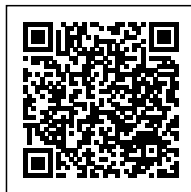


SOCIAL IMPACT: THE ROLE OF THE EXTERNAL LAWYER

Posted on 28/02/2013



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For Christopher Baker and Grégoire Bertrou, mindfulness of the social impact of corporate decisions on which we are consulted is core to our role as trusted adviser.

The risk management and compliance business is booming, driven by the increasing pressure of the

regulatory environment and the high costs, both direct and indirect, of bad corporate citizenship. To understand why antitrust, securities and corruption compliance are key focus areas for In-house Counsel and CEOs, one only needs to refer to the sanctions recently imposed by the European Commission or the Federal Trade Commission (2012 €1.47bn record EC fine in the TV and computer monitor cathode-ray tubes cartel), by the financial market authorities around the world (first settlements in the LIBOR case already exceed \$1bn) or in the context of anti-corruption investigations (2012 ING \$619m OFAC settlement).

Beyond the 'classics', however, best practice requires careful risk management in all areas that can have a significant impact on corporate image and profitability, such as information technology security, protection of IP rights and private data, and in supply chain controls, as recently evidenced by the European horsemeat scandal. Scott Thomson's inclusion in the Forbes pantheon of the five most publicised ethics violations by CEOs – he was forced to resign as Yahoo's CEO for having embellished his resume – is an apt reminder of the impact of even apparently non-essential ethical misjudgements.

Having progressed along the risk management road, business leaders are increasingly coming to believe in the direct and indirect benefits of good corporate citizenship – while professors and consultants strive to identify and measure them.

The reasoning

Three rationales for implementing 'social impact' policies are usually identified. First, as discussed above, is risk control: the business must avoid adverse social impact and related legal and reputational consequences.

Second is the opportunity and benefit of good corporate citizenship: improved Corporate Social Responsibility (CSR) practices contribute to the health and resilience of an enterprise, making it more competitive through better employment practices, energy efficiency programmes, and improved client and stakeholder perceptions. Also making it more innovative by changing the way one thinks – CSR is actually capable of provoking beneficial and differentiating product and process innovation. Third, more marginal but essential, is the recognition by some enterprises that their very goal, their corporate purpose, is social impact. Each year, there are new entrants to this group.

Defining roles

As enterprises consider the costs of bad corporate citizenship and the benefits of good, the external lawyer is challenged to define (and market) his role in that reflection. As business leaders and their In-house Counsel work with risk mapping, and circle through the five stages of identifying and assessing risk, preparing scenarios, responding and implementing corrective measures, so too must external lawyers define their value proposition to the client for each phase.

There is first an 'upstream' contribution, advising boards, business leaders and In-house Counsel on how best to manage risk and pursue social impact opportunity, build and implement compliance, and promote social innovation.

There is a 'downstream' or crisis management contribution in managing issues when a problem has surfaced. External lawyers are called upon to analyse and evaluate incident reports and whistle blowing revelations, to deal with routine or crisis investigations and multijurisdictional dawn raids carried out by administrative authorities, and to respond to journalist scoops and NGO pressure.

There are issues relating to tactical exploration of leniency programmes in the context of competition or financial market authorities' investigations. In both their upstream and downstream contributions, the external lawyer can play a complex value-added role, spreading best practices, helping to 'independently' establish facts, advising and assessing risks and, when appropriate, providing representation in court.

An external part

One role that leads to interesting questions is the participation of external lawyers in internal investigations when a 'problem' has surfaced. The 'independent investigator' role can lead to a

perception that lawyers are acting as policemen, prosecutors or agents for the regulator. Ethical and legal issues abound.

The review of documents, mailboxes and the interviewing of employees pose questions relating to evidentiary and discovery rules, as well as how to ensure that employee privacy is protected and under which conditions data can be transferred to foreign jurisdictions. Also on how to relate to future witnesses, and on conflicts of law where the same issue arises in multiple jurisdictions. Daily challenges are posed by the tension between compliance, disciplinary procedures, employment law and the need for internal corporate justice – equal treatment regardless of status. Professional ethics rules do not provide ready-made answers for the external lawyer. Empirical studies suggest they could do better.

Navigating the tension between corporate citizenship, profitability and regulatory and reputational pressure is a major strategic challenge for business leaders. External lawyers therefore have a key chance to deliver value to corporate client by ensuring that legal advice is mindful of ethical and social risks and opportunities, in short, of the social impact of the corporate decisions being weighed.

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