

2016 anti-bribery and corruption survey results

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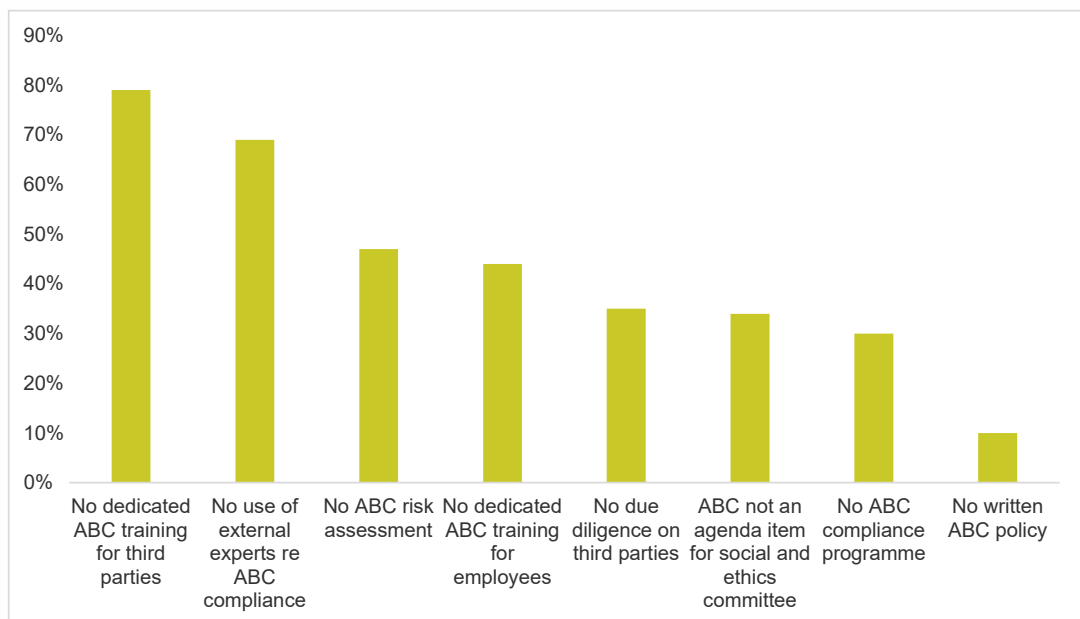
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executive summary

ENSAfrica's third annual anti-bribery and corruption ("**ABC**") survey has revealed that 39% of respondents have experienced incidents of bribery or corruption in the last 24 months. The key question addressed in the survey was whether or not companies are putting proportionate measures in place to deal with the rising risks of bribery and corruption.

It may appear that companies are committed to combating the risks of bribery and corruption, with 92% of respondents believing that their companies demonstrated a culture of compliance and 90% indicating that their companies had an ABC policy in place. However, these findings were contradicted by the absence of certain key ABC measures. For example, only 53% of respondents indicated that their companies had conducted an ABC risk assessment/gap analysis, which in itself is a compliance obligation that is not diligently applied. Proportionate controls should be developed to address the gaps identified. It is difficult to imagine how a company can determine what measures should be put in place if it has not assessed its bribery and corruption risks.

The graph below reflects a number of other concerning findings of the 2016 survey:



The key findings suggest that a regulator may perceive certain companies' commitment to ABC as being superficial and unable to pass muster if placed under scrutiny. The survey further found that very few corporates had invested in compliance programmes, with compliance viewed as a grudge spend. This could expose companies and senior management to significant legal liability.

Former United States ("**US**") Deputy Attorney General, Paul McNulty, is quoted as saying: "If you think compliance is expensive, try non-compliance." In line with this statement, regulators have previously meted out staggering fines. Furthermore, the FBI's arrest of Samuel Mebiame, the son of a former Gabonese Prime Minister, for allegedly paying bribes on behalf of a US company in, inter alia, Zimbabwe, the Congo and Libya, demonstrates that US regulators are monitoring the corruption landscape in Africa.

