



## Mitigating risks at board level

**Date and Time:** Tuesday 11 December 2018 from 15:00 – 16:00 Central European Time

### DEBRIEFING NOTE

On December 11, ecoDa and AIG organised an interesting webinar on “Mitigating risks at board level”. The event brought together a large number of participants who listened to Kevin LaCroix (Vice President at RT ProExec), Noëlle Lenoir (Partner, Kramer Levin Naftalis) and Noona Barlow (Head of International Financial Lines Claims at AIG).

Using real and concrete cases, the speakers explained how board responsibility and liability has evolved over the past years. Suzanne Liljegren (ecoDa’s Communication Adviser), acting as the moderator, questioned them: Why do European directors have an increased risk of liability today? And what can directors do to protect themselves and reduce the risks?

The speakers all agreed that the exposure to risks today goes beyond traditional financial risks and includes risks related to privacy, climate change and cultural issues, such as the #MeToo movement (especially in the US). With many companies operating globally, it is not only the scope of risks that is growing but also the exposure to multi-jurisdictions. In that context, board members must anticipate possible severe crises, almost having to operate as risk managers and closely review the risk mapping.

The big changes in the risk environment are not only at companies’ level. The emergence of new sets of rules when it comes to liability for supervisory board members, is happening everywhere. This has led to greater convergence across the world around a common set of expectations and a common approach to accountability.

Board members may be subject to civil and criminal prosecution which can result in very large penalties and fines, and may even involve jail sentences. Class actions lawsuits are now filed in the US following disappointing growth figures due to GDPR complications or lack of disclosures. Kevin LaCroix presented a large number of real life cases showing that Europe is now joining the global move. As he stressed: *“companies have to conduct activities with a strong foresight in this new risk environment”*.

It is becoming obvious that directors’ liability cannot be reduced anymore to the duty of care. Board members must not only prevent malpractice but they should take steps to be sure that they express their opinion on all occasions. In fact, not being present at board meetings does not relieve directors from their responsibilities as long as they have access to the material. As clearly stated by Noelle Lenoir, *“it is like in politics; even if you are not guilty, you are accountable! Full blindness and negligence are no longer acceptable. Board members have to be active”*. Board members have to be proactive and exercise a duty of curiosity. Board dynamics should also be changed to integrate different perspectives and backgrounds.

Directors should ask for, and benefit from, periodic compliance training based on real life examples (ex. whistleblowing). Board's training is key to provide full awareness of directors' duties and legal implications when not complying. Having a chief compliance officer within the company is also becoming a best practice. But they should have direct access to the board and its committees to present regular update on compliance requirements and the actual situation of the company. The speaking-up culture in companies has to be assessed as an important mean to overcome possible risks and threats.

To cope with this new and real risk environment, board members need to get appropriate insurance cover. The sources of D&O claims have evolved significantly as have unprecedented amounts for defense costs. As highlighted by Noona Barlow, *"legal fees are skyrocketing with partner rates reaching \$1,500/hour. There is a risk that, given these costs, some directors may find themselves with insufficient insurance."* The US securities class actions continue to be the most expensive cases but a lot of money is sunk into non-US claims, specifically in cases involving bribery and anti-corruption investigations. Fines against data protection breaches have already been implemented in Austria, in Portugal and in Germany and we have seen the first US securities class action arising from GDPR implementation issues. Following the recent Toshiba decision in the US, we may see an increase in US securities claims are now brought against foreign companies. *"All those new developments should resonate in the boardrooms"*, added Noona Barlow.

The participants were invited to take part in a poll showing what risks are of most concern for their board. It turned out that Data security (69%) was the most frequently cited issue followed by corruption/bribery (25%), competition/antitrust (25%), privacy (19%), climate change (13%) and health issues (9%). The panelists agreed that the results might vary from one jurisdiction to another. They were a bit surprised that corruption and bribery did not receive a higher score and that "#MeToo" type concerns were not cited at all.