



CORPORATE ANTI-CORRUPTION MEASURES TO SUPPORT SUSTAINABLE BUSINESS

Foreign bribery and the role of intermediaries, managers and gender



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Foreword

The understanding of corruption risks is key to the successful prevention and detection of bribery within companies. Access to data can help draw a clearer and more comprehensive picture of this crime by shedding light on behavioural patterns at both ends of corrupt transactions and by helping to identify bribery schemes, thereby enabling better anticipation and mitigation of risks. This study analyses newly available data on two aspects of foreign bribery schemes that are key for the private sector: the use of intermediaries and the status of individuals involved in bribery committed by corporate entities. This study also takes a first look at the merits of applying a gender lens to the collection of data relating to cases of foreign bribery.

This study forms part of a three-part project on corporate anti-corruption measures to support sustainable business. This project supports the 2030 Agenda for Sustainable Development and its 17 Sustainable Development Goals (SDGs). SDG 16 specifically deals with “Peace, Justice and Strong Institutions,” and target 16.5 of this goal is “Substantially reduce corruption and bribery in all their forms.” In particular, the target seeks to decrease the “[p]roportion of businesses that had at least one contact with a public official and that paid a bribe to a public official, or were asked for a bribe by those public officials during the previous 12 months.” This target and indicator recognise that the private sector is a primary actor in the supply side of corruption. The three complementary and interrelated pillars of this project support more effective corporate anti-corruption compliance programmes and policies based on the premise that compliance can only be efficient if tailored to actual risks.

The study was developed amid global recognition that actionable data on corruption and bribery is currently insufficient, and further research is needed to better understand, and therefore combat bribery. As part of the 2019-2021 G20 Anti-Corruption Action Plan, the G20 Anti-corruption Working Group committed to “continue to deepen its understanding of possible approaches to corruption measurement and encourage the development of additional reliable tools”. This study, through an analysis of targeted data, aims to build policy makers’ and the business community’s understanding of foreign bribery risks and in turn, better mitigate them.

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1 Introduction

Bribery is a complex and clandestine phenomenon that can be difficult to measure and quantify. As data can help draw a clearer and more comprehensive picture of this crime, it has an important role to play in the fight bribery. By shedding light on behavioural patterns on the giving and receiving ends of corrupt transactions, data can help identify bribery schemes and in turn, better anticipate and mitigate risks. In this aspect, data can support the development of informed policymaking, guide law enforcement authorities in bribery investigations, and help companies implement efficient compliance programmes. The importance of strengthening the evidence-based approach to combating corruption and promoting integrity is underlined in the OECD Strategic Approach to Combating Corruption, which guides the Organisation's current and future work, with a view to ensuring that its anti-corruption and integrity policies are more coherent, more globally relevant and impactful.¹

Leveraging data to enhance the fight against bribery requires diligently collecting, processing and compiling relevant and actionable information. While countries and organisations have made great strides in that direction in the past years, much remains to be done to fully unleash the potential of data in the fight against bribery and corruption.

The impact of the OECD Foreign Bribery Report² in 2014 shows the power of concrete data to shed light on this complex phenomenon. Based on rigorous data collection, the Foreign Bribery Report measures and describes foreign bribery with reference to actual cases, rather than with statistics derived from econometrics, perception surveys or unsubstantiated allegations.

The offence of foreign bribery is the specific crime of bribery of foreign public officials in international business transactions, as set out in Article 1.1 of the OECD Anti-Bribery Convention and transposed into domestic legislation of countries Party to the Convention. Foreign Bribery Report highlights risk areas and patterns to enable governments and companies to better understand the “who, what, where, why, and how” of this crime.

The current study analyses newly available data on two aspects of foreign bribery schemes that are key for the private sector: the use of intermediaries and the status of individuals involved in bribery committed by corporate entities. The report also examines how facilitators other than intermediaries can further a foreign bribery scheme. Using case examples, it advocates for the collection of detailed information to feed research on this subject, and in turn to enhance the fight against foreign bribery.

In parallel, the study takes a first look at available data on the proportion of men and women involved in foreign bribery schemes to investigate whether access to data relating to corruption and gender could help inform policies to better fight foreign bribery.