respondents

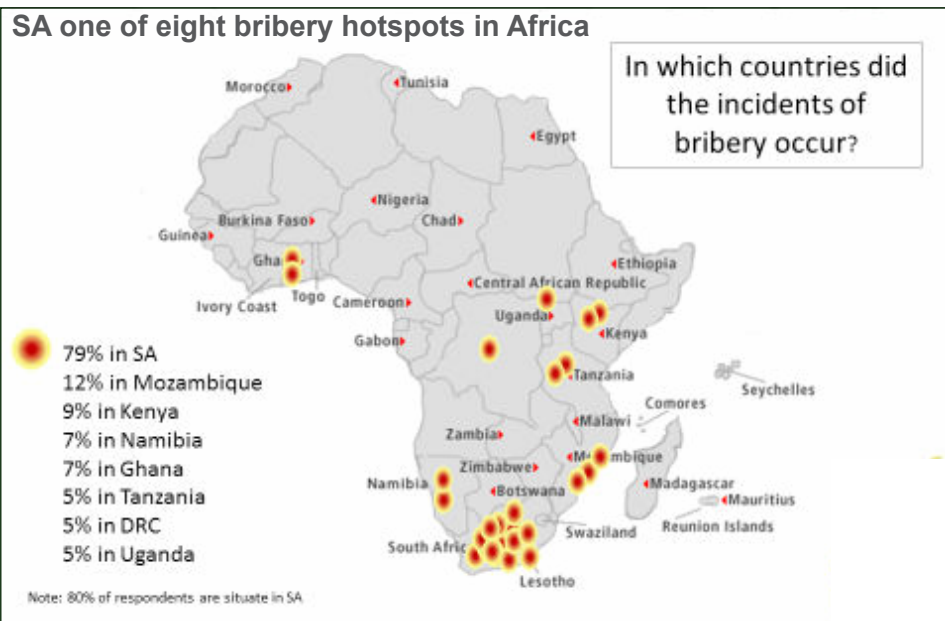
We would like to thank the 132 respondents who took the time to participate in this year's ABC survey. The 2016 survey saw a 50% increase in participation from 2015; this significant increase is indicative of an increased awareness of, and interest in, ABC (particularly in Africa).

While the vast majority of respondents indicated that they conducted business in Africa (83%), a significant number indicated that their companies conducted business in the US (26%) and the United Kingdom ("UK") (26%). The physical location of individual respondents is important as this may have had a bearing on their perceptions. In this regard, the majority of respondents indicated that they were located in South Africa (80%), with the remainder based in Burundi, Ghana, Mauritius, Namibia, Nigeria, Rwanda and Uganda.

Respondents were based in a range of industries. The largest industries represented were financial services (25%) and manufacturing, retail and wholesale (24%). In addition, there was significant representation from the oil, gas and energy; consulting; telecommunications; mining; transportation; IT and electronics; and tourism sectors. Respondents were primarily compliance professionals (29%) and legal professionals (28%), with others in operations, finance, management, audit, sales and marketing roles.

bribery and corruption incidents and perceived risks

As mentioned above, in the last 24 months, 39% of respondents experienced incidents of bribery or corruption. Of this group, 18% experienced three or more incidents and 20% experienced five or more incidents. The majority of incidents were reported to have occurred in South Africa (79%). This could however have been as a result of the respondents' geographical location. Incidents were also reported to have occurred in Mozambique, Kenya, Namibia, Ghana, Tanzania, the Democratic Republic of Congo and Uganda.



The most frequent means for reporting incidents appears to have been verbal reports to management (67%), followed by whistle-blower hotlines (61%). A significant number of incidents appear to have been reported by email (23%). Some incidents appear to have been reported via multiple channels. From a practical perspective, the importance of whistle-blower hotlines cannot be overemphasised as they provide employees and third parties with a vital channel to report suspected incidents of bribery and corruption to senior management. Many systems allow whistle-blowers to remain anonymous, which can address fears of victimisation and personal danger. Of concern is that 20% of respondents indicated that their companies did not have a whistle-blower hotline in place. This must however be read in the context that one third of this group indicated that their companies were in the process of developing such a system. For companies without such a system, it is highly advisable that a robust whistle-blower reporting channel is implemented.

Respondents provided detailed information on what they perceived to be bribery and corruption risks faced by their companies and the potential impact thereof. This must not be confused with conducting an actual bribery and corruption risk assessment, and must be understood as the informal perceptions of the respondents.

