OECD Guidelines for Fighting Bid Rigging in Public Procurement: Helping governments to obtain best value for money, available at www.oecd.org/competition/cartels/42851044.pdf, and, as an example, the experience of the Canadian Competition Bureau, available at www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/00599.html.

^{145.} The privilege against self-incrimination in many jurisdictions forbids a government from compelling an individual to provide evidence that could potentially incriminate that individual if a criminal case is brought to trial.

^{146.} European Commission, Competition Leniency, available at <http://ec.europa.eu/competition/cartels/leniency/leniency.html>.

^{147.} See also Oduor, Jacinta Anyango; Fernando, Francisca M. U.; Flah, Agustin; Gottwald, Dorothee; Hauch, Jeanne M.; Mathias, Marianne; Park, Ji Won; Stolpe, Oliver, Left out of the bargain: settlements

corporate criminal procedures, as evidenced by the OECD Foreign Bribery Report, which found that 69% of the 427 foreign bribery cases concluded since the entry into force of the Anti-Bribery Convention were settled. However, and as noted in the report, settlement procedures should respect the principles of due process, transparency and consistency, so the outcome of the settlement should be made public, where appropriate and in conformity with the applicable law.¹⁴⁸

Specific instances mechanism under the OECD MNE Guidelines

Similar to, but separate from, the abovementioned reporting mechanisms, which relate to the reporting of serious corporate misconduct allegations to public bodies, the grievance mechanism built into the OECD Guidelines for Multinational Enterprises (see Annex B) facilitates the reporting of potential violations of the standards set forth in the Guidelines. As such, the Guidelines are the only government-backed international instrument on responsible business conduct with a built-in grievance mechanism – specific instances. Under this mechanism, national contact points (NCPs)¹⁴⁹ are obliged to provide a platform for discussion and assistance to stakeholders to help find a resolution for issues arising from the alleged non-observance of the Guidelines. NCPs must do so in a manner that is impartial, predictable, equitable, and compatible with the principles and standards of the Guidelines.¹⁵⁰

Corporate governance codes

Regulators have an opportunity to complement and strengthen the legal framework for business integrity through the requirement for companies to comply with soft law instruments. Codes of Corporate Governance, which are often applied on a voluntary comply-or-explain basis, are an example. Under the German Corporate Governance Code (see Annex B), for example, there is a new explicit reference to the board's responsibility to oversee the company's compliance programme.¹⁵¹

The extent to which a company discloses its compliance with provisions on oversight of compliance risk, like the one included in the German Corporate Governance Code, has an impact on other factors, such as building a company's reputation for doing business with integrity and investor relations. In a forthcoming paper on the role corporate governance plays in strengthening business integrity, the Director of the Netherlands Compliance Institute argues for the inclusion of specific provisions on the

in foreign bribery cases and implications for asset recovery, Stolen Asset Recovery (StAR) initiative, 2003, Washington DC; World Bank Group; European Commission cartel case settlement fact sheet, available at http://ec.europa.eu/competition/cartels/legislation/cartels_settlements/settlements_en.html.

148. The OECD has not assessed on a macro level the impact of the different modalities under which jurisdictions implement these procedures, or on their actual strength deterring corporate misconduct or encouraging the adoption of business integrity measures and programmes. In some country-specific cases, and within certain areas of risk, OECD bodies have assessed country-specific employment of these measures, criticizing when they have appeared to lack transparency or present a challenge to full and fair due process.

149. Under the MNE Guidelines, NCPs are agencies established by adhering governments to promote and implement the Guidelines. More information is available at www.oecd.org/investment/mne/ncps.htm.

150. More on the specific instances mechanism, and a database of specific instances addressed by NCPs, are available at <http://mneguidelines.oecd.org/specificinstances.htm>.

151. For more information, see Deutscher Corporate Governance Kodex, available at www.dcgk.de/en/home.html.

role of, and protections for, the integrity officer in corporate governance codes, in order to ensure the business integrity function receives the institutional support necessary to execute its responsibilities.

High-level reporting mechanism (HLRM) and “business ombudsmen”

Two initiatives specific to the risk of corruption, and specifically the risk of bribery solicitation and extortion, include the development of a high-level reporting mechanism and the adoption of a Business Ombudsman. Both initiatives involve a process that allows companies to report bribery solicitation to a dedicated and high-level institution that is tasked with swiftly responding to such reports.¹⁵²

¹⁵². For an example from Colombia, see www.baselgovernance.org/news/president-colombia-launches-worlds-first-high-level-reporting-mechanism-concept-developed-basel. For an example from the Ukraine, see www.ebrd.com/news/2014/-business-ombudsman-appointed-for-ukraines-anticorruption-initiative.html. These initiatives are also supported by the B20 group, see www.collective-action.com/initiatives/hlrm.

Chapter 5

Assessment: Implications of the findings

This chapter assesses the main findings of the report, particularly in relation to the role of boards and senior managers in discharging their duties dealing with risk, internal controls and setting the ethical tone of the company. It also considers implications for future work and offers a description of possible next steps.

The TNB Project was set with the aim to bridge the gap between responsible business standards and their implementation, in order to promote business integrity. Many of these standards, guidelines and recommendations are housed at the OECD, and the promotion of their effective implementation is key to achieving the OECD's overall goal of creating a stronger, cleaner and fairer global economy. The Project's overall premise was that, by focusing on strengthened corporate governance—and in particular engagement with the board and executive management—a corporation may be better equipped to prevent serious corporate misconduct.

For this reason, this report did not take a risk-specific approach to business integrity (i.e., focusing only on one type of risk, such as bribery, competition, or fraud, for example). It also avoided entering into a discussion about the scope of the goals companies should or should not have when addressing these issues. Consequently, as well, we have used the terms business integrity and responsible business conduct as if they were synonyms throughout in this document, although for some communities this should not be the case.

While, as argued, business integrity is perceived to focus more on avoiding risk (close to the idea of compliance), the responsible business agenda invites companies to become actors of positive change, emphasising the opportunities rather than the risks. In this report, we do not attempt to join this debate, but rather seek to understand how companies can actually better implement the commitments to integrity or responsible business conduct adopted by their leaders, regardless whether they were adopted to avoid risks or to grasp opportunities. In both cases, there are concrete corporate governance decisions, procedures and actions that have to be set in motion for those commitments, to mere legal compliance or to contribute to a better world, can become a reality.