¹ OECD Strategic Approach to Combating Corruption and Promoting Integrity, <http://www.oecd.org/corruption/OECD-Strategic-Approach-Combating-Corruption-Promoting-Integrity.pdf>

² OECD (2014), OECD Foreign Bribery Report: An Analysis of the Crime of Bribery of Foreign Public Officials, <https://www.oecd.org/corruption/oecd-foreign-bribery-report-9789264226616-en.htm>.

Methodology and scope

Data collection and processing was key to the development of the 2014 Foreign Bribery Report. It was produced following a two-phase approach: (1) collecting data on concluded enforcement actions for the foreign bribery offence against individuals and entities over 15 years;³ (2) producing an analysis aimed at measuring and describing transnational corruption methodology and trends based on data from 427 enforcement actions in foreign bribery cases.

This study relies on data collected by the OECD Anti-Corruption Division on foreign bribery enforcement actions from the 44 countries Party to the OECD Anti-Bribery Convention.

The data result from an analysis of the 115 foreign bribery resolutions against companies concluded between January 2014 and June 2018. They were collected notably from court decisions and non-trial resolution agreements available on the websites of national law enforcement authorities, as well as country monitoring reports on the implementation of the OECD Anti-Bribery Convention.

In terms of thematic coverage, the current report includes the use of intermediaries, involvement of management in the supply side of a foreign bribery scheme, and gender. The first two data points were selected from the Foreign Bribery Report for their relevance for the business community. The gender component of this research is new. Data on the crime of foreign bribery is already inadequate and there is even less data on gender-related aspects. The scope of this study was delineated based on available resources and could serve as a starting point for further research.

³ The report covered foreign bribery cases concluded between 15 February 1999 (date of entry into force of the OECD Anti-Bribery Convention) and 1 June 2014.

2 Using data to understand bribery by companies

Bribery facilitation by intermediaries and “gatekeepers”

Individuals and corporate structures can facilitate foreign bribery in various ways. Most notably, intermediaries between the bribe giver and bribe recipient are known to be key facilitators. Conscious of this long-standing reality, the OECD studied the role of Intermediaries in international business transactions in 2009.⁴

Twenty years of foreign bribery enforcement have shown that in a vast majority of cases, bribes are paid, offered or promised through an intermediary. In 2014, the Foreign Bribery Report revealed that in 75% of cases concluded since the entry into force of the OECD Anti-Bribery Convention, bribery had been carried out through an intermediary. Confirming this trend, research conducted for the current study shows that an intermediary was involved in 81% of cases (93 out of 115) and, in almost all cases, the intermediary made at least one direct bribe payment.

On par with acting as intermediaries, individuals and corporate entities can facilitate bribery in other capacities. For instance, in a business context, several actors come into play either to protect a company against the various risks it is exposed to, or to mitigate the effects of these risks if they materialise. Among other aspects, this includes protecting the company from corporate misconduct and ensuring that it operates in a way that complies with the laws and regulations that apply to it. Because of this protective role, people occupying these functions are often referred to as “gatekeepers”.

While the role of gatekeepers is to shield a company from misconduct, they are also in a position, in their professional capacity, to facilitate or conceal it. In particular, they can do so either by failing to carry out their professional duty or purposefully using it to give the wrongdoing the appearance of legality.

Following the Panama and other high-scale white-collar scandals that have come to light in recent years, the role of gatekeepers has received increased attention from commentators.⁵ However, less research has been undertaken on their specific role in facilitating corrupt transactions than intermediaries more generally and less information is available on how they facilitate bribery. This study focuses specifically on lawyers and accountants.

⁴ See OECD (2009), *Typologies on the Role of Intermediaries in International Business Transactions*, <https://www.oecd.org/daf/anti-bribery/anti-briberyconvention/43879503.pdf>.

⁵ See for instance OECD and IBA (May 2019), *Report of the Task Force on the Role of Lawyers and International Commercial Structures* [Report of the Task Force on the Role of Lawyers and International Commercial Structures](https://www.ibanet.org/Conferences/The-role-of-lawyers-in-international-commercial-structures.aspx), <https://www.ibanet.org/Conferences/The-role-of-lawyers-in-international-commercial-structures.aspx>.