The graph below highlights the comparative figures of perceived bribery and corruption risks for the 2016 and 2015 surveys:



Key findings concerning the perceived bribery and corruption risks, as well as the potential impact thereof, include:

- 27% of respondents said they were **highly exposed to bribery in Africa** (up from 17% in 2015), while 57% said they were moderately exposed
- 76% of respondents indicated that **“the use of third parties” posed a significant risk to their company** (up from 68% in 2015 and 65% in 2014)

- 52% of respondents said they were exposed to the risk of bribes and 48% to facilitation payments. Interestingly, the exposure of **employing government officials** or their relatives jumped from 8% in 2015 to 21% in 2016
- 92% of respondents indicated that the area that would be most severely impacted by bribery or corruption would be their **“corporate reputation”**, followed by financial loss (55%), possible debarment from government contracts or trading (29%) and a negative impact on share price (24%)
- 53% of respondents believed they were **“somewhat prepared”** to respond to the threat of an ABC compliance investigation by a regulator, while 10% believed they were **“not well prepared”**

ABC compliance programme

The actual incidence of bribery and corruption, as well as the perceived risks thereof, highlight the importance of companies putting adequate ABC compliance programmes in place. In many instances, the implementation of such programmes is mandatory.

While certain companies will not fall within the jurisdiction of the countries mentioned below, it is highly likely that most companies are subject to some form of ABC legislation.

For many years, US regulatory authorities have zealously pursued companies that paid bribes abroad and have enforced the stringent requirements of the US Foreign Corrupt Practices Act, 1997 (**“FCPA”**). More recently, UK regulatory authorities have taken a firm stance against bribes paid in and outside the UK. The UK Bribery Act, 2010 (**“UKBA”**) makes it an offence for a company to fail to take adequate steps to prevent bribery being committed by any person who performs services for or on behalf of the company. Although many companies do not believe that they fall within the jurisdiction of the US and/or the UK, US and UK regulators and courts have taken an expansive approach to jurisdiction in the past.

In South Africa, the Prevention and Combating of Corrupt Activities Act, 2004 expressly prohibits acts of bribery and corruption, and imposes strict reporting requirements on those in a position of authority. Furthermore, the Companies Regulations, 2011 require that certain companies have a board sub-committee known as the Social and Ethics Committee. The regulation requires that this committee monitor, among others, the implementation of the Organisation for Economic Co-operation and Development’s (**“OECD’s”**) recommendations regarding corruption. The OECD recommends that companies should adopt management control systems that discourage bribery and corrupt practices. What is surprising, given the legal obligation to monitor the implementation of the OECD recommendations, is that 34% of respondents indicated that ABC is not an agenda item for their social and ethics committees.

Key findings relating to ABC compliance programmes:

- 70% of respondents indicated that their companies **had an ABC compliance programme** (up from 52% in 2015)
- the main reasons cited for not having such a programme were “**no internal expertise to conduct or implement programme**” (43%) and “**we are in the process of developing one**” (43%)
- in view of the above, 17% of the companies represented by the respondents do not have an ABC compliance programme in place and were not in the process of developing one

While there has been improvement year on year, the number of respondents whose companies have not implemented (and are not in the process of developing) an ABC compliance programme is of great concern. Any company committed to compliance should have an ABC compliance programme in place and the absence of such a programme would be indicative of little to no commitment to ABC. Furthermore, the absence of an ABC compliance programme could expose a company to significant legal risks (depending on the jurisdictions within which a company operates). The implementation of an ABC compliance programme is contemplated by the relevant legislation and guidelines of the US, the UK and South Africa. While the specific requirements of these jurisdictions differ, generally the core components of an ABC compliance programme should, among other things, include:

- an ABC risk assessment
- an ABC policy that is accompanied by appropriate tone from the top
- due diligence on business partners (especially in high-risk areas)
- communication and training
- monitoring by the compliance function

ABC risk assessment

The starting point for the design of any ABC compliance programme should be an appropriate risk assessment. In such an assessment, a company should, among others, assess the nature and extent of its exposure to internal and external bribery and corruption risks. The risk assessment should be done periodically, should be informed and should be documented (adapted from the UK Ministry of Justice, Guidance on the UKBA). If a company has not conducted an ABC risk assessment, it will not be able to determine its significant risks and how these should be addressed.

