



Directors

Gatekeepers against systemic failure

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Compliance should not be seen as a burden but rather as an added value

Corporate scandals and failures have one thing in common: the lack of a compliance culture. An organisation must ensure that the right governance, compliance and risk management frameworks are put in place for it to steer away from failure.

Putting a robust framework in place requires an understanding of what having the right compliance culture truly means. This is not something which should be viewed in absolute terms: rather it encompasses values, beliefs and behaviours which employees within an organisation are expected to implement. The application of this concept, and the type of policies and procedures to be implemented, will naturally depend on the nature, size, complexity and volume of the business. However, compliance issues must always be placed at the top of the agenda (irrespective of the nature, size, complexity and volume of the business) – not only because of legal and regulatory requirements – but more importantly because the failure to do so would invariably lead to consequences which would impact the very core of an organisation, as well as its reputation. In the long run, the strength of an industry and, possibly, an entire economy, would bear the brunt of multiple failures.

Invariably, in an organisation where there is no compliance culture, failure is not an 'if', but a case of 'when'. It is the responsibility of directors to set the bar, and the standards set by them must be filtered down through senior management across all employees. This would not only have the effect of mitigating the risks of failure, but more importantly, it improves efficiency, reduces ongoing compliance costs and strengthens the industry in which the organisation operates.

A number of elements must be kept in mind to ensure that an organisation remains above board when it comes to legal or regulatory compliance. One, however, has to start by looking at the role which directors and senior management play in the corporate pyramid.

In terms of general principles of company law, directors are responsible to promote the well-being of a company and are responsible for its general governance as well as its proper administration, management and the general supervision of its affairs. In larger organisations, whilst the directors remain responsible for the overall oversight and supervision of the organisation's affairs, the day to day management of such activities would typically be delegated to senior management, which ultimately play an instrumental role in managing the affairs in accordance with the ethos set, and instructions provided, by the directors. This means that the directors, as the supervisory body of the organisation, should ensure that it operates in accordance with the vision and principles set by the board of directors and in compliance with all applicable laws and regulations. The directors retain the overall responsibility to oversee the affairs of the organisation and how these are being managed. This responsibility should be concretised in the day to day undertakings of an organisation, with particular attention being given to regulatory requirements in the environment in which the entity operates. The approach an organisation takes to compliance is key to its success – or failure.

Compliance should not be seen as a burden but rather as an added value. Nurturing a sound compliance culture is key in a regulated environment where mismanagement and lack of compliance may lead to reputational, regulatory and legal consequences. Compliance should not start with the compliance officer, but rather with each and every individual within the organisation, whether such person is undertaking a licensable activity or otherwise. Indeed, the compliance function within an organisation should only be seen as the second line of defence, ensuring that the employees are undertaking their functions in a compliant manner. Ensuring compliance with legal, regulatory and any other requirements should be seen by all employees in an organisation as a regular part of their day to day job.

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Although each and every individual is expected to undertake his function in line with the relevant laws, regulations and internal policies and procedures of the organisation, directors and senior management have the responsibility of leading by example. It is therefore the directors' (as well as senior management's) responsibility to set the right tone, values and ethics across an organisation, instill a robust compliance culture and ensure that employees are well aware of the importance of ensuring compliance with the applicable laws, regulations and internal policies and procedures in their day to day job. Communicating the board's expectation to all employees is key to ensuring that the board's ethos and vision can be duly implemented within the organisation.

In addition to being responsible for the overall implementation of a robust compliance culture, directors have the obligation to ensure that the organisation's policies and procedures are always up to date. In order to ensure this, as a minimum, board meetings of regulated entities should be held on a regular basis and the board of directors should be updated on developments in relation to all units of the organisation. Directors are responsible for the overall oversight of all the activities of the organisation and therefore have a responsibility to ensure that they are kept abreast on all fronts, be it the licensable activities undertaken, marketing efforts, risk management, compliance, financial and other matters. Directors need to take an active role during board meetings and need to challenge senior management on the manner in which they are managing the business on a day to day basis. Independent directors should also be challenging the executive directors thereby ensuring that there are proper checks and balances even at board level. Directors should also be aware of the environment in which the organisation is operating and discuss the manner in which the organisation can remain competitive whilst at the same time always acting in compliance with the relevant requirements. To ensure this, policies, processes and procedures are to be put in place and frequently reviewed to keep them up to date.

Indeed, as businesses evolve, so should their internal policies, processes and procedures in order to reflect the size, nature, complexity and volume of business of the organisation. The policies and procedures approved by the directors should clearly set out the roles and responsibilities of each function within the organisation. Employees should then be held accountable for their actions in implementing the relevant policies or procedures. Legal and regulatory advice should be sought thereby ensuring that the organisation is well aware of the requirements applicable to new and existing lines of business. Policies should clearly reflect, without ambiguity, the requirements set out in the legal and regulatory advice and the application of such advice on a day to day basis by the relevant employees.

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The employment of professional and competent personnel is also vital in ensuring that the organisation can operate in a sustainable and compliant manner. Directors and senior management should therefore ensure that their recruitment efforts target individuals with the right mindset and the necessary competence. Any gaps in the competence and/or skill set of individuals should be identified and duly addressed through ongoing training.

Ongoing training is fundamental as organisations operate within an ever-changing regulatory landscape. This makes it even more important for directors and employees to remain abreast with the relevant developments within their respective field of operations. In this respect, directors are to ensure that training programs are established and implemented. In particular, organisations operating within a regulated environment are obliged to ensure that tailored training is being provided to employees on anti-money laundering and counter terrorist financing matters and the relevant data protection laws.

Directors are also responsible to ensure that proper risk management policies and controls are adopted by the organisation in order to mitigate any risks to which the organisation is exposed to. The risk management systems should cater for all types of risks including but not limited to strategic, operational, financial, compliance, regulatory, technology and security risk. Failure to properly identify the risks to which the organisation is exposed, or the appropriate risk mitigation measures, might lead to unforeseen events which might put the organisation out of business. It is therefore of primary importance that the directors, together with other units of the organisation, thoroughly discuss the risk management systems, taking into account all relevant risks to which the organisation is exposed to and ensuring that the adequate risk mitigation measures are being applied.

Directors of companies which are subject to AML-CFT legislative framework are also responsible to ensure that the organisation has a business risk assessment for anti-money laundering and counter terrorist financing purposes. Such business risk assessment should identify the money laundering and terrorist financing risks to which the organisation is exposed to, taking into account a number of factors, including geographical, customer, delivery channels, product, service and transactional risks. Directors should take ownership of this exercise whilst being assisted by the appropriate personnel across the organisation.

It is clear that directors have a very important role to play in ensuring the continued strength of the industry in which they operate. Within a globalised world, the failure of one major organisation invariably affects other entities; a domino effect which, as we have seen in the past, may result in systemic failure. Putting in place the appropriate governance, compliance and risk management infrastructure within each and every organisation, is fundamental in mitigating the risks of such failures. But it all starts with the directors' and senior management's willingness to truly understand and embrace their role as gatekeepers of sound organisations.