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A fine line

Further guidance to In-House Lawyers in England and Wales on ensuring good corporate governance in your organisations

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Foreword

Reconciling the Irreconcilable?, the first set of guidelines published by the C&I Group in March 2005, discussed the uncertainties that exist amongst in-house lawyers and their employers about the roles that in-house lawyers play in ensuring good corporate governance in their organisations - in particular whether they should be the "conscience of the company" with a legal, professional or moral duty to keep their organisations on the right path, or alternatively trusted advisors on specific legal issues put to them by the organisation's management.

Since then the dust has been settling on a spate of corporate governance scandals, including Enron, WorldCom (now MCI) and Royal Dutch Shell, and it is becoming evident that in-house lawyers are being given a more prominent and responsible role in corporate governance.

Risk management has also developed, with more organisations now identifying, quantifying and managing in a systematic way all of the material risks that they face. In-house lawyers have been drawn into this process, being required to identify, manage and control the legal risks faced by their organisations. How much they can actually achieve depends not only on their own skills and energy, but also on being allowed by their organisation's senior management to perform their roles with sufficient authority and independence.

As a result, we have developed this second set of Guidelines to complement those given in *Reconciling the Irreconcilable*, with a view to:

- helping you ensure good corporate governance in your organisation; and
- assisting you and your management to understand the scope and limits of your role and your responsibilities as an in-house lawyer.

It is worth emphasising that the potential for personal liability exists for in-house lawyers regardless of the size and shape of the organisations which employ them. This document is therefore addressed to **all** of our in-house lawyer members, irrespective of the nature of their employers.
We hope that you find these Guidelines useful.

In order to ensure that our Guidelines reflect the views of our in-house lawyer members, please let us know what you think. What areas of corporate governance concern you most? How could these Guidelines be improved?

Please contact any member of the Corporate Governance Committee through the C&I website www.cigroup.org.uk.

We will be delighted to hear from you.

Bruce Macmillan Dell EMEA, Chairman
Adam Eades Euronext.LIFFE, Deputy Chairman
Maxine Chow LGC Group Holdings plc
Simon Graham Wragge & Co LLP
David Haig Banque AIG, London Branch
Colin Leaver Simmons & Simmons
Richard Tapp Carillion plc

Introduction

These Guidelines are called *A Fine Line* for good reason: the corporate governance boundaries are shifting, and as an in-house lawyer you must find your footing in this new world.

Corporate governance is difficult to manage, not only because it covers such a wide range of areas, but because so many different individuals both within and outside an organisation have a part to play.

Thus you cannot hope – nor should you aspire – to be the keeper or "saviour" of your organisation's corporate governance. To attempt to do so would deny the reality that boards, auditors, regulators, financiers, advisors and so many others must also contribute.

We have written these guidelines with the aim of making them relevant, whether you are the head of legal, sole in-house counsel or an in-house lawyer within a team.

We hope that by:

- focussing on the main areas in which you as an in-house lawyer can contribute to good corporate governance; and

- assisting your management to understand the scope and limits of your role and your responsibilities as an in-house lawyer in the context of the particular business environment in which you work,

you are able to foster good corporate governance practices within your areas of responsibility, and avoid becoming a scapegoat if (despite your best efforts) a failure does occur.

A. Defining your role

A.1 The in-house lawyer and corporate governance

The key areas in which in-house lawyers may contribute to corporate governance can be divided broadly into three categories:

- **Advising the board on corporate governance issues**, including helping to organise the board and its committees, and providing independent advice to them on corporate governance, whether as company secretary or otherwise.

- **Ensuring that the organisation's contracts and property rights are valid and enforceable, and are enforced**, as legal advisor and as part of the risk management process.

- **Managing regulatory risks**, including the identification, design and implementation of quality procedures to enable good compliance, and the management of issues resulting from non-compliance.

Depending on your organisation's size and nature, these areas may all be allocated to a single person, or they may be split between several. However, in each of these, you as an in-house lawyer can make a valuable contribution. (See section F for further discussion on the allocation of responsibilities.)

