Issues for Board Agendas
2015
Introduction

In a recent Financial Times survey of UK business leaders on the biggest risks for 2015, political uncertainty, market volatility and terrorism all featured high. But, as the CEO of the Investment Association remarked, “[the risks]… that are most worth worrying about are the ones over which we have some measure of control”.

In this article we have highlighted a selection of regulatory and governance issues that we believe require the attention of boards and management throughout 2015. For each issue, we have set out a list of specific points for boards to consider. We have chosen them because of their potential to result in serious financial and/or reputational damage. In many of them there have been developments or upcoming changes which mean that the time is now right for a review of the adequacy of existing strategy, procedures or working practices.

So we consider the following:

> **obligations to defend against cyber attacks.** A cyber security breach can have very serious repercussions. Legislators and regulators are prioritising this issue and are proposing new legislation to tighten up cyber security measures.

> **the expansion of data privacy rules.** Controversial proposals to reform European data protection laws continue to inch forward. The new regime is likely to be more prescriptive, with the potential for very significant fines. Crucially, compliance is likely to require considerable advance planning.

> **the tax planning tightrope for multinationals.** Tax – and the “fairness” principle – continues to generate much public interest, and this has galvanised governments and international organisations into further concerted action.

> **the creative imagination of antitrust regulators.** The last 12 months have seen the EU Commission push the barriers as to what constitutes a cartel beyond what had been understood to date – with significant risk implications for many organisations.

> **ensuring internal whistleblowing systems are sound.** A whistleblowing system that works well and ensures issues are evaluated and escalated quickly can be an important tool in managing or reducing risk. Boards should ensure that whistleblowing procedures work as intended and that issues raised by this route are investigated.

> **successful succession planning.** Succession planning is one of the most important of a board’s functions. Poor planning and processes around board changes can create both short- and long-term problems. Listed companies need to consider their disclosure obligations carefully.

> **human rights becoming hard law.** Adoption by multinationals of the UN Guiding Principles on Business and Human Rights is requiring companies to focus on how to implement those commitments – and can throw up more issues than you think.
Obligations to defend against cyber attacks

The importance of cyber security is clear from the recent string of high profile data breaches. These can lead to direct exposures, such as theft of funds, compensation claims and regulatory fines. Often more important are the intangible impacts, such as reduced customer confidence in your brand, damage to competitiveness, or disclosure of confidential or privileged materials.

The threat landscape is also changing. Organisations now face cyber attacks on many fronts – including disaffected insiders, organised crime, hacktivists, competitors and even nation states. Attacks range from the random and opportunistic to the advanced and persistent. Almost all large organisations must consider themselves a target.

Most boards should already be aware of these risks. However, the commercial risks are increasingly being supplemented by legal and regulatory risks. At a European level, the Network and Information Security Directive is likely to be adopted in 2015. This will place express security obligations on organisations performing important public functions such as those involved in the energy, transport, water and financial sectors, as well as certain e-commerce companies. These organisations will need to comply with minimum security standards and report breaches.

The proposed reforms to European data protection laws will also impose new obligations on organisations processing personal data (see right). These Europe-wide measures are supplemented by national developments. In the UK, this includes greater government concern about cyber security (evidenced by the UK government’s Cyber Essentials campaign), regulatory initiatives (such as the “Walking Shark II” cyber attack exercise led by the government’s Cyber Essentials campaign), regulatory initiatives (such as the “Walking Shark II” cyber attack exercise led by the FCA and Bank of England) and sanctions (such as the fines issued by the Information Commissioner to Sony, the British Pregnancy Advisory Service and others after their websites were hacked).

Expansion of data privacy rules

Controversial proposals to reform European data protection laws continue to inch forward. The proposed General Data Protection Regulation should be adopted in late 2015 or early 2016 and will deliver the biggest shake-up to privacy regulation for 20 years.

The proposals include obligations not just to comply, but to be seen to comply. New concepts, such as “accountability”, “privacy impact assessments” and mandatory privacy officers will result in regulators intruding further into the back office of companies’ privacy compliance than under the current regime.

“THE PROPOSED GENERAL DATA PROTECTION REGULATION WILL DELIVER THE BIGGEST SHAKE-UP TO PRIVACY REGULATION FOR 20 YEARS.”

These more prescriptive requirements will be backed by a step change in sanctions. The Commission originally proposed fines of 2% of annual global turnover, increased to 5% of annual global turnover in the European Parliament’s first reading of the Regulation. While the exact level of sanctions is still to be decided, legislators are determined to introduce an antitrust style regime to make privacy a boardroom issue.

The proposed reforms are now unlikely to come into force until 2017, or even 2018. However, they are likely to require a number of changes to the way organisations collect and use personal data, including changes to information technology systems and processes. These changes will take time and may be difficult to resource if left to the last minute. The proposals are also starting to have soft law effects and are influencing the way regulators interpret and enforce the current data protection framework.