Hence, this report offers a corporate governance perspective to the integrity – responsible business conduct efforts. From this angle, corporate objectives set by the board and senior management have to be translated into corporate governance processes, procedures, and frameworks that a company has to design, put in place and monitor depending on its own circumstances and exposure to risk, as recommended by the Principles. This report analyses these practices and the factors driving corporate commitment towards them, particularly at the top of the organisation, with the ambition to disseminate tools to improve companies' ability to more effectively prevent a range of misconduct risks, many of which were highlighted in this report.

This stocktaking exercise tries, therefore, to answer two main questions. First, to what extent are companies (especially their boards and executive management) organizing themselves in order to better integrate considerations of business integrity into their corporate governance frameworks, strategy, and operations. Second, what factors influence business decisions to implement business integrity measures, including in particular decisions that require board-level or senior management consideration and approval.

The results of the TNB Survey and several interviews with companies indicate that, in the vast majority of companies providing input to this report, business integrity considerations are increasingly

being brought to the attention of the board. Boards are involved in designing and implementing their companies' business integrity policy and they often assign responsibility over these issues to a board committee. Companies are increasing their budgets for business integrity and a vast majority of them see that budget an asset or investment, rather than a cost.

Some companies are also exploring ways to more holistically approach the traditional business integrity function. They moved the function within the organisation, seeking to find the optimal placing where it could be timely involved in decision making, but at the same time could work efficiently to save costs and to exploit synergies to better address potential breakdowns in communication between various independent business integrity areas within the company. The report also shows how chief compliance officers and integrity experts have to make a convincing value proposition for their budgets, but also how fines, and other forms of more intrusive sanctions for misconduct, are on the rise and attracting the attention of corporate leaders. They react adopting new frameworks for reporting, supervising, remunerating and for making people accountable to the company's values and policies, as well as seek to find ways to engage with stakeholders and the authorities to gain trust and recognition for their efforts. These results were presented more fully in Chapter 3 of this report.

Despite progress made, however, there remain companies that either fail to prevent, or choose to engage in serious corporate misconduct. They may do so because of an inadequate assessment of risk factors in the corporation's operating environment. These could include, for example, a perception that the risk of enforcement against certain types of misbehaviour is low, or that the benefits to implementing and enforcing a business integrity programme are too intangible or too long-term to warrant the time and resources needed, particularly in the face of short-term business pressures. Chapter 4 of the report highlights factors that, according to companies engaging with the TNB Project, were influential in their own decision to develop and implement business integrity measures and programmes. According to the TNB Survey results, the primary reason cited by respondents for their company's resolve to detect, prevent and address serious corporate misconduct was the risk of reputational damage, followed, to a lesser extent, by enforcement actions.

Given the role business plays in today's global economy, more must be done in order to effectively and actively prevent future failures of business integrity. This is where the OECD, its Members, Partners and stakeholders, could reflect on potential avenues for further research and consideration of issues touched upon in this report.

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Annex A

Methodology

The new information collected and analysed for the purpose of this report comes from the 88 complete responses to the OECD Survey on Business Integrity and Corporate Governance and from nearly 40 interviews with private sector representatives between January and April 2015, some of which were conducted on an anonymous basis, as well as case studies highlighting business integrity practices voluntarily provided by some companies. Interviews and case studies were conducted either with companies that volunteered following the announcement of the TNB Project in January 2015, as well as through a request for input from the OECD Secretariat to companies in their private sector networks. While sources have not been identified and therefore the individual company context cannot be taken in to account when considering the information obtained through individual interviews, such information nevertheless brings narrative and practical examples to the various issues discussed in this report. Points that were corroborated across various interviews have also been highlighted.

Additional observations are based on a broad literature review, the sources of which can be found in the Bibliography to this report, and from discussions that took place in the context of an OECD Trust and Business Project consultation, held on 25 March 2015 as part of the OECD Integrity Forum. The business integrity policies and frameworks described in this report are not intended to suggest that one structure is better than another but instead to display trends and practical examples that will hopefully be useful to companies seeking to establish or review their own business integrity framework, as well as to governments considering their policies and approaches to promoting business integrity.

The OECD Survey on Business Integrity and Corporate Governance (TNB Survey) was conducted between 11 February and 24 April 2015 and received a total of 88 responses. The main objective of the TNB Survey was to identify and describe how companies are organising themselves in order to address specific business integrity risks. This included a specific focus on the structure, function and responsibility of the board of directors and senior management for developing, implementing and reviewing business integrity policies within their company.

The survey questionnaire was developed based on a review of previous surveys focusing on aspects of corporate ethics and compliance.¹⁵³ It was further refined through a piloting process that involved seeking feedback on survey questions and structure from the BIAC Anti-Corruption and Corporate Governance Taskforces. The majority of survey questions were optional and allowed multiple responses, percentages have therefore been calculated for each question based on the percentage of respondents who answered that question. This explains the variations in the number of responses per question and why the percentages in some questions do not add up to 100%. Depending on how respondents identified

^{153.} Including the EY 2014 Global Fraud Survey; KPMG 2013 Global Hedge Fund Survey: The Cost of Compliance; LRN 2013 Ethics & Compliance Leadership Survey Report; McKinsey 2011 Global Survey: Governance since the economic crisis; North Carolina State University's ERM Initiative and Protiviti, Executive Perspectives on Top Risks for 2015. (See the bibliography for full references.)

themselves during the survey, they were either directed to questions specifically designed for external business integrity advisors (e.g. lawyers, accountants, risk management consultants – a total of 19 respondents) or for company representatives (a total of 69 respondents). When referring to percentages of respondents to TNB Survey questions, these have been rounded to the nearest whole number. In some cases the full data range is not described and instead only the majority scores are highlighted, for descriptive purposes.