A.2 Knowing your limits

In each of these areas, you should agree the scope of your responsibilities with the board and/or senior management as appropriate. You may be company secretary, head of legal and/or head of compliance, or perhaps none of these. However, if your remit includes any of these areas, then you should ensure that you have:

- the necessary authority, time, resources and independence to discharge those responsibilities;

- the relevant skills, training and expertise; and

- a mechanism which enables you to raise concerns with independent directors (if your organisation has them) if you are not able to resolve them first through your normal reporting line to senior management.

You might also find it useful to compare your role and responsibilities with counterparts in other organisations, to ensure that there are no material deficiencies.

Regardless of whether you are formally responsible for a particular area or not, it does not follow, nor should it be implied, that you are the "conscience" of your organisation. Remember the responsibilities of the board for ensuring that the organisation has good corporate governance policies, of senior management for implementing the board's policies, of other control functions (e.g. internal audit) for monitoring their implementation, and of the staff generally for compliance and for reporting any breaches that they observe.

Good corporate governance is a team effort, and therefore you should not encourage the notion that one person is the sole conscience.

A. Defining your role

A.3 Doing the job well

Often you may find yourself advising in challenging circumstances. Whether or not this is the case, as a matter of good practice, ensure that your advice is clear and, for anything material, is recorded. Remember that personal and corporate pressures can produce distorted understandings of what you are saying, or distorted memories of what you said on a prior occasion.

If you discover later that the advice you gave, or the work you did, on a particular matter was defective whether because of your/your team's error or because your advice was based upon incomplete or inaccurate facts supplied to you, you should scope out the nature of and reasons for the error, its potential impact and the possible areas where conflict of interest may arise if you continue to be involved. You should then immediately inform your boss and, if necessary, the board.

If the organisation could suffer loss as a result of that defective advice, you should ensure that the organisation obtains independent external legal advice. It may be possible to continue to act in relation to the matter with your boss/the board's written permission, but if so you should be careful to declare those areas where your advice may be subject to a conflict of interest as you give it. This will help to ensure you are not perceived as having hidden the problem, or as being part of the problem.

Taking these steps should help ensure that you are not made the 'scapegoat' or 'fall guy', even if a corporate governance failure occurs in your organisation.

A.4 Your team is as strong as its weakest link

Some recent corporate governance scandals have shown that mere allegations of malpractice within a legal department can drag the whole function, and even the whole company, down. However, if every lawyer in a team contributes to good practice, then they can prevent this from occurring.

Therefore, even if you are an in-house lawyer within a team (rather than being a sole in-house counsel or the head of legal), you should still:

- ensure that your own role, responsibilities and reporting lines are clear, and that your training and resources are adequate;
- ensure that you are able to discharge your role and responsibilities to a standard that maintains the overall standards of the team; and
- satisfy yourself that the parts of the legal department that you have exposure to are operating at a standard that you feel is appropriate and, if this is not the case, seek constructively to draw this to the attention of your legal management.

By doing these things in a positive way, you can help to build and maintain a strong corporate governance environment, and add value to your team.

B. Advising the board on corporate governance

B.1 The role of the company secretary

The company secretary is in general the board's primary advisor on matters relating to corporate governance.

The role of the company secretary in a UK listed company is set out in the Combined Code. In summary it covers ensuring that board procedures are complied with, advising the board on all governance matters, ensuring good information flows within the board and its committees and between senior management and non-executive directors, facilitating inductions, and assisting with professional development as required.[1] It is good practice to apply the same principles in other types of organisation.

The company secretary can manage corporate governance proactively by helping the board to develop a corporate governance policy for the organisation, and to implement that policy through training of the directors, individual appraisals of the directors (by the chairman), and an annual performance evaluation of the board as a whole. It is clear therefore that company secretaries have a central role to play in any organisation's corporate governance.