How can lawyers facilitate bribery?

Lawyers, to the same extent as individual agents or corporate vehicles, can act as an intermediary between the bribe giver and the bribe recipient. For instance, in a case resolved in 2013 by the US authorities, the General Counsel of a company made direct payments to the bank account of a Colombian public official in order to secure a lucrative contract between its employer and a local state-owned enterprise.⁶

Box 1. Case example of bribery facilitation by a company's in-house counsel¹

In 2017, a Singapore-based company and its wholly-owned US subsidiary agreed to pay a combined fine of more than USD 422 million to resolve charges with authorities in the United States, Brazil and Singapore arising out of a decade-long scheme to pay millions of dollars in bribes to officials in Brazil. In August 2017, a former in-house counsel of the company was found guilty of active participation in the scheme. From 1990 and 2017, the individual created and executed false agreements on behalf of the company to conceal improper payments to an agent knowing that a portion of those payments would be used to pay Brazilian public officials.

¹ United States America v. Jeffrey Chow, Docket Number: 17-Cr-466 (29/07/2017)

Acting in their professional capacity, lawyers can also facilitate bribery by consolidating a corrupt transaction or otherwise furthering the scheme. For instance, lawyers can draft the contracts for the provision of goods or services secured with a bribe and create fake invoices. Additionally, and maybe more importantly, lawyers possess a range of specialised legal skills that enable them to transfer value obtained from criminal activity between parties and obscure ownership.⁷ In particular, they play a key role in setting up shell and mailbox companies which are conduits for illicit financial flows, including bribery and money laundering. To assist clients in transactions, legal professionals may also hold clients' funds in designated accounts or agree to act on behalf of clients (e.g. under a power of attorney) in relation to specific aspects of transactions. In the high-profile 1MDB corruption scandal, trust accounts of several law firms were allegedly used as conduits to launder millions of dollars. Services provided globally by legal professionals include advising on clients' financial transactions and legal structures that involve financial or business arrangements.

Box 2. Case examples of facilitating the laundering of ill-gotten gains¹

¹Malaysia Development Berhad or 1MDB, is a government-owned company intended to promote economic development in Malaysia. From 2009 to 2015, the company was allegedly subject to a complex scheme to embezzle billions for the benefit of former politicians and businessmen. In 2016, the United States filed a civil complaint seeking to seize more than USD 1 billion in assets tied to 1MDB. As illicit money allegedly flowed from the fund to buy luxury real estate and private jets in the United States, it made a crucial stop to the trust account of a large New York law firm.

According to the complaints, the money was transferred in and out of the firm's "interest on lawyer account," a type of account used by law firms to hold client funds for future use. Once transferred through the firm's account, it was used to fund a Beverly Hills hotel, private jet and yacht rentals, and a major Hollywood motion picture.

¹ <https://www.justice.gov/opa/pr/united-states-seeks-recover-more-1-billion-obtained-corruption-involving-malaysian-sovereign>

⁶ United States of America v. Gregory Weisman, Docket No. 13-CR-00730-JEI (01/06/2014)

⁷ FATF (2019), Guidance for a Risk-Based Approach for Legal Professionals, FATF, Paris, www.fatf-gafi.org/publications/documents/Guidance-RBA-legal-professionals.html, p. 16.

In at least 8 out of 151 resolutions analysed for this study, one or several lawyers facilitated the scheme, either as an intermediary or a gatekeeper, or both. Considering that bribes were paid, offered or promised to obtain a business advantage in all resolutions, this number appears relatively small. This is because, in a majority of cases, information on lawyers' involvement in the scheme is not available.

How does the accounting and audit profession facilitate bribery?

Accountants and/or auditors were involved in 35% of cases (40 out of 115), either as intermediaries or as gatekeepers. While accountants can help further a foreign bribery scheme in various ways, the most common situation is by giving the appearance of legality to accounting books, for example by issuing an unqualified audit opinion.