As is the case for any analysis based on self-reports, the possibility of error cannot be excluded. For example, survey respondents may have interpreted questions incorrectly or may not have provided accurate answers. The responses of the TNB Survey come from companies, or company representatives, with a high level of awareness of business integrity. They are not, therefore, necessarily representative of broader perceptions and approaches in this area. In addition, there were negligible responses from state-owned or controlled companies or small or family-run businesses. Survey results therefore do not necessarily represent the specific circumstances of these categories of company.

The survey respondents' organisations were primarily headquartered in the US (20%), UK and Germany (8%, respectively), Brazil, France and Portugal (7%, respectively), the remaining respondents' organisations were spread across numerous countries from all of the world's regions.¹⁵⁴ These organisations operated in the financial services (22%), Manufacturing (17%), energy, IT and pharmaceuticals and medical devices (16%) sectors.¹⁵⁵

Of the 25 respondent companies that indicated their net sales in FY2014, these ranged from USD 1 million to USD 6.7 billion with an average of USD 1 billion. Sixty respondents indicated the number of employees in their company at the end of FY2014, with a median of 8709 employees per company, the largest company had 420 000 employees. This information indicates that most respondents came from large companies with significant global operations and therefore is not representative of the predicaments of small to medium-sized enterprises.

In terms of the respondents' role within their organisation, most respondents identified themselves as Chief Compliance Officers (28%), followed by Legal Counsel/General Counsel (16%) and CEO/President/Managing Director (12%). In total, 18% of respondents were board members, including chairperson and non-executive director (6%, respectively). External integrity advisors, including lawyers, accountants and external auditors and risk management consultants, made up 26% of respondents.

^{154.} Including, Argentina, Australia, Belgium, Canada, Chile, Colombia, Denmark, Hong Kong (China), India, Ireland, Italy, Luxembourg, Nigeria, Pakistan, Peru, Portugal, Singapore, Spain, Switzerland, the Netherlands, Trinidad and Tobago, Turkey and the UAE.

^{155.} We are grateful to AdvaMed, BIAC, Compliance Week, Ethic Intelligence, Journal of Business Compliance, FCPAméricas, IBA and SCCE for circulating the survey to their membership.

Annex B

Select OECD standards for business integrity

As noted above, the OECD Trust and Business Project aims to bridge the gap between business integrity standards and their implementation, in order to support corporations to prevent them from being used for, or engaging in, serious corporate misconduct. The Project has as its foundation a focus on the international standard for corporate governance, the G20/OECD Principles of Corporate Governance, and the Principles' specific recommendations on the role of the board and executive management in setting the ethical tone in a company and in ensuring the company's business integrity programme is fundamentally sound and effectively addresses the company's integrity-related risks. Business integrity standards preventing misconduct include a number housed at the OECD, including those outlined in this section. For the purposes of this initial paper, the risks specifically considered in this paper are those addressed by the OECD standards described more fully below.

This Annex also includes examples of business integrity standards implemented at a national level. They include specific recommendations to companies' boards and executive management.

B.1. Corporate governance and 'tone from the top'

A strong "tone from the top" is a cornerstone of a sound business integrity policy. The board of directors and senior executive management have a special role to play in ensuring that business integrity considerations are effectively integrated into a company's decision-making, so that the company is better able to mitigate the risk of being used for, or engaging in serious corporate misconduct. That is why the TNB Project focuses on engaging a company's board and executive management on these considerations. The foundation for the Project's focus is the Principles, as well as the OECD Guidelines on Corporate Governance of State-Owned Enterprises, which complement and are based on the Principles.

B.1.1. G20/OECD Principles of Corporate Governance

The Principles are intended to help policymakers evaluate and improve the legal, regulatory, and institutional framework for corporate governance, with a view to supporting economic efficiency, sustainable growth and financial stability. This is primarily achieved by providing shareholders, board members and executives, as well as financial intermediaries and service providers, with the right incentives or information to perform their roles or exercise their rights within a framework of checks and balances.¹⁵⁶ The Principles are widely used as a corporate governance benchmark by individual

^{156.} The Principles were first released in 1999 and then revised in 2004 and more recently in 2015, they are available at www.oecd.org/daf/ca/Corporate-Governance-Principles-ENG.pdf. The Principles are presented in six different chapters: I) Ensuring the basis for an effective corporate governance framework; II) The rights and equitable treatment of shareholders and key ownership functions; III) Institutional investors, stock markets, and other intermediaries; IV) The role of stakeholders; V)

jurisdictions around the world. They are also one of the Financial Stability Board's Key Standards for Sound Financial Systems¹⁵⁷ and provide the basis for assessment of the corporate governance component of the Reports on the Observance of Standards and Codes of the World Bank.¹⁵⁸

The Principles are developed with an understanding that corporate governance policies have an important role to play in achieving broader economic objectives with respect to investor confidence, capital formation and allocation. The quality of corporate governance affects the cost for corporations to access capital for growth and the confidence with which those that directly or indirectly provide capital can participate and share in their value-creation on fair and equitable terms. Good corporate governance reassures shareholders and other stakeholders that their rights are protected and make it possible for corporations to decrease the cost of capital and to facilitate their access to the capital market.

Chapter VI of the Principles is devoted to the responsibilities of the board, under the conceptual framework that the corporate governance framework should ensure the strategic guidance of the company, the effective monitoring of management by the board, and the board's accountability to the company and the shareholders.

Principle VI.C calls for boards to apply high ethical standards, with its annotations suggesting that the board should set the ethical tone of the company, "not only by its own actions, but also in appointing and overseeing key executives and consequently the management in general". It explains that this is in the long term interest of the company as it will make it credible and trustworthy. The development of company codes is highlighted as are voluntary commitments to comply with the OECD Guidelines for Multinational Enterprises.¹⁵⁹

Principle VI.D. list the key functions that boards should fulfil, which include: (i) reviewing and guiding corporate strategy, major plans of action and risk management policies and procedures, as well as (ii) ensuring the integrity of the corporation's reporting systems and that appropriate systems of control are in place, in particular, systems for risk management and compliance with the law and relevant standards.