This advisory role will probably become even more important within UK companies when the proposed changes to the law on directors' duties take effect.[2]

[1] The Combined Code on Corporate Governance, June 2006, paragraph A.5
[2] The Company Law Reform Bill, available at http://www.publications.parliament.uk

B.2 The in-house lawyer as company secretary

In-house lawyers do not have a monopoly on company secretarial positions, and indeed the company secretary does not need to be legally qualified. However, in-house lawyers can add value to this role for many reasons. For example, in-house lawyers:

- have basic training on many of the legal issues that arise from day to day in any company (company, employment, property, tax, etc);
- are relatively independent from senior management, by virtue of their legal training and their ethical and professional duties; and
- are able to provide advice in a context which is subject to legal advice privilege.

B.3 The company secretary and board committees

A key issue is access to the board. The company secretary of course attends all board meetings. The Higgs Report, on which the Combined Code is based, recommends that it is good practice for the company secretary to attend meetings of each committee of the board, as well as the board itself. [3] The logic is to enable the company secretary to provide well-informed advice on all areas of the organisation's corporate governance, and to assure all stakeholders that corporate governance

[3] Review of the role and effectiveness of non-executive directors, Derek Higgs, January 2003, paragraph 11.30

B. Advising the board on corporate governance

failures are not being hidden away. It is good practice to apply the same principles in non-listed organisations.

Obviously there are circumstances when it would not be appropriate for the company secretary to attend committee meetings, e.g. when remuneration of the individual, or his/her peers or superiors, is being discussed. However the company secretary should be given an accurate minute of the discussion to include with the rest of the minutes, so that (s)he retains a corporate governance overview.

B.4 The company secretary and subsidiaries

Boards of subsidiary undertakings are particularly exposed to pressure to act in the interests of their parent or controlling shareholders, rather than in their own company's interests. Intra-group transactions, intra-group outsourcing of control and/or operational functions, and nominations of shareholder representatives as directors are all areas which can place subsidiaries in potential conflict with their parent companies.

The company secretary of a subsidiary therefore has an additional burden of responsibility to ensure that his/her directors understand that their prime duty is to the subsidiary organisation, and not to the shareholder(s), and (s)he should advise the board how to discharge this duty in specific situations.

B.5 Handling corporate governance difficulties

Whilst many corporate governance issues are clear cut and can be resolved by reference to the Combined Code or to other relevant materials, there may also be issues where there is ambiguity or room for disagreement. In these circumstances what should you do if you are the company secretary, and the board (or the chairman) does not accept your advice on its corporate governance arrangements, or a specific corporate governance issue? If you believe that the issue is sufficiently important, and you are not persuaded by the board's (or the chairman's) logic, then there are various options available to you. For example:

- you can appeal to the independent non-executive directors (if your organisation has them), after which you may normally consider your legal and moral obligations to be discharged. However, you should keep a written record of the discussion, and you may wish to have this acknowledged by the directors to whom you spoke; or

- in the most serious cases, where it is necessary to protect the interests of the organisation and your own reputation, you may consider "whistleblowing" and/or tendering your immediate resignation. In such cases, it would be wise to take independent legal advice before you act. However, it should never come to this if proper checks and balances are established at the outset.

C. Risk management and defining legal risk

C.1 Risk management from the top-down

The board is responsible for ensuring that the material risks facing an organisation (e.g. credit, market, technological, environmental and legal risks) are identified and managed effectively through the adoption of appropriate policies and the establishment of good systems and controls, including the hiring of good managers to implement those policies and to run the business properly.

The rigour and formality with which this needs to be done will depend on the particular legal, regulatory and reputational requirements affecting the organisation. However, even if there is no formal requirement, a board should carry out a review at least annually of the material risks that its organisation faces. The company secretary should advise the board to carry out such an annual review, if it does not do so already.