Only 53% of the respondents reported that their companies had conducted a detailed ABC risk assessment, while 15% indicated that such risk assessments were in the pipeline. Of the 53% who indicated that risk assessments had been done, 65% indicated that the ABC compliance programmes in place had been tailored based on the results of the risk assessments.

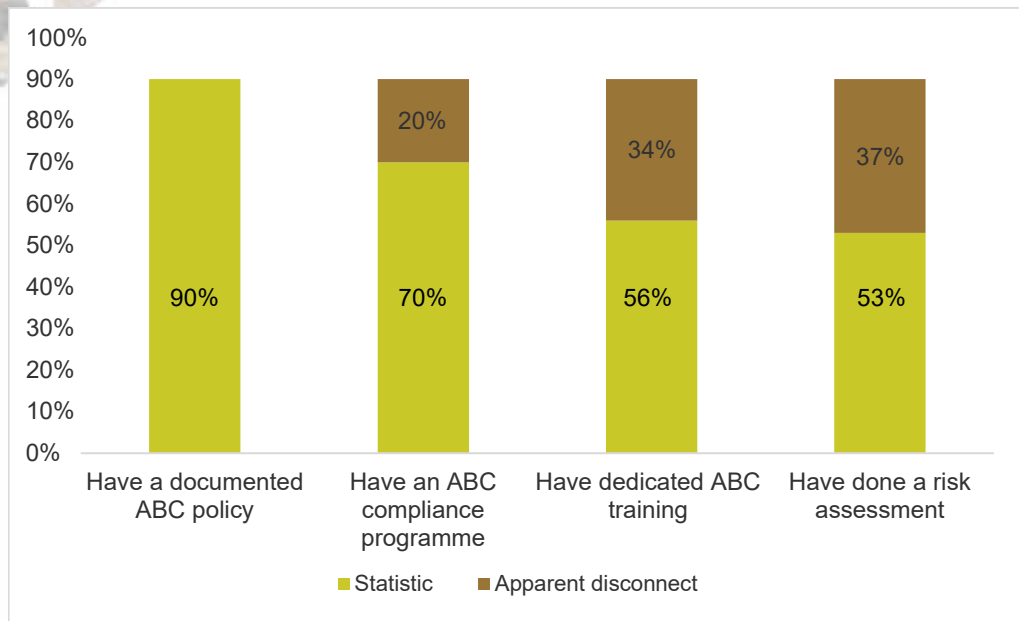


The survey results suggest that a large number of companies with ABC compliance programmes had implemented these without assessing their bribery and corruption risks. Furthermore, the results suggest that even when companies had assessed the risks, some had not used the knowledge gained from their risk assessments to tailor their ABC compliance programmes accordingly.

ABC policy, culture of compliance and tone from the top

Around 90% of respondents indicated that their companies had a documented policy prohibiting bribes, which is consistent with the 2015 survey results. Such policies appear to be available through various channels, including the internet (84%), staff training (74%), employment contracts (44%), management and human resources (42%), internal drives (24%) and on awareness campaign posters (22%). The policies are also available to third parties through various channels, for example, company contracts (55%), online (41%) and emails (20%). Of particular concern is that 22% of respondents indicated that the ABC policies were not available to third parties at all.

At first glance, the findings related to having an ABC policy in place appear to be favourable. However, there is a clear disconnect between this and other key findings. It should be apparent that the number of respondents who had ABC policies in place (90%) far exceeded those who had ABC compliance programmes in place (70%). Similarly, there is a disconnect when compared to the number of respondents who reported that their companies had conducted an ABC risk assessment (53%). While it is positive that a large number of companies have implemented documented ABC policies, a regulator may view the absence of further measures as indicative of superficial commitment to ABC and may view the implementation of an ABC policy without a proper ABC compliance programme as being a window-dressing exercise.