Box 3. Case example of bribery facilitation by an accountant¹

Between 1996 and 2003, a Dutch construction and engineering company paid bribes to Saudi and Suriname officials to secure military construction contracts and the construction of two bridges. At the relevant time, the company was a client of a "Big 4" accounting firm. The company was sanctioned by the Netherlands in late 2012.

In December 2013, the accounting firm was sanctioned for money laundering and forgery in connection with the foreign bribery scheme. The Netherlands found that the audit conducted by the firm had been deliberately conducted in a way that made it possible for the company to conceal the payments to foreign agents and the corresponding shadow administration. The firm agreed to pay EUR 7 million in fines and confiscation. Furthermore, it committed to strengthening its anti-corruption compliance programme, subject to the supervision of the Netherlands' Authority for the Financial Markets.

¹. Openbaar Ministerie (30 December 2013), "KPMG treft schikking voor haar rol bij het verhullen van betalingen aan buitenlandse agenten", www.om.nl/vaste-onderdelen/zoeken/@32396/kpmgtreft-schikking/

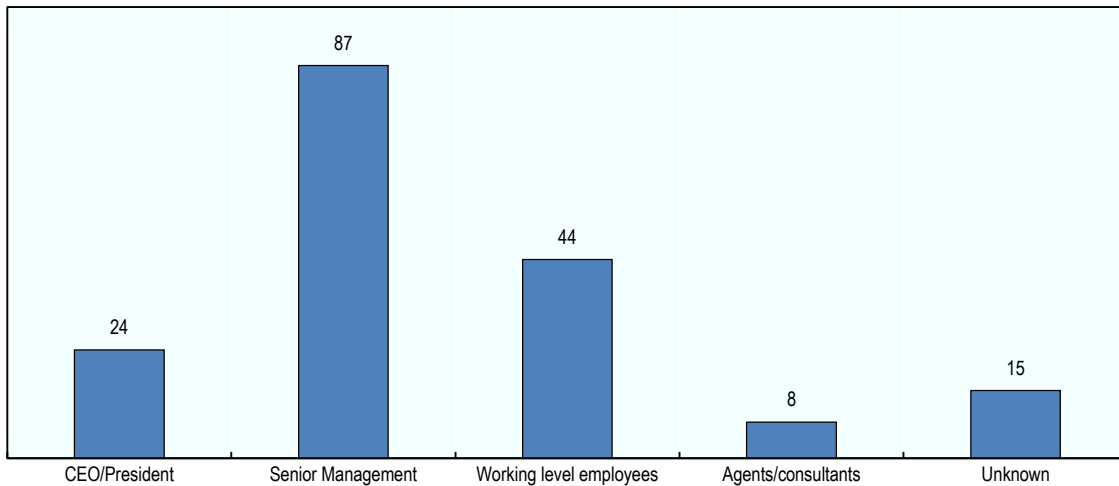
Access to comprehensive data on the role of gatekeepers in concluded cases would help build typologies and provide a clearer picture of who they are. More specifically, their nature and function vis-a-vis the legal person alleged to have committed bribery, as well as their exact role in the scheme.

Status of the individual involved in bribery by corporate entities

To better comprehend the bribery of foreign officials by companies and in turn better anticipate and mitigate risks, it helps to know the status of the individuals who committed the offence, including company management. In particular, this information can help companies to design efficient compliance programmes, focusing their efforts where it matters most.

Enforcement data shows that senior management is the hierarchical level of individuals most frequently involved in bribery committed by a company. In fact, in 75% of the cases (87 out of 115), a senior manager was involved in the scheme.

Figure 1. Status within companies of individuals involved in bribery transactions



Source: OECD Anti-Corruption Division analysis of 115 foreign bribery resolutions against companies concluded between January 2014 and June 2018.

In a majority of cases, the offence involved more than one individual within the same company. More granular information on the respective status of the different persons involved could help understand the chain of command and responsibilities in bribery schemes, and the extent to which company management instructed, or should have been aware of, the bribe payments. Further research could help to identify possible correlations between status of bribe payers and the industry in which the company operates.