C.2 Risk management from the bottom-up

In practice, boards rely heavily on their senior management, who in turn rely on middle management, to inform them of the risks which exist in the organisation, and to recommend policies, and systems and controls, to manage those risks. This is especially likely with legal risk, as senior management (in the UK at least) are unlikely to be legally trained and will therefore rely heavily on the in-house lawyer.

Generally, well-run organisations manage risk both from the top-down and bottom-up, as part of a strong corporate governance culture.

C.3 Defining legal risk

The International Bar Association defines legal risk as:

"*the risk of loss to an institution which is primarily caused by (a) a defective transaction, (b) a claim (including a defence to a claim or a counterclaim) being made or some other event occurring which results in a liability for the organisation or other loss (for example, as a result of the termination of the contract), (c) failing to take appropriate measures to protect assets (for example, intellectual property) owned by the institution, or (d) change in law.*"[4]

This definition is very comprehensive. However, we think it can be useful to divide legal risk into two sub-categories. These are:

- **"enforceability risk"**, meaning risk to the validity and enforceability of an organisation's contracts and property rights, for example because of uncertainty in the law or its interpretation, incapacity of a counterparty, a change in law, ambiguity, inaccuracy or uncertainty in

[4] International Bar Association Working Party on Legal Risk, February 2004, cited at para 4.40 of Legal Risk in the Financial Markets, by Roger McCormick, Oxford University Press 2006. The sub-categories of risk that we propose below differ from Mr. McCormick's (op cit pages 115 to 118), as it assists our analysis of the role of the in-house lawyer if we combine items (a), (c) and (d) and the third party claim element of item (b) as "enforceability risk", and expand on the regulatory claim element of item (b). Note that, in the IBA definition, "defective transaction" is given an extended meaning, and the definition is accompanied by notes which should be read with it since they affect its interpretation. The definition acknowledges that there are some grey areas as to whether or not e.g. political risk or reputational risk are really part of legal risk; likewise the risk of deliberate wrongdoing by an individual (e.g. the "rogue trader").

C. Risk management and defining legal risk

the terms of a contract due to negligence of the legal function or elsewhere in the organisation, or a "battle of the forms", or claims (whether valid or invalid) by a third party of one of the above; and

- **"regulatory risk"**, meaning risk of legal or regulatory sanctions, material financial loss, or loss to reputation that an organisation (or individuals within it) may suffer as a result of its failure to comply with laws, regulations, internal or external rules, related self-regulatory organisation standards, and codes of conduct applicable to its activities.[5]

Thinking about legal risk in these two ways can be helpful, as no doubt you can think of much if not all of your work as falling into one or other of these areas. Sections D and E focus on how to manage these two types of risk.

[55] See the Basel Committee on Banking Supervision high level paper on "Compliance and the compliance function in banks", April 2005

D. Managing enforceability risks

D.1 In-house lawyers as risk managers

In-house lawyers advise routinely on the validity and enforceability of their organisation's contracts and property rights, and are frequently responsible for ensuring that those rights are managed strategically in order to achieve their organisation's goals. They also defend those contracts and property rights if they are subsequently challenged by a third party. Now this role is often formalised as part of the organisation's overall risk management process.

D.2 The head of legal's role

The head of legal will normally have a key role in identifying and managing the enforceability risks faced by the organisation, and may be formally appointed as the "owner" of this risk category.

If you are in this position, you should identify the specific enforceability risks faced by the organisation, and then assess the significance and probability of each such risk. You should do this by reference to the history of previous incidents within the organisation and its competitors, and should consult with key employees and management in each function, business division and jurisdiction. However, you should also remember to think "big", as some enforceability risks cannot be predicted by looking at past mistakes.

If there are any specific enforceability risks that you are *not* responsible for (for example, employment contracts and disputes, if they are handled by the HR function), you should ensure that this is formally recorded so that you are not subsequently held accountable for a failure in those areas. The Board and senior management will be responsible for ensuring that those enforceability risks are adequately managed.