At first glance, the findings regarding the perceived culture of compliance and commitment of top-level management also appear favourable. In this regard, 92% of respondents indicated a perceived culture of compliance at their companies and 94% indicated buy-in from top-level management. However, these positive findings are undermined by the following:

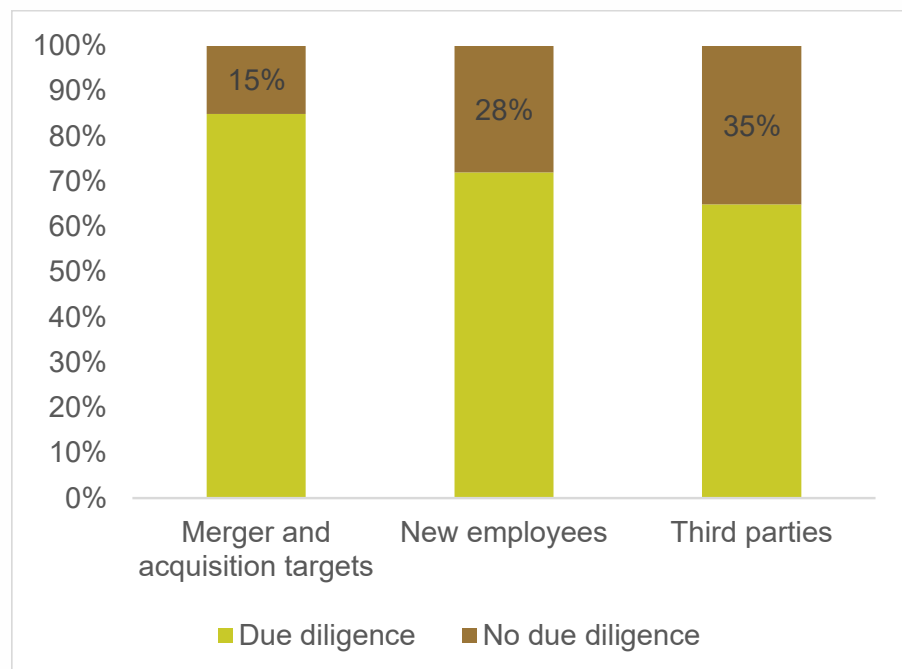
- 34% of respondents indicated that they **did not believe sufficient resources and funding** were dedicated to the compliance function
- 25% of respondents said there was **no direct reporting line from compliance to the CEO** (while 22% indicated that they did not have any compliance officers)
- 21% indicated that they **did not believe the compliance function was sufficiently independent**

Actions do ultimately speak louder than words and it is important that the tone from the top is confirmed by actions to improve ABC compliance. Of particular importance is the extent to which resources and funding are dedicated to ABC compliance. A regulator will consider how much a company spends on compliance each year (in the context of its size) and the resources dedicated to the compliance function. If a relatively large company spends very little on compliance and has little to no compliance resources, it will be difficult to convincingly argue that it is committed to ABC compliance.

due diligence

Anti-corruption compliance legislation requires the performance of Anti-Corruption Due Diligence on business partners, agents and intermediaries. A company should apply due diligence procedures by taking a proportionate and risk-based approach in respect of those who perform and will perform services for, or on behalf of, the company, in order to mitigate identified bribery and corruption risks (adapted from the UK Ministry of Justice, Guidance on the UKBA). Due diligence procedures may be appropriate in the context of merger and acquisition target companies, prospective employees and third parties. The key findings of the survey in respect of due diligence processes are:

- 85% of respondents indicated that their companies conducted **due diligence** screenings on **merger and acquisition targets** (up from 83% in 2015)
- 72% said that **due diligence** screening was done on **new employees** (down from 80% in 2015)
- 65% of companies conducted **due diligence** screenings on **third parties** (up from 62% in 2015)



When committing to a relationship, it is sensible to properly assess the person to whom you intend to commit. The same can be said in the corporate context. It is somewhat surprising that 15% of respondents' companies did not assess target companies in mergers and acquisitions, 28% did not properly screen new employees, and 35% did not assess third parties. This approach to key relationships could get the companies into difficult situations. Under the US regime, when a company buys or merges with another company, it can potentially be held liable for acts of bribery and corruption committed by the target company, even if the acts were committed prior to the purchase or merger. This concept is known as successor liability and it highlights the importance of conducting a thorough due diligence exercise when considering mergers and acquisitions.

Furthermore, a company cannot commit an act of bribery or corruption on its own (given that companies are legal fictions). However, under certain circumstances, the acts of employees and third parties may be imputed to a company and it is therefore essential that companies guard against employing the wrong employees and third parties.

communication and training

In the UK, the regulator recommends that companies seek to ensure that their bribery prevention policies and procedures are embedded and understood throughout their organisations through internal and external communication and training. Communication and training should be proportionate to the risks a company faces (adapted from the UK Ministry of Justice, Guidance on the UKBA). For policies and procedures to be effective, these must be communicated to those expected to comply with them. This may include communication to both employees and third parties, with formalised training being the most effective way to do so.