The annotations to this principle emphasise that risk management oversight involves oversight of the accountabilities and responsibilities for managing risks, specifying the types and degree of risk that a company is willing to accept in pursuit of its goals, and how it will manage the risks it creates through its operations and relationships. It is thus a crucial guideline for management that must manage risks to meet the company's desired risk profile. The annotations also recommend companies to establish and ensure the effectiveness of internal controls, ethics, and compliance programmes or measures to comply with applicable laws, regulations, and standards, including statutes criminalising the bribery of foreign public

Disclosure and transparency; and VI) The responsibilities of the board. The Principles are supplemented by annotations.

157. See online at www.financialstabilityboard.org/2004/04/cos_040401/?page_moved=1.

158. Reports on the Observance of Standards and Codes of the World Bank, available at www.worldbank.org/ifa/rosc_cg.html.

159. The annotations add that "company-wide codes serve as a standard for conduct by both the board and key executives, setting the framework for the exercise of judgement in dealing with varying and often conflicting constituencies. At a minimum, the ethical code should set clear limits on the pursuit of private interests, including dealings in the shares of the company. An overall framework for ethical conduct goes beyond compliance with the law, which should always be a fundamental requirement."

officials, as required under the OECD Anti-Bribery Convention, and other forms of bribery and corruption. The annotations add that compliance must also relate to other laws and regulations such as those covering securities, competition and work and safety conditions.¹⁶⁰ These compliance programmes should also underpin the company's ethical code.

B.1.2. OECD Guidelines on Corporate Governance of State-Owned Enterprises

Reflecting the specific corporate governance issues facing state owned enterprises, the OECD has developed the SOE Guidelines, in essence an application of the Principles to these companies where the state exercises control. The SOE Guidelines aim to: (i) professionalise the state as an owner; (ii) make SOEs operate with similar efficiency, transparency and accountability as good practice private enterprises; and (iii) ensure that competition between SOEs and private enterprises, where such occurs, is conducted on a level playing field.¹⁶¹

Chapter II of the SOE Guidelines deals with the role of the state as an owner of companies. The main message is that the state should act as an informed and active owner, ensuring that the governance of SOEs is carried out in a transparent and accountable manner, with a high degree of professionalism and effectiveness. For this, Guideline II.F described some of the prime responsibilities of the state, which include, among others: (i) setting and monitoring the implementation of broad mandates and objectives for SOEs, including risk tolerance levels; and (ii) setting up reporting systems that allow the ownership entity to regularly monitor, audit and assess SOE performance, and oversee and monitor their compliance with applicable corporate governance standards.

Chapter V of the SOE Guidelines discusses stakeholder relations and the application of high ethical standards, taking the position that the state should make clear any expectations the state has in respect of responsible business conduct by SOEs. For this, Guideline V.C. establishes that SOE boards should develop, implement, monitor and communicate internal controls, ethics and compliance programmes or measures, including those which contribute to preventing fraud and corruption. They should be based on country norms, in conformity with international commitments and apply to the SOE and its subsidiaries. Similarly, Guideline V.D. mandates that SOEs to observe high standards of responsible business conduct.

Chapter VI of the SOE Guidelines addresses disclosure and transparency requirements, which SOEs are encouraged to take to the same level of listed companies. SOEs are invited to report on foreseeable risk factors and measures taken to manage them, including on financial and operational risks, but also, where relevant and material to the SOE, on human rights, labour, environment and tax-related risks.

Finally, Chapter VII defines the responsibilities of the boards of SOEs. The SOE Guidelines expect boards to have the necessary authority, competencies and objectivity to carry out their functions of strategic guidance and monitoring of management. They are also expected to act with integrity and be held accountable for their actions. They are to formulate or approve, monitor and review corporate strategy, establish appropriate performance indicators and identify key risks; as well as develop and oversee effective risk management policies and procedures, among other key functions. SOE boards are

^{160.} The Principles also highlight compliance with taxation, human rights, the environment, fraud, and money laundering.

^{161.} The SOE Guidelines were first released in 2005 and revised in 2015. They are available online at www.oecd.org/daf/ca/OECD-Guidelines-Corporate-Governance-SOEs-2015.pdf.

invited to consider setting up specialised committees, composed of independent and qualified members, to support the full board in performing its functions, including addressing risk management.

B.2. Responsible business conduct

The OECD Guidelines for Multinational Enterprises (MNE Guidelines) are a set of recommendations on responsible business conduct addressed by governments to MNEs¹⁶² operating in or from adhering countries. They are supported by the representatives of business, labour organisations and non-governmental organisations¹⁶³ and are a part of the 1976 OECD Declaration on International Investment and Multinational Enterprises, a policy commitment by adhering governments to provide an open and transparent environment for international investment and to encourage the positive contribution MNEs can make to economic and social progress.

The MNE Guidelines cover all major areas of business ethics.¹⁶⁴ Their recommendations are set out in eleven chapters and cover the following areas of responsibility: information disclosure, human rights, employment and labour, environment, anti-corruption, consumer interests, science and technology, competition, and taxation. Observance of the MNE Guidelines by enterprises is voluntary and not legally enforceable. Nevertheless, matters covered by the MNE Guidelines may also be the subject of national law or international commitments. MNEs are expected to fulfil the recommendations set out in the MNE Guidelines and the countries adhering to the MNE Guidelines make a binding commitment to implement them.

The MNE Guidelines recognise that all parties – not only enterprises – have a role to play in building a healthy business environment. Enterprises, for their part, are expected to take into full account established policies in the countries in which they operate and consider the views of other stakeholders. In this regard, enterprises should contribute to economic, environmental, and social progress, with a view to achieving sustainable development.

General policies that set the tone and establish common fundamental principles for the specific recommendations throughout the MNE Guidelines focus on two aspects of the business-society relationship: (i) the positive contribution that MNEs can make to sustainable development, and (ii) avoiding adverse impacts and addressing them when they occur. For this, enterprises should carry out

^{162.} This discussion of the OECD MNE Guidelines derives from the text of the Guidelines preamble and other relevant sections of the instrument. A precise definition of multinational enterprises is not required for the purposes of the MNE Guidelines. These enterprises operate in all sectors of the economy. They usually comprise companies or other entities established in more than one country and so linked that they may coordinate their operations in various ways. While one or more of these entities may be able to exercise a significant influence over the activities of others, their degree of autonomy within the enterprise may vary widely from one multinational enterprise to another. Ownership may be private, State or mixed. The MNE Guidelines are addressed to all the entities within the multinational enterprise (parent companies and/or local entities) (Guideline I.4).