You should then develop procedures for reducing, transferring, avoiding and/or assuming the enforceability risks that you are responsible for, and ensure that they are embedded in the organisation. Very basic procedures *might* include:

- Limiting the individuals in the organisation who can commit the organisation financially and legally to transactions, by means of an authorised signatories list
- Providing training and education, materials and tools to inform all relevant staff on enforceability risks and issues
- Providing guidance on structuring, analysing and managing current and prospective relationships with third parties, and on the negotiation process leading up to the making of such commitments, and instituting processes to ensure that contracts are kept updated, post-signing, to reflect changes in the ongoing relationship to which the contract relates
- Requiring staff to consult with the legal function and/or to follow defined processes and/or to use standardised documents and guidelines before making a binding commitment on behalf of the organisation or signing a contract
- Promptly informing you of any situation which might result in

D. Managing enforceability risks

litigation (including arbitration, ombudsman claims, regulatory sanctions, etc) and requiring all litigation to be managed by you

- Maintaining a panel of approved external law firms and channelling all instructions to those law firms through you (excluding, perhaps, those areas where it is agreed that others have responsibility within the organisation, e.g. HR contracts and disputes)

- Capping and controlling contractual liabilities, taking account of your organisation's individual and aggregate insurance cover limits and exclusions

- Limiting the governing law of contracts to English law, and other laws that you – and your insurers – are comfortable with (e.g. through obtaining legal opinions)

- Monitoring legal developments in relevant jurisdictions for any changes which may affect the organisation's legal rights

You should obtain input from the senior management on this process of identifying, assessing and managing the organisation's enforceability risks, because commercial decisions are required, e.g. which risks should be assumed, and which should be avoided, and what resources should be allocated to this process.

Ideally you should summarise your analysis of enforceability risks for incorporation in an overall risk review for the board, so that it can then provide feedback as to the relative importance of the risks and how they should be managed.

On an ongoing basis, you should monitor the effective application of your procedures, and review them in response to any failures, changes in the organisation's objectives and its business or the external environment, including actual or expected changes in law or its interpretation by the courts.

D.3 Providing comfort to the board as part of the risk management process

You may be asked to provide some form of comfort to the board that you have identified, and are managing, the key risks in the organisation. In responding to such a request, you should try to be as helpful as possible to the board, without detracting from the board's and senior management's own primary responsibilities for corporate governance.

A reasonable response is to provide the board with an explanation of the risks that you have tried to manage, how you have gone about it, and any significant failings that you have observed; and your recommendations for remedying any such failings (including any further resources you require). You should ensure that the specific areas that you are responsible for are defined (excluding, for example, HR contracts and disputes if you are not responsible for them).

You should resist giving any form of guarantee that all the risks have been identified and managed, as this could well expose you to unfair criticism, increase your risk of personal liability, and give you an actual or perceived conflict of interest if a

problem later emerges. Remember that corporate governance should be a collective effort and that the board is ultimately responsible.

D.4 Handling difficult enforceability risk issues

In our view, this is not likely to be a contentious area of corporate governance, as it should be clear to all that you as an in-house lawyer are on the same side as the business, i.e. trying to minimise the risk that the organisation's contracts and property rights are unenforceable.

However, we know that in-house lawyers are frequently under pressure and their teams (if they have them) overstretched. If this is a problem in your organisation, you should raise the issue with your senior management before a serious mistake occurs.

E. Managing regulatory risks

E.1 The board's responsibility for establishing a compliance culture

Regulatory risk is relevant to all organisations, not merely financial institutions, and many of the recent corporate governance scandals have involved regulatory failures.

The board is primarily responsible for setting a compliance culture that emphasises standards of honesty and integrity. It and the senior management should lead by example in their own behaviour and in supporting the in-house lawyer (or a specialist head of compliance) in managing the regulatory risk at lower levels of the organisation. The independent non-executive directors (if any) should ensure that this occurs. These basic concepts do not require specialist knowledge, training or experience in regulation. If the organisation is formally regulated, the regulator should also ensure that this corporate governance process is really working – and not wait until a serious regulatory breach occurs in the organisation.