3 Foreign bribery schemes through a gender lens

In recent years, the international discourse on gender and corruption has been gaining prominence within the anti-corruption community. In 2018, the B20, C20 and W20 released a common statement on why gender matters for anti-corruption, emphasising that “making the link between gender and corruption may help to develop a better understanding of corrupt practices and craft more effective strategies to target them”.⁸ Also in 2018, for the first time since its creation in 2010, the G20 Anti-Corruption Working Group included gender in its Anti-Corruption Action Plan and committed to deepen its understanding of the linkages between gender and corruption.⁹ Building a comprehensive body of data is the first step towards mainstreaming gender in anti-corruption policies. This study therefore takes a first look at the accessibility of gender data related to foreign bribery schemes.

While this study constitutes a first attempt to collect such information for foreign bribery schemes, data availability is sparse. Further research at a global scale and over a significant time could help to determine if the payment of bribes by women has increased in proportion to their access to managerial positions, as well as identify possible correlations between gender and the type and/or amount of sanctions imposed. Further work could also focus on the differentiated gender impact of foreign bribery.

Box 4. Accessibility of gender information in foreign bribery cases

Research conducted for this study not only finds a data gap between gender and bribery, but also shows that in the large majority of cases, gender information on individuals involved in the supply side of the transaction cannot be found.

Identifying gender was possible only in the United States, where the webpage of each concluded resolution includes a link to other resolutions concluded under the same case. Researching a resolution against a company thus allows access to resolutions against individuals, if any, under the same case. Even then, assigning gender to the data available proved to be problematic. The only way to determine the most likely gender of the individual involved is to consider the first name, which leaves a margin of error. Following this method, it was possible to determine that women were likely to have been involved on the supply side of bribery in 12 of the 115 cases.

In other countries, identifying the gender of individuals involved in corporate cases is virtually impossible. The fact that this study is limited to resolutions against companies could explain why accessing gender information poses a challenge. However, it is unlikely that a review of cases concluded against individuals would be more fruitful, considering that in only three of the five countries Party to the Anti-Bribery Convention that are the top enforcers against individuals, the names of individuals sanctioned are published. Even where the names of offenders are accessible, gender

⁸ <https://civil-20.org/c20/corruptiontoo-why-gender-matters-for-anti-corruption/>

⁹ [https://one.oecd.org/document/DAF/WGB/RD\(2018\)10/en/pdf](https://one.oecd.org/document/DAF/WGB/RD(2018)10/en/pdf)

identification would once again rely solely on first names. When inferring gender based on publicly available data, the accessibility of data containing honorifics and pronouns could help more effectively determine the most likely gender for the individuals involved. This study therefore demonstrates that there is very little data available regarding gender, which serves as a reminder of the growing need to collect and make accessible gender disaggregated data and information.

While countries might be concerned that revealing the gender of bribe payers and recipients in each concluded case would provide a clue on the identity of such persons and thus infringe rules on confidentiality, data could take the form of compiled, cross-country comparable statistics. Such statistics would be the starting point to draw correlations between gender and different components of foreign bribery schemes. Information on the gender of corporate management in companies that pay bribes, and the gender of the bribe receivers would also help understand how gender affects foreign bribery schemes. Additionally, data on the gender of legal counsels and/or prosecutors, as well as a gender-based comparison of sanctions would help determine possible links between how gender influences the resolution of foreign bribery cases. In the face of these unanswered questions, bridging the data gap on gender and corruption has become imperative.

Conclusion

As bribery schemes become increasingly sophisticated, understanding patterns and identifying new trends has become critical to help the business community and policy makers to stay ahead of the curve. Comprehensive and reliable data is a fundamental prerequisite in this global endeavour. Trends on intermediaries and individual offenders illustrate how the different components of a foreign bribery scheme can be measured and pieced together. But they are only a sample of the measurable components. Comprehensive and disaggregated data on actual cases would help build knowledge and in turn, fuel informed business decisions and policymaking to enhance the fight against foreign bribery.

Further research on gender aspects of anti-bribery compliance, enforcement and both direct and indirect victimisation is also needed. As stakeholders increasingly recognise the importance of data to better understand linkages between gender and corruption, collecting comprehensive and standardised data on the subject has become urgent.

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