



Mitigating risks at Board level

11 December 2018 - 15:00 -16:00 (CET)



A Joint ecoDa/AIG webinar Mitigating risks at Board level

Tuesday 11 December 2018
15:00 – 16:00 Central European Time

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Evolving Concepts of the Board's Role

- Evolution of the understanding of board responsibility and liability
- Convergence around a common set of expectations and common accountability approach

Recent High-Profile European Accountability Examples

- **United Kingdom, June 2017:** RBS Settles With Last Investor Group for Additional £200 Million, Combined Value: £1 Billion Total
- **Netherlands, July 2018:** Amsterdam Court approves previously announced €1.3 Billion Settlement of Fortis Investor Claims

Emerging Areas of Potential Board Liability: Privacy

- **July 2018:** Facebook quarterly earnings release
 - Disappointing growth figures due to GDPR complications
 - Share price drops \$120 billion
 - Securities class actions filed
- **August 2018:** Nielsen Holdings
 - Disappointing earnings release due to GDPR
 - Securities suits filed

Emerging Areas of Potential Board Liability: Climate Change

- **ExxonMobil Class Action Lawsuit** (N.D. Tex. Nov. 2016)
 - Internal reports recognized climate change risks
 - Company failed to disclose concerns or modify asset values on balance sheet
 - Motion to dismiss denied August 14, 2018
 - October 2018: New York Attorney General filed climate change-related disclosure civil lawsuit against the company

Emerging Areas of Potential Board Liability: #MeToo Movement

- **Revelations followed by D&O lawsuits:**
 - 21st Century Fox: Derivative suit settled for \$90 million.
 - Wynn Resorts: Derivative and securities class action lawsuits filed
 - National Beverage: Securities suit filed following revelations of CEO's alleged same-sex harassment
 - New York Metropolitan Opera: Opera sues its former music director claiming same-sex harassment allegations harmed opera's reputation and finances

Noëlle Lenoir

*Partner, Kramer Levin Naftalis & Frankel LLP,
Board member at Valeo*

LITIGATION RISKS AT BOARD LEVEL

Introduction:

- **The liability of an independent Board Member**
 - Individually / Collectively;
 - Active or inactive participation to a wrongful decision may give rise to liability (Cass.Com., 30 March 2010).
- **The transformation of Board Members' responsibility**
 - To be independent *vis à vis* the management and stick to role of guidance and control;
 - To avoid conflict of interests and wrongdoings, and especially take ownership of risk assessment and management.

A. From responsibility to accountability

- The duty to be well informed and keep a constant **attitude of curiosity** (especially with regard to the accuracy of the books and records);
- The duty to be **an active Board Member**, e.g. to update one's knowledge to fully participate in **Boards' and committees' meetings**;
- To **closely review risk mapping** (Sapin II Law), as an essential part of the role of the audit committee; and also have a close look at the **financial and extra-financial communications** of the company, payment of dividends (to ban fictitious dividends).

B. From accountability to civil liability

- Civil and criminal liability is commonly at least in France incurred based on the conventional rules with regard to the **onus of the proof** and the **existence of a damage**;
- **But things are changing:**
- **(i) the French duty of care Law** obliges companies and their Board to control not only subsidiaries, but also suppliers and sub-contractors with regard to CSR and anti-corruption (a kind of vicarious liability);
- **(ii) shareholders, creditors, unpaid employees' class action** especially in the event of questionable acquisition, of insolvency may involve directors unless they can invoke the lack of information provided to them.

C. Anticorruption, compliance and criminal liability

- FCPA, UK Bribery, Sapin II and other anticorruption's laws have **extraterritorial scope** and thus companies may be subject to multijurisdictional investigations
- **To avoid this, ethics and compliance** must be regarded as an integral part of the Board's obligations (risk assessment, tone from the top);
- In case of disclosure of malpractices, negligence and weak control may be the source of **Board Members' liability**:
 - (i) notion in UK Bribery Act of ***"failure to prevent bribery"***;
 - (ii) liability under FCPA for **"willful blindness"**;
 - (iii) obligation imposed by Sapin II Law to Board Members to **"actively manage corruption risks"**.

To conclude, a few recommendations to Board Members and to companies with regards to prevention, detection and remediation of corruption

- Compliance begins with setting the **proper tone** for the rest of the company.
- The **chief compliance officer** have direct **access to the Board** of Directors and its committees to present regular update on compliance requirements and the situation of the company in this respect.
- Directors should ask and benefit from **periodic compliance training** based on real life examples (ex. whistleblowing).
- Board members must also **take action** when corruption issues bubble up to the surface.

Noona Barlow

*Head of International Financial Lines Claims and Acting
Head of International Casualty Claims At AIG*



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Head of International Financial Lines Claims, AIG



Sources of D&O Claims



Commercial D&O UK/Europe/MEA

Type of claim – large reserves May 2016 – May 2018	Average incurred
U.S. securities class actions	\$\$\$\$\$+
U.S. regulatory investigations (SEC)	\$\$\$\$\$
U.S. criminal (DoJ)	\$\$\$\$\$
Non-U.S. securities claims	\$\$\$\$
Non-U.S. regulatory investigations (e.g. FCA)	\$\$\$\$
Insolvency	\$\$\$
Non-U.S. criminal investigation: bribery and corruption	\$\$\$
Company v. Insured	\$\$
Non-U.S. criminal investigation: tax	\$\$
Non-U.S. criminal investigation: other	\$\$
Non-U.S. criminal investigation: environmental	\$
Other claims	\$



Commercial D&O Claim Trends

- Legal fees skyrocketing: partner rates reaching \$1,500/hour
- Continued growth of collective shareholder actions in non-U.S. courts
- Despite Morrison vs. National Australia Bank, we still see U.S. shareholder class actions against foreign firms
- Higher activity in corruption and bribery claims (including high cost multi-jurisdictional investigations)
- Deferred Prosecution Agreements (DPAs)
- Insolvency claims still most frequent cause of loss amongst major losses, but decreasing as we move away from 2008 GFC



Emerging claims

- #metoo
- Cyber breaches
- Health & Safety
- Climate Change
- GDPR?