E.2 Delegation of the board's responsibility

If the organisation is highly regulated, or if guarding its reputation is key to its business model, it may appoint a specialist head of compliance whose role is to take proactive steps to identify and manage the regulatory risks facing the organisation so that they do not result in significant loss or damage. In other organisations, this role may be part of the head of legal's role. However, in all cases, this role will be far easier to perform if the board and the senior management are performing their own responsibilities properly (see above).

E.3 Clarifying the scope of the delegation

A single person cannot be expected to take primary responsibility for identifying and managing all of the areas of regulatory risk that an organisation faces. In practice, therefore, responsibility for employment rules is often allocated to the head of the HR function, responsibility for tax and accounting rules to the head of finance, and so on, with the head of compliance (actual or de facto) being responsible for the rest. The organisation may, however, want a single person to have oversight over the entire range of regulatory risks that apply to the organisation (i.e. including rules for which another individual has primary responsibility), so that nothing falls between the cracks.[6]

If you are the head of compliance (actual or de facto), you will need to agree with senior management which areas of regulatory risk you are primarily responsible for, and whether you are expected to have oversight over the other areas of regulatory risk.

E.4 Identifying and assessing the regulatory risks

First of all, you should identify the specific regulatory risks that the organisation faces in the areas that you are primarily responsible for. This is a major task, and one which you

[6] This appears to be the case with compliance oversight officers of firms authorised and regulated by the Financial Services Authority. See the Carr Sheppards Crosthwaite Limited final notice dated 19th May 2004, available on www.fsa.gov.uk.

may well need help with from colleagues in other departments, from senior management and from outside counsel, as it will involve a very broad range of rules in each jurisdiction in which the organisation operates.

Only then can you begin to assess the significance and probability of each regulatory risk, using the history of previous incidents within your organisation, your competitors, or legal opinions etc as a guide. Discussions with colleagues and senior management are particularly important in assessing regulatory risk, as it requires a very detailed understanding of both the rules and their application to the organisation's business. For example, they may be aware of conflicts of interest that exist in the business, and they should alert you to them – if you have not already identified them.

E.5 Developing procedures for managing the risks

Once you have identified and assessed the risks, you can then start developing procedures for managing them. This is essentially a process of training the organisation's staff on the relevant rules and how to comply with them, monitoring that they do so, investigating suspected breaches and (if you find that there has indeed been a breach) reporting them to senior management. Occasionally, you may have to intervene in a transaction to prevent a breach from occurring. The rigour and degree of caution with which you perform this role will depend on the nature of the organisation, the extent to which it is regulated or for other reasons is very concerned about its reputation, and whether it already has a good compliance culture. Obviously you should ensure that you have or are given sufficient independence, authority, resources and access to information and personnel, to perform this role to the required standard.

E.6 Your status, authority and independence

If your organisation expects you to retain oversight over the entire range of regulatory risks that apply to the organisation (i.e. including rules for which another individual has primary responsibility), you are likely to require an even higher level of independence, authority, resources and access to information and personnel. Attending the organisation's executive committee meetings as an observer is a particularly useful way to achieve this, as then you will be aware immediately of business developments, and can advise if there is a regulatory risk that needs to be addressed. In addition, all members of staff should be required to report actual or suspected regulatory breaches to you. The same should apply to any outside counsel instructed by the organisation (i.e. including any outside counsel instructed by the HR function).

"Sufficient independence" requires you to have access to such information and personnel as *you* consider necessary to investigate any suspected regulatory breaches, and freedom to report significant breaches directly to the board (or the audit committee) and any regulator, as well as to senior management. If the organisation has an audit committee, you should have unfettered access to it, and a private meeting with it at least annually, so that you can raise any concerns with it.

E. Managing regulatory risks

E.7 Providing comfort to the board as part of the risk management process

As with enforceability risk (see para D.3 above), you may be asked to provide some comfort to the board that you have identified, and are managing, the key regulatory risks in the organisation. You should respond with the same helpful attitude, without detracting from the board's and senior management's own primary responsibilities for corporate governance.

