

ECMC response to EBA Consultation Paper on Internal Governance

While the draft guidelines are generally excellent, I propose a couple small but important changes.

In the Executive Summary it is stated that recently more focus was given to conduct-related shortcomings (page 5). Therefore, the management body's responsibilities should include setting, approving and overseeing the implementation of a.o. a corporate culture and values that foster responsible and ethical behaviour, including a code of conduct or similar instrument (page 15/16).

Many of the recent scandals in the financial services industry are a result of unethical behaviour. As Governor Carney of the Bank of England stated on June 10, 2015: "Unethical behaviour went unchecked, proliferated and eventually became the norm. Too many participants neither felt responsible for the system nor recognized the full impact of their actions.....It's vital that we – public authorities and private market participants – work together to reverse the tide of ethical drift.

Therefore I full heartedly agree with adding ethical behaviour to the corporate governance guidelines.

In paragraph 9.2 of the draft guidelines it is stated that the management body should develop, adopt, adhere to and promote high ethical and professional standards.....and ensure the implementation of such standards (e.g. a code of conduct) and compliance by staff.....institutions should define the function responsible for evaluating breaches of the code of conduct and a process for dealing with issues of non-compliance.

In my view it is clear which function should be responsible for this. As the compliance function already takes care of the code of conduct and activities to protect the integrity of the organization, they are also the best candidate for helping the management body develop and promote high ethical standards and to ensure compliance with these ethical standards. So in my view the scope of the compliance function should be expanded to promoting ethical behaviour and stimulating an ethical culture. The head of the function should therefore be called 'Ethics and Compliance Officer' or 'Head of Ethics and Compliance'.

In paragraph 12.4 it is stated that the risk management function and the compliance function may be combined and in paragraph 15.2 it is stated that the compliance function may be combined with the risk management function or legal function. I strongly oppose to that.

Historically, the risk function is not used to dealing with ethical matters and neither is the legal department. A good example to illustrate this is the 2015 settlement of General Motors in the USA. The Legal Department of General Motors had found out that there was a problem with the ignition switch of certain cars, as they had to settle the claims of the (family of the) people who became disabled or died as a consequence of the malfunctioning of the car. They involved the technicians and came to the conclusion that it would be cheaper for the company to settle the claims of the disabled and deceased people. In other

words: they decided to let people die. And allegedly over 100 people died as a result. A risk function could have come to the same conclusion, while trying to minimize the financial impact of the occurrence of a risk. But the Ethics and Compliance function would have advised differently.

In a record settlement with the pharmaceutical company Pfizer in 2010 US Inspector General Levinson already indicated that “the lawyers should tell you whether you can do something and compliance tells you whether you should. We think that upper management should hear both arguments”. As a result Pfizer separated the legal and the compliance function. And more and more multinational companies outside of the financial services industry are taking a similar approach, as a good Ethics and Compliance Officer will be able to advise the management body which actions are lawful but awful.

My conclusion is therefore that the scope of the compliance function should be expanded to promoting ethical behaviour and stimulating an ethical culture. The head of the function should be called ‘Ethics and Compliance Officer’ or ‘Head of Ethics and Compliance’. The function should be independent and not report into risk or legal.

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