Only 56% of respondents indicated that their companies had dedicated ABC training for employees. While this represents an increase from 39% in the 2015 survey, the 44% of respondents who did not have dedicated ABC training is of concern. Furthermore, only 21% of respondents indicated that their companies provided ABC training to third parties. This is despite 76% of respondents indicating that the most significant bribery and corruption risk faced by their companies was the use of third parties. These figures must be read in line with the findings concerning the implementation of ABC policies detailed above. Nevertheless, the clear lack of internal and external training could lead to difficult situations. If a company were to have a bribery or corruption incident, a regulator investigating the incident would invariably ask the company to prove that it had trained the relevant employee or third party on its ABC policies and procedures. If the company is unable to prove that it had conducted such training, it would be difficult to divorce itself from the conduct of the person concerned.

monitoring by the compliance function

The final core component of an ABC compliance programme is an obligation to perform continuous monitoring. Certain findings relevant to the compliance function have already been dealt with above, including that 34% of respondents did not think compliance had sufficient resources and funding. About 25% of respondents indicated there was no direct reporting to the CEO and 21% indicated that compliance was not sufficiently independent. Further important findings include that:

- 58% of respondents indicated they were “**somewhat confident**” that their company had proportionate procedures to prevent and detect violations, while those who were “**very confident**” dropped to 32% (from 36% in 2015)
- 23% of respondents said that their companies **did not monitor the effectiveness of the compliance function**

- 19% of respondents believed that their **compliance personnel did not have the necessary skill and experience** to understand and identify transactions that would pose a risk to the organisation

While compliance as a distinct discipline within companies is still relatively novel, the prominence given to it within a company may be perceived by a regulator as representing the degree of the company's commitment to ABC. If the compliance function receives little funding, has incompetent personnel and has limited power and authority within the company (including no direct reporting line to senior management), it cannot be expected to be effective, and a regulator would view the situation in a dim light. Furthermore, the fact that 23% of respondents indicated that the effectiveness of compliance was not monitored is of concern. If a survey was conducted on the finance function of companies and 23% of respondents indicated that the effectiveness of the finance function was not monitored, it is likely that the demand for insolvency practitioners would soon increase. It is therefore important that the compliance function is taken seriously and appropriate steps are taken to monitor its effectiveness.

interesting insights

The 2016 survey reflects a significant increase in incidents of corruption experienced by respondents. It also highlights a marked increase in bribery incidents in South Africa. The results further suggest some improvement in terms of compliance programmes and policies, however, the findings reflect multiple areas in which there is significant room for improvement. Most notably, companies should focus on supplementing their ABC policies and tone from the top with commensurate measures that include conducting periodical ABC risk assessments and using the results thereof to implement and update ABC compliance programmes. Such programmes should include robust ABC training for employees and third parties, as well as due diligence procedures (where appropriate). At the centre of these steps should be a robust compliance function that is given adequate resources and status within the organisation.

The focus of the findings has been on internal measures taken by companies. In the final question of the 2016 survey, respondents were asked whether or not their companies used external experts to assist in the implementation of ABC measures. Only 31% indicated that external experts were used. While the importance of internal measures cannot be overemphasised, it is also important for companies to consider appointing external experts to assist in diagnosing their risks and formulating appropriate measures to address such risks. This approach would certainly be viewed favourably by a regulator. Ultimately, few people would attempt to self-diagnose a serious illness without consulting a medical practitioner. Why should companies adopt a different approach when it comes to ABC? When it comes to corrupt activities, there is no doubt that prevention is better than cure. ABC compliance should be non-negotiable for all corporates operating in Africa.

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In this article, certain comparisons are drawn between the results of previous surveys and the 2016 survey. Such comparisons must be read in the context that the respondents of the surveys year-on-year differ, and therefore the comparisons may not necessarily represent accurate developments over time.

In this article, there are various references to the percentage of respondents who provided specific answers to questions. These references must be read in the context that not all respondents answered each and every question in the survey. Nevertheless, the percentages represent the number of persons who answered in a specific manner in each instance and, generally, a significant number of the total respondents answered relevant questions.