This area is particularly sensitive, as you are likely to have very little personal control over the behaviour of other staff (your influence being limited to advising, training and monitoring), and you will depend heavily on the board and senior management to instil a good compliance culture and to discipline staff who break the rules.

Again, a reasonable response is to provide the board with an explanation of the risks that you have tried to manage, how you have gone about it, and any significant failings that you have observed; and your recommendations for remedying any such failings (including any further resources you require). You should ensure that the specific areas that you are responsible for are defined (excluding, for example, tax, accounting, employment and/or health & safety laws if you are not responsible for them). You should review the record of regulatory breaches, and how they have been dealt with by senior management once reported to them.

Again, you should resist giving any form of guarantee that all the risks have been identified and managed, as this could well expose you to criticism, increase your risk of personal liability, and give you an actual or perceived conflict of interest if a breach which you may not have been aware of later emerges or a new breach occurs. As with enforceability risk (or even more so), regulatory risk management and compliance should be a collective effort, and as with all corporate governance the board is ultimately responsible.

E.8 Handling difficult regulatory risk issues

You will have to challenge staff if they have already committed a regulatory breach or if they are embarking on a course of action which is likely to lead to a breach. If you can make your challenge as constructive as possible in the circumstances, then this can go a long way to smoothing the process. Sometimes though, despite your best efforts, investigations can be perceived as unwanted "interfering with the business". This should not matter provided that senior management supports you, and they should normally do so in order to protect the reputation and long-term viability of the organisation.

But what if you are sure that you are right, and the senior management do *not* support you? As in paragraph B.5 above, you should appeal to the independent non-executive directors (if your organisation has any) and, if that fails, in extreme circumstances you may have to threaten to – or actually – "blow the whistle" internally and/or externally and/or resign. However, before doing so, you should take independent legal advice.

F. Allocating responsibilities

F.1 Different models

It may seem straightforward to identify the different areas in which the in-house lawyer can contribute to good corporate governance. However, in the UK it is rare for organisations to set responsibilities within such clear boundaries – smaller companies may not have the luxury of managing corporate governance with the resources that larger organisations have at their disposal; and larger organisations can have so many stakeholders that dividing lines are blurred.

F.2 Splitting the roles

If your organisation splits the company secretary, head of legal and/or head of compliance roles between yourself and other individuals, you should ensure close communication and co-ordination with the others, and a clear delineation of functions and responsibilities between the roles to avoid confusion and/or coverage gaps arising. You should also ensure that your various duties and reporting lines are documented and understood by the various individuals to whom you report.

F.3 Taking on an additional role

If you hold one role and are then asked to take on another, you should be sure to understand, and agree with senior management, the bounds of your new responsibilities, to have or acquire the knowledge and skills to fulfil those responsibilities, and to ensure that your resources and autonomy are sufficient to allow all your responsibilities to be properly performed. The key, as ever in this complex area, is to ensure that you know what you are responsible for, and what are others' responsibilities.

F.4 Juggling the roles

If your organisation does not split the company secretary, head of legal and head of compliance roles, and you are solely responsible for all of them, you will have to switch "hat" depending on the issue that you are dealing with at the time. You may have to do this quite expressly, to remind yourself and others what you are aiming to achieve.

For example, as company secretary, you are likely to report to the chairman, while as head of legal and/or compliance you may report to someone different, e.g. the CEO. You will have to treat each of them with great discretion, always respecting their separate roles. On the other hand, they will have to understand and accept that you will discuss separate issues with each of them according to the separate roles which you are performing. You may also need to apply different skills and behaviours to the different roles.

F.5 Becoming a director

Finally, if you are the company secretary, the head of legal and/or the head of compliance of an organisation, and you are invited to become a director, you should consider very carefully how this additional role will interact with your existing responsibilities, and in particular how the independence that is required for those other roles may be affected. If you feel that there is a potential conflict of interests, then it may be appropriate, for example, to relinquish the compliance role to a subordinate who will report to you.