Five cyber security points for the board to consider

- Who within your organisation is accountable for cyber risk? Is that person sufficiently senior to ensure that the issue is considered seriously throughout the organisation?
- Do you receive a regular update setting out the cyber threats to your organisation and the measures (both systems related and behavioural) taken to counter these threats?
- Does your organisation have a central reporting mechanism for cyber attacks and a response plan (including a communications plan) should a breach occur?
- Does the rest of your organisation understand the risks of cyber attacks? What steps are taken to train and update staff about these risks?
- How do the security measures taken by your organisation compare to your peers, and to government recommendations? Does your organisation adhere to any international standards? Have your security measures been subject to external audit or penetration testing?

Four data privacy points for the board to consider

- How much personal data does your organisation process and how critical is it to the organisation? For example, the reforms will be most relevant to consumer facing organisations.
- How well does your organisation comply with current data protection laws? Does it already have privacy officers and conduct privacy impact assessments?
- What sort of relationship does your organisation have with relevant privacy regulators?
- How long will it take to bring your organisation’s compliance up to scratch with the new rules? What system and process changes will be necessary?
Tax planning tightrope for multinationals

All multinationals engage in tax planning techniques – some to a lesser and some to a greater extent. The goal of maximising shareholder value means that companies seek to arrange their tax affairs in a tax efficient manner. Moreover, many countries actively seek to be competitive on tax to attract business, indicating an acceptance that tax is a relevant factor for multinationals to take into account in structuring their operations.

Recently, however, the public perception of the dividing line between acceptable tax mitigation and abusive avoidance has been shifting.

A focus on businesses paying their “fair share” of tax

There has been increased focus on the tax affairs of multinationals since the financial crisis, accompanied by a sentiment that businesses should pay their “fair share” of tax in the jurisdictions where they operate. This has been evidenced both by significant public interest and debate, and by the level of political engagement. Key examples in the UK are the widely reported Parliamentary inquiries into tax avoidance led by the Public Accounts Committee which started in 2012. In 2014, the well-publicised “Luxembourg leaks” (which resulted in confidential and, in many cases, sensitive information about tax rulings in Luxembourg being made public) also generated substantial interest. At an EU level, the European Commission has launched an EU State Aid investigation into the tax rulings given by various Member States and the European Parliament is also looking at this area. Some multinationals have survived this process relatively unscathed (at least to date), while others have been subject to investigation, “named and shamed” by the media, politicians and others, and threatened with falling sales and boycotts.

Governments have also responded to this changing environment. Many countries have strengthened their anti-avoidance arsenal including (to name but a few) the UK with its new “diverted profits tax” and France and Germany with increased restrictions on interest deductibility. In the United States, new rules designed to stop US corporations from engaging in “inversion” transactions have been introduced and further measures are being considered.

A move towards international co-ordination

At an international level, there has also been important co-ordination and co-operation. The OECD is in the midst of a major project to address “base erosion and profit shifting” ("BEPS") which may result in a number of new international and domestic measures, and there have been several significant new disclosure and information exchange initiatives (including the well-known US “FATCA” rules). Linked to this, based on initiatives by the EU, the OECD and certain Member States, it seems only a matter of time before multinationals will be obliged to disclose their tax payments on a country-by-country basis. Transparency requirements relating to government payments are already creeping in for certain sectors (extractive and financial services).

Implications

The consequences of these developments are two-fold:

> first, it is clear that the tax landscape is changing substantially, and this is likely to remain the case for the foreseeable future. Consequently, multinationals need to be ready to respond quickly to new legislation, guidance and practice. In some cases, this may result in a major restructuring of operations;

> second, the line between acceptable and unacceptable tax planning/avoidance is increasingly becoming a matter for consideration at the board level. As has always been the case, the starting point in drawing this line is the law, but increasingly there will be other factors to consider, including PR, stakeholder concerns and the competitive environment.

It is, therefore, more important than ever for board members to understand their company’s approach to tax and ensure it fits with the board’s stated values and principles. We set out below points for boards to consider.

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<thead>
<tr>
<th>Five tax points for the board to consider</th>
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<tbody>
<tr>
<td>1. Does the board have a close dialogue with the tax function? Does the board understand how the changing tax landscape and legislative developments may affect the business and structure of the group, including the group’s effective tax rate?</td>
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<td>2. Should a review of the group’s existing structure be undertaken to understand areas of risk and ensure structures are implemented correctly? Might a restructuring be required? Be aware that alternative structures may achieve the same or a similar result in a more acceptable manner.</td>
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<td>3. Is the group potentially impacted by the ongoing EU State Aid enquiries? Is external advice required?</td>
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<td>4. Do decisions on tax take into account “soft” issues, such as reputational impact? Should they? Does the board have an appropriate level of involvement in those decisions?</td>
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<td>5. Does the group have a specific tax policy? How does it fit with the group’s values and broader policies? Is the board willing to communicate that policy to the public/stakeholders in its tax affairs and is there a communication plan?</td>
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Creative imagination of antitrust regulators

Cartel investigations have always posed significant threats to corporates globally with substantial increases seen in cartel fines imposed in the EU, the US and China in the last few years (see table below). However, the European Commission is beginning to take a more aggressive approach towards competition enforcement. This, combined with planned legislation which will make it easier for individuals harmed by cartel activity to bring a private damages action, means a board review of competition risk is timely.