^{163.} Through the OECD Business and Industry Advisory Committee (BIAC), the OECD Trade Union Advisory Committee (TUAC), and OECD Watch.

^{164.} See OECD Guidelines for Multinational Enterprises - Responsible Business Conduct Matters, 2014, available at http://mneguidelines.oecd.org/MNEguidelines_RBCmatters.pdf. For further information on the OECD's standards on responsible business conduct see the *Recommendation of the Council on Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas* [C/MIN(2011)12/FINAL] and the *Recommendation of the Council on Common Approaches for Officially Supported Export Credits and Environmental and Social Due Diligence* [C(2012)101].

risk-based due diligence,¹⁶⁵ for example by incorporating into their enterprise risk management systems the ability to identify, prevent and mitigate actual and potential adverse impacts. Enterprises should also have in place measures for addressing these impacts. The MNE Guidelines also recommend that enterprises should engage with relevant stakeholders in order to provide meaningful opportunities for their views to be taken into account in relation to planning and decision making for projects or other activities that may significantly impact local communities.

The MNE Guidelines are implemented via National Contact Points (NCPs), which adhering countries are required to establish and which are tasked with undertaking promotional activities, handling inquiries, and providing a mediation and conciliation platform for resolving issues that arise from the alleged non-observance of the MNE Guidelines. This makes the MNE Guidelines the only international corporate responsibility instrument with a built-in grievance mechanism, the specific instances mechanism.

The specific instances mechanism under the MNE Guidelines is complemented by a proactive agenda,¹⁶⁶ which was developed after the 2011 update to the Guidelines to help enterprises identify and respond to risks of adverse impacts associated with particular products, regions, sectors, or industries. Central to its potential to effect change on a broad scale is its employment of the multi-stakeholder process which gives relevant stakeholders the opportunity to participate side-by-side with enterprises in developing strategies to avoid risks of adverse impacts. Examples of the proactive agenda's application in practice include the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High Risk Areas, along with three initial proactive agenda projects focusing on due diligence in the financial sector; stakeholder engagement and due diligence in the extractive sector; and responsible investment in agricultural supply chains.

B.3. Anti-corruption

The Anti-Bribery Convention is the only legally binding instrument globally to focus primarily on the supply of bribes to foreign public officials in international business transactions. All Convention Parties must make the bribery of foreign public officials a criminal offence. They are obligated to investigate credible allegations and, where appropriate, to prosecute both individuals and companies who offer, promise or give bribes to foreign public officials and to subject those who bribe to effective, proportionate and dissuasive penalties. All Parties to the Convention have passed legislation criminalizing foreign bribery, and most have established a corporate liability regime for holding corporations liable for foreign bribery.¹⁶⁷

^{165.} Due diligence is understood as the process through which enterprises can identify, prevent, mitigate, and account for how they address their actual and potential adverse impacts as an integral part of business decision-making and risk management systems. It can be included within broader risk management systems, provided that it goes beyond simply identifying and managing material risks to the enterprise itself to include the risks of adverse impacts related to matters covered by the MNE Guidelines (Guideline II.c.14).

^{166.} More available at <https://mneguidelines.oecd.org/proactiveagenda.htm>.

^{167.} Article 2 of the OECD Anti-Bribery Convention requires each Party to “take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official.” Commentaries in the Convention to Article 2, as well as Annex 1 to the 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions provide further guidance to States Parties as to how these obligations should be fulfilled.

Under the Convention, these laws must ensure that individuals and companies can also be prosecuted when third parties are involved in the bribe transaction, such as when someone other than the foreign official receives the illegal benefit on his or her behalf, including a family member, business partner, or a favourite organisation of the official. Between the time the Convention entered into force in 1999 and the end of 2013, 333 individuals and 111 entities have been sanctioned under criminal proceedings for foreign bribery in 17 Parties. Of those, at least 87 of the sanctioned individuals were sentenced to prison for foreign bribery.

Companies are on the front line in the global fight against foreign bribery. For this reason, Parties to the OECD Anti-Bribery Convention recognised the important role companies have in this fight when they adopted in 2010 a *Good Practice Guidance on Internal Controls, Ethics and Compliance*, which is an integral part of the Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions (“2009 Anti-Bribery Recommendation”).¹⁶⁸ It highlights the fundamental elements of any effective anti-bribery compliance programme, and is the only guidance of its kind adopted at an intergovernmental level. Specifically, and as noted further below, it calls on senior management to strongly, explicitly, and visibly support and commit to the company’s internal controls, ethics and compliance programmes or measures for preventing and detecting foreign bribery, which should be clearly articulated and visible within the company. Oversight of the ethics and compliance programmes or measures should include the authority to report matters directly to independent monitoring bodies, such as internal audit committees of boards of directors or of supervisory boards, and implementation of the programmes or measures should be the duty of one or more senior corporate officers invested with an adequate level of autonomy from management, resources, and authority.

Under the 2009 Anti-Bribery Recommendation, member countries should encourage companies to develop and adopt adequate internal controls, ethics and compliance programmes or measures for the purpose of preventing and detecting foreign bribery, taking into account the Good Practice Guidance on Internal Controls, Ethics, and Compliance.

B.4. Competition

Anti-competitive conduct is a serious offence and, in some jurisdictions, even a crime, which harms consumers, government and markets. Through well-designed competition law, effective enforcement and competition-based economic reform, governments promote growth, employment and consumer welfare. More than 130 countries around the world have adopted competition rules, making anti-competitive conduct and agreements illegal and punishable by heavy fines and sometimes professional disqualification or jail time.

Hard core cartels are the most egregious violations of competition law. They harm consumers and other market players in many countries and industries, by fixing and raising prices, restricting supply and/or allocating markets, thus making goods and services unavailable or unnecessarily expensive for purchasers. The OECD 1998 Recommendation concerning Effective Action against Hard Core cartels advises that governments ensure that their competition laws effectively halt and deter hard core cartels by

¹⁶⁸.