Summary

In these guidelines, we have tried to assist you, as in-house lawyers, in understanding the roles you may have in ensuring that your organisation has good corporate governance, and in agreeing those roles with your senior management.

The main roles you may have in this area are:

- **Advising the board on corporate governance issues**, including helping to organise the board and its committees, and providing independent advice to them on corporate governance, whether as company secretary or otherwise.

- **Ensuring that the organisation's contracts and property rights are valid and enforceable, and are enforced**, as legal advisor and as part of the risk management process.

- **Managing regulatory risks**, including the identification, design and implementation of quality procedures to enable good compliance, and the management of issues resulting from non-compliance.

In each of these roles, you have an important contribution to make to the organisation's corporate governance, but none implies that you alone are the "conscience of the company", or its "saviour". You are not alone in upholding your organisation's corporate governance, and there are many others, in particular the board, who must share – and in the case of the board be ultimately responsible for – that burden.

A fundamental starting point for ensuring good corporate governance is to make sure that every area is identified and accounted for by someone within the organisation. Then you can agree the scope of your responsibilities with the board (if company secretary) or with the senior management (if you are the head of legal and/or compliance), and ensure that you are able to discharge those responsibilities, in terms of your own skills and experience, and the resources available to you.

Think about how you manage "enforceability risks" and "regulatory risks", and develop organisational procedures to make sure that these are managed both from the top-down and bottom-up.

If you are company secretary, head of legal and/or head of compliance, and your organisation has independent non-executive directors, ensure that you have an avenue for raising concerns with them if you are not able to resolve them first with the senior management. Although more serious cases may call for more drastic measures, it should never come to this if proper checks and balances are established at the outset.

Disclaimer

The information contained in this document is given in good faith with the intention of furthering the understanding of its subject matter. Whilst the Corporate Governance Committee of the Commerce & Industry Group ("Committee") believes that it is accurate and up-to-date as at the date on which it was approved for publication (24 July 2006), none of the Committee, the Commerce & Industry Group, the Law Society of England and Wales, or any of their respective members or employees accept any liability:

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The views and opinions expressed in this document are not necessarily to be attributed to the organisations represented by Committee members.

Further reading

1. Reconciling the Irreconcilable? Best Practice Guidelines for In-House Lawyers in England and Wales in the new corporate governance environment, 11 March 2005, Commerce & Industry Group and Wragge & Co LLP, available on www.cigroup.org.uk

2. Riding the Razor's Edge – Legal Risk and Compliance, PLC Law Department Quarterly, July-September 2005, Volume 1 Number 1

3. Legal Risk in the Financial Markets, by Roger McCormick, Oxford University Press 2006

4. Lawyers as Risk Managers, by Andrew M Whittaker, General Counsel of the Financial Services Authority, Butterworths Journal of International Banking and Financial Law – January 2003

5. Basel Committee on Banking Supervision high level paper on "Compliance and the compliance function in banks", April 2005

6. Specimen job description for the corporate governance role of the company secretary published by the Institute of Chartered Secretaries and Administrators (ICSA), available on www.icsa.org.uk

7. The Combined Code on Corporate Governance, June 2006

8. Review of the role and effectiveness of non-executive directors, Derek Higgs, January 2003

9. The fish rots from the head – the crisis in our boardrooms: developing the crucial skills of the competent director, by Bob Garratt, Profile Books 2003

10. Conflict Guidance – Explanatory Notes to Rule 16D, The Law Society, April 2006, paragraphs 18 to 23

11. Confidentiality and Disclosure Guidance – Explanatory Notes to Rule 16E, The Law Society, April 2006, paragraphs 9 et seq

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The C&I Group has established a dedicated Committee to deal with a range of corporate governance issues, and is committed to addressing them in order to support its membership community.

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