Annex II, *Good Practice Guidance on Internal Controls, Ethics and Compliance*, available at www.oecd.org/daf/anti-bribery/44176910.pdf. Similar recommendations are made to the board in parallel anti-bribery business principles, including those highlighted in the Anti-Corruption Ethics and Compliance Handbook for Business. The 2009 Anti-Bribery Recommendations [C(2009)64] is available online at www.oecd.org/daf/anti-bribery/oecdantibriberyrecommendation2009.htm.

providing for effective sanctions and adequate enforcement procedures and institutions to detect, punish and deter hard core cartels.¹⁶⁹

In addition, bid rigging, a.k.a. collusion in public procurement, is a form of hard core cartel, which deprives government and society from the benefits of a truly competitive public procurement process. It leads to great losses of public resources, by diverting public money into bid riggers' pocket. The OECD's 2012 Recommendation and 2009 Guidelines on Fighting Bid Rigging in Public Procurement call for governments to assess their public procurement laws and practices at all levels of government in order to promote more effective procurement and reduce the risk of collusion in public tenders.¹⁷⁰ The OECD Secretariat further supports government efforts by training procurement officials around the world to prevent, detect and address cartelisation in public procurement.¹⁷¹

Enforcement against anti-competitive conduct also plays as a strong incentive for business integrity initiatives, whether proactively or following sanctions. Companies around the world are increasingly aware of competition violation risks, and various competition authorities encourage or impose compliance programs. The OECD roundtable on Promoting Compliance with Competition Laws draws a useful panorama of why compliance matters and how it can be fostered by government policies.¹⁷²

More generally, the OECD provides a central forum for the development of best practices in competition policy and enforcement among competition authorities, relevant ministries, academic and private sector experts. Business integrity considerations inform such competition enforcement and policy guidance, notably in the OECD roundtables dealing with regulated sectors¹⁷³ ex officio cartel investigation and screening,¹⁷⁴ self-reporting and leniency,¹⁷⁵ and competition and corporate

- ^{169.} 1998 Recommendation of the Council concerning Effective Action against Hard Core Cartels, available at www.oecd.org/daf/competition/recommendationconcerningeffectiveactionagainsthardcorecartels.htm. The OECD 2014 Recommendation further promotes and facilitates international co-operation among competition authorities, to strengthen cross-border enforcement and hereby reduce the harm arising from anticompetitive practices across borders; see OECD 2014 Recommendation concerning International Co-operation on Competition Investigations and Proceedings, available at www.oecd.org/daf/competition/international-coop-competition-2014-recommendation.htm. See also OECD 2005 Best Practices for the Formal Exchange of Information between Competition Authorities in Hard Core Cartel Investigations, available at www.oecd.org/daf/competition/cartels/35590548.pdf.
- ^{170.} 2012 Recommendation of the Council on Fighting Bid Rigging in Public Procurement and Related OECD 2009 Guidelines, available at www.oecd.org/daf/competition/oecdrecommendationonfightingbidrigginginpublicprocurement.htm.
- ^{171.} Recommendation of the Council on Fighting Bid Rigging in Public Procurement, available at www.oecd.org/daf/competition/oecdrecommendationonfightingbidrigginginpublicprocurement.htm.
- ^{172.} 2011 Roundtable of the Council on Promoting Compliance with Competition Law, available at www.oecd.org/daf/competition/Promotingcompliancewithcompetitionlaw2011.pdf.
- ^{173.} Regulated Sectors: OECD Best Practice Roundtables on Competition Policy, list of proceedings available at www.oecd.org/daf/competition/regulated-sectors-competition-roundtables.htm.
- ^{174.} OECD 2013 Roundtable on Ex-Officio Cartel Investigations and the Use of Screens to Detect Cartels, available at www.oecd.org/daf/competition/exofficio-cartel-investigations.htm.
- ^{175.} OECD Roundtable on Leniency for Subsequent Applicants, 2012, summary of proceedings, available at www.oecd.org/daf/competition/Leniencyforsubsequentapplicants2012.pdf.

governance.¹⁷⁶ Companies stand on the front line to ensure that they act independently and competitively in the markets. Executives currently spending time in jail and recent extraditions on antitrust grounds are strong reminders of the importance of abiding by competition rules.

B.5. Examples of national integrity practices

Legislators and policy-makers have implemented a number of business integrity practices at a national level. They include specific recommendations to companies' boards and executive management, recognising that a company's business integrity program is toothless without proper support and oversight. Below are some examples of national laws, regulations, and guidance. Most of the national-level examples included below are not considered "hard law", but rather provide government guidance to companies on what governments expect of them in terms of how companies develop and implement their corporate governance frameworks and business integrity measures. For example, the corporate governance codes in section B.5.1 below are applied on a comply-or-explain basis; the examples of guidance included in section B.5.2 are usually applied by governments when determining sentencing in the event of a violation of laws or regulations but are also used as guidance by companies when developing business integrity measures and programmes.

B.5.1 Corporate governance codes

Regarding the corporate governance framework, generally, many countries have used various combinations of legal and regulatory instruments on the one hand, and codes and principles on the other.¹⁷⁷ For example, all of the 41 countries surveyed in the March 2015 OECD Corporate Governance Factbook have developed national codes or sectoral principles of corporate governance that complement or constitute part of the legal and regulatory corporate governance framework. A comply or explain system has been adopted in the EU countries and in 7 other jurisdictions (73%), usually through laws and regulations (19 jurisdictions) or through listing rules underpinned by laws and regulations (10 jurisdictions). Disclosure to the market regarding adherence to the code is normally required and has become part of the annual reporting requirements for listed companies. At least 29 institutions (in 24 jurisdictions) issue a national report reviewing adherence to the corporate governance code by listed companies in the domestic market.

A number of the codes in these jurisdictions include specific recommendations to the board and executive management on their responsibility to set the ethical tone in a company and to ensuring the company's compliance system effectively addresses the company's integrity-related risks. The UK Corporate Governance Code,¹⁷⁸ for example, applies to all companies with a Premium Listing of equity shares in the UK. Companies to which the Code applies must report on how they have applied the Code in their annual reports and accounts. Section C.2.3 of the Code specifically calls on the board to "monitor the company's risk management and internal control systems and, at least annually, carry out a review of their effectiveness, and report on that review in the annual report. The monitoring and review should cover all material controls, including financial, operational and compliance controls". This principle is supported by, and further explained, in the September 2014 Guidance on Risk Management, Internal

^{176.} OECD 2010 Hearing on Competition and Corporate Governance, available at www.oecd.org/daf/competition/prosecutionandlawenforcement/46824205.pdf.

^{177.} The summary provided in this paragraph is taken from section 2.1 of the March 2015 Corporate Governance Factbook, available at www.oecd.org/daf/ca/Corporate-Governance-Factbook.pdf.

^{178.} See online at <https://www.frc.org.uk/Our-Work/Codes-Standards/Corporate-governance/UK-Corporate-Governance-Code.aspx>.

Control and Related Financial and Business Reporting by the UK Financial Reporting Council, which is responsible for setting the UK Corporate Governance Code.¹⁷⁹

The German corporate governance code (Deutscher Corporate Governance Kodex)¹⁸⁰ similarly consists of non-mandatory recommendations and suggestions for German listed companies. Deviations from the recommendations have to be explained and disclosed in companies' annual declarations of conformity. It describes frameworks for corporate management and supervision, along with standards for responsible corporate governance. Revisions to the code published in September 2014 include a specific recommendation to the Board to oversee compliance issues, including: a requirement for the management board to inform the supervisory board on “all issues important to the enterprise with regard to strategy, planning, business development, risk situation, risk management and compliance; a requirement for the Chairman of the supervisory board to remain in regular contact on these issues with the Management Board; and a requirement for the audit committee of the supervisory board to monitor compliance, unless another committee is entrusted with the responsibility.

The Dutch Corporate Governance Code,¹⁸¹ which applies to listed companies with registered offices in the Netherlands and is implemented according to an “apply or explain” principle, integrates corporate social responsibility issues in the tasks for the management board and the supervisory board.

Box 18. King Code of Governance

Principle 6: Compliance with laws, rules, codes and standards: 6.1. The board should ensure that the company complies with applicable laws and considers adherence to nonbinding rules, codes and standards

- 6.1.1. Companies must comply with all applicable laws.
- 6.1.2. Exceptions permitted in law, shortcomings and proposed changes expected should be handled ethically.
- 6.1.3. Compliance should be an ethical imperative.
- 6.1.4. Compliance with applicable laws should be understood not only in terms of the obligations that they create, but also for the rights and protection that they afford.
- 6.1.5. The board should understand the context of the law, and how other applicable laws interact with it.
- 6.1.6. The board should monitor the company's compliance with applicable laws, rules, codes and standards.
- 6.1.7. Compliance should be a regular item on the agenda of the board.
- 6.1.8. The board should disclose details in the integrated report on how it discharged its responsibility to establish an effective compliance framework and processes.

The South African King Code of Governance Principles apply to all entities, regardless of the manner and form of incorporation or establishment and whether in the public, private sectors or non-

^{179.} See online at <https://www.frc.org.uk/Our-Work/Codes-Standards/Corporate-governance/UK-Corporate-Governance-Code/Guidance-for-boards-and-board-committees.aspx#Biscuit3>.

^{180.} See online at www.dcgk.de/en/.

^{181.} See online at <http://commissiecorporategovernance.nl/download/?id=606>.

profit sectors. Companies are expected to implement the Code on a “comply or explain” basis.¹⁸² The Code’s specific provision on compliance goes further than legal compliance with laws and is included in Box 18.

B.5.2 Other examples of guidance on corporate behaviour

The United States Sentencing Commission Guidelines Manual sets out, in Chapter 8, six factors to be taken into account by courts when sentencing legal persons convicted of criminal offences. Of these six factors, the two factors that can be taken into account in mitigation of sentence are: (i) the existence of an effective compliance and ethics program; and (ii) self-reporting, cooperation, or acceptance of responsibility. Guideline §8B2.1 describes an effective compliance program and in particular, the role of the board (Box 19).

Box 19. Extracts from United States Sentencing Commission Guidelines Manual (2014)

§8B2.1. Effective Compliance and Ethics Program. (b) Due diligence and the promotion of an organizational culture that encourages ethical conduct and a commitment to compliance with the law within the meaning of subsection (a) minimally require the following:

(1) The organization shall establish standards and procedures to prevent and detect criminal conduct.

(2) (A) The organization’s governing authority shall be knowledgeable about the content and operation of the compliance and ethics program and shall exercise reasonable oversight with respect to the implementation and effectiveness of the compliance and ethics program.

(B) High-level personnel of the organization shall ensure that the organization has an effective compliance and ethics program, as described in this guideline. Specific individual(s) within high-level personnel shall be assigned overall responsibility for the compliance and ethics program.

(C) Specific individual(s) within the organization shall be delegated day-to-day operational responsibility for the compliance and ethics program. Individual(s) with operational responsibility shall report periodically to high-level personnel and, as appropriate, to the governing authority, or an appropriate subgroup of the governing authority, on the effectiveness of the compliance and ethics program. To carry out such operational responsibility, such individual(s) shall be given adequate resources, appropriate authority, and direct access to the governing authority or an appropriate subgroup of the governing authority.

“Governing authority” means (A) the Board of Directors; or (B) if the organization does not have a Board of Directors, the highest-level governing body of the organization.

In relation to bribery of foreign public officials as a specific type of serious corporate misconduct, in 2011 the United Kingdom published the Guidance about procedures which relevant commercial organisations can put in place to prevent persons associated with them from bribing (UK Adequate

^{182.}

The Code uses the Netherland’s definition of the “apply or explain” approach, stating: “The ‘comply or explain’ approach could denote a mindless response to the King Code and its recommendations whereas the ‘apply or explain’ regime shows an appreciation for the fact that it is often not a case of whether to comply or not, but rather to consider how the principles and recommendations can be applied.”

Procedures Guidance).¹⁸³ Of the six principles set out in the Guidance to inform procedures put in place by commercial organisations wishing to prevent bribery, Principle 2 relates to “Top-level commitment.” It describes the actions to be taken by the top-level management of a commercial organisation (be it a board of directors, owners or any other equivalent body or person), including (1) communication of the organisation’s anti-bribery stance, and (2) an appropriate degree of involvement in developing bribery prevention procedures.

Similarly, in Brazil, which in 2013 enacted a civil and administrative form of corporate liability for offences against the public administration, including domestic and foreign bribery, the Government introduced in March 2015 a decree regulating several aspects of the law. At the time of writing, the OECD Working Group on Bribery in International Business Transactions, which monitors Parties’ Implementation of the OECD Anti-Bribery Convention (of which Brazil is a Member) had not yet assessed the Decree. Of note here, the Decree includes a provision recognising a corporation’s integrity programme as a mitigating factor (Art. 5, par. 4) in the decision to impose sanctions in the event of a violation of Brazil’s so-called “Clean Company Law” (Law N. 12.846/2013 of August 1, 2013). An integrity programme qualifying for consideration in these circumstances, the Decree notes, must have as one of its parameters “commitment of the legal entity’s senior management, including board members, evidenced by their clear and unequivocal support of the programme.”¹⁸⁴ In an additional regulation issued in April 2015, the Brazilian Office of the Comptroller General (CGU) set out the procedure it would follow when evaluating compliance programs for the purposes of the Clean Company Law. This includes requiring companies to submit a compliance report detailing, *inter alia*, the company’s decision-making process with respect to compliance and the corresponding competence of officers, board members, departments and sectors (Ordinance 909/2015).

Another example of government guidance on corporate behaviour includes the new French Guidelines for the reinforcement of the prevention of corruption in commercial transactions, developed by the Central Service for the Prevention of Corruption (SCPC) and adopted by the government on 25 March 2015 following a broad consultation with the main stakeholders in the sector.¹⁸⁵ The Guidelines recognise that, while there is currently no legal requirement in France for businesses to adopt internal measures to prevent corruption, a number of French companies are adopting such measures because of the increase in multi-jurisdictional enforcement of corruption cases, as well as to comply with anti-corruption principles and guidelines produced by international bodies or foreign legislation.¹⁸⁶

^{183.} UK Guidance about procedures which relevant commercial organisations can put in place to prevent persons associated with them from bribing, see www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf.

^{184.} Text here is taken from an unofficial translation of the March 2015 decree provided to the Secretariat.

^{185.} The Guidelines are available on the French Ministry of Justice’s website in the French www.justice.gouv.fr/include_htm/pub/lignes_directrices.pdf and English www.justice.gouv.fr/include_htm/pub/Lignes_directrices_EN.pdf.

^{186.} The preamble to the Guidelines states that they meet the highest international anti-corruption standards and are aimed at French companies and other organisations carrying out commercial transactions, with the aim of establishing compliance systems to prevent corruption in their commercial transactions and to ensure their effectiveness. The Guidelines are also aimed at professional organisations which assist businesses with their efforts. At the time of writing, the OECD Working Group on Bribery had not yet assessed the Guidelines.

The Canadian Competition Bureau published in 2008 and updated in 2010 and in 2015 a bulletin on corporate compliance programmes¹⁸⁷ as guidance to companies in applying Canada's legal framework to promote competitive markets and to enable informed consumer choice. The bulletin states that an effective compliance programme may be considered by the Bureau when recommending a case to the Public Prosecution Service of Canada, including recommendations on the fine or remedy that should be imposed in the event of a violation of Canada's competition framework. In terms of its guidance on compliance programmes, the bulletin lists senior management involvement and support first under its list of basic requirements for a credible and effective corporate compliance programme. The bulletin also includes a list of benefits of incorporating such a programme within a company (Box 20).

Box 20. Canadian Competition Bureau: Benefits of Corporate Compliance

A well-structured compliance program provides a framework for compliance with the Acts. Some of the specific benefits of a credible and effective program may include the following:

- maintaining a good reputation;
- improving a business' ability to recruit and retain staff—a business with a reputation for compliance is likely to attract higher-quality employees and have a better employee retention rate;
- improving a business' ability to attract and retain customers and suppliers who value companies that operate ethically;
- reducing the risk of non-compliance;
- triggering early warnings of potentially illegal conduct;
- allowing a business to qualify for favourable treatment in sentencing, or reducing costs related to litigation, fines, AMPs, adverse publicity and the disruption to operations resulting from a Bureau investigation and/or proceedings before the court;¹²
- reducing the exposure of employees, management and the business to criminal or civil liability;
- educating employees as to the appropriate course of conduct if called upon to provide evidence in the course of an inquiry by the Bureau, or if the company is the target of such an inquiry;
- assisting a business and its employees in their dealings with the Bureau—for example, by identifying contraventions of the Act early enough to request immunity or leniency; and
- increasing awareness of possible conduct in breach of the Act among competitors, suppliers and customers in the market.

Some jurisdictions also feature government-issued, sector-specific business integrity guidance for companies. One example includes guidance provided by the US Department of Health and Human Services Office of the Inspector General (OIG), which has developed voluntary compliance program guidance documents for operators in the sector.¹⁸⁸ In addition, the OIG publishes the terms of corporate integrity agreements (CIAs) that the OIG enters into with health care providers and other entities as part

^{187.} See www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03927.html.

^{188.} Available online at <https://oig.hhs.gov/compliance/compliance-guidance/index.asp>.

of the settlement of Federal health care program investigations arising under a variety of civil false claims statutes. Providers or entities agree to the obligations, and in exchange, OIG agrees not to seek their exclusion from participation in Medicare, Medicaid, or other Federal health care programs. Often, CIAs require settling entities, such as health systems and hospitals, to agree to Board-level requirements, including annual resolutions that must be signed by each member of the Board, or the designated Board committee, and detail the activities that have been undertaken to review and oversee the organisation's compliance with Federal health care program and CIAs requirements.

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CORPORATE GOVERNANCE AND BUSINESS INTEGRITY

A Stocktaking of Corporate Practices

Anchored in the G20/OECD Principles of Corporate Governance, this report is about using better corporate governance to fight corporate misconduct. The report takes stock of corporate practices tying business integrity considerations into corporate governance frameworks, strategy and operations. It also assesses what factors influence business decisions to implement business integrity measures in practice. This report is a timely response to a succession of disturbing corporate scandals to which no industry or country appears to be immune.

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