Cartel Fines (1990 – 2014) (¤m)

<table>
<thead>
<tr>
<th>Year</th>
<th>EU</th>
<th>US</th>
<th>China</th>
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<tr>
<td>1990–1994</td>
<td>344</td>
<td>127</td>
<td>271</td>
</tr>
<tr>
<td>1995–1999</td>
<td>1,419</td>
<td>271</td>
<td>127</td>
</tr>
<tr>
<td>2000–2004</td>
<td>3,157</td>
<td>336</td>
<td>264</td>
</tr>
<tr>
<td>2005–2009</td>
<td>7,969</td>
<td>3,363</td>
<td>1,419</td>
</tr>
<tr>
<td>2010–2014</td>
<td>8,700</td>
<td>3,157</td>
<td>2,332</td>
</tr>
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Commission back to business

The Competition Commissioner, Margrethe Vestager, took office in late 2014, and identified energy, financial services, and digital markets as among her top sector priorities. Continuing scrutiny of tax advantages granted by certain Member States to large multinationals remains on her agenda.

Pushing the boundaries in parental liability

Under EU Competition law, in some circumstances the Commission has the discretion to hold one or more parent entities jointly and severally liable for the infringing conduct of a subsidiary. This increases the amount of fines imposed and aims to engage parent companies in compliance activities. That discretion ostensibly applies where the subsidiary does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company.

Recently, the Commission has stretched the interpretation of this case law, finding parental liability even where there has been no awareness or involvement in the infringing behaviour, limited involvement of the parent in the business of the subsidiary, and very low shareholdings. Moreover, we have seen a move from the previous focus on industrial parent companies (who may arguably be more likely to be aware of the conduct of their subsidiaries), to financial investors who are being held jointly and severally liable with their portfolio companies.

Likely increase in private damages actions

A new Directive concerning actions for damages under national law for infringements of EU competition law must be implemented by Member States by the end of 2016. This Directive is designed to facilitate private damages claims and is therefore expected to increase the volume of such claims.

The changes include:

(i) new disclosure rules to enable claimants to gain access to key documents from the Commission’s investigation (excluding settlement submissions and leniency corporate statements);

(ii) an EU-wide minimum limitation period for bringing claims of 5 years; and

(iii) shifting the burden of proving loss (the burden is now on the defendant). The Directive also introduces joint and several liability for damages between all cartel members, so that a claimant may bring a claim against any entity held jointly and severally liable by the Commission.

Five competition/antitrust points for the board to consider

1. Boards of companies in energy, financial services, and digital markets should take heed of the Commissioner’s warning that these sectors will be a priority focus for her.

2. Consider the competition law risks relating to the behaviour of subsidiaries and put in place effective compliance procedures that help to prevent breaches from occurring and offer mitigation in the event of a problem.

3. Identify risk areas and, if there are any suspicions, do an audit. Tailor training and guidance. Implement reporting procedures and run mock dawn raids.

4. Be alert to the question of whether tax benefits offered by governments may constitute state aid.

5. Private damages actions represent an increasingly significant cost relating to cartel enforcement, which will increase in the coming years given the reforms introduced. Consider your potential exposure to this type of claim.
Ensuring whistleblowing systems are sound

Whistleblowing disclosures are on the rise, undoubtedly increasing the risk to businesses of negative attention from the media, the public and regulators of the issues and their management. But this is a risk that can and should be managed. In fact, far from being seen as a problem, whistleblowing disclosures are a valuable opportunity for businesses to address underlying risks before these get out of hand. The key to maximising the benefits of whistleblowing is for wrongdoing to be reported early and managed properly so that the issue can be investigated and addressed and any damage to the business, if evidenced, can be limited, and negative press avoided.

Awareness and involvement of the board is therefore an essential component of an effective whistleblowing policy. A whistleblowing strategy which encourages disclosures, and promotes awareness and the proper investigation of these at all levels from the top-down, will help limit damage to the business. Audit or risk committees may want to track reporting to identify themes and satisfy themselves issues are being considered and addressed.

Proper treatment of whistleblowers must also be endorsed and observed through the organisation, not least because of the high costs of compensation (which is uncapped in the UK) that can be awarded to whistleblowers who have suffered a detriment as a result of their disclosure, as well as the potential for negative publicity.

In some European jurisdictions, notably Portugal, Germany and Luxembourg, there is a limited requirement for financial organisations/institutions to have whistleblowing policies in place. In many jurisdictions where there is no legal requirement to do so, particularly the UK, there is nonetheless an ever-mounting expectation of the public and regulators that companies will have whistleblowing policies and practices and that these will be used effectively.

“Such procedures will only ever be as good as the culture in which they are operated.”

Whistleblowing procedures will only ever be as good as the culture in which they are operated. The financial incentives for whistleblowers that exist in the US do not apply in most of Europe, although in the UK the door has not been completely shut on this possibility. Without such incentives, it is even more important that individuals know there are channels through which concerns can and should be raised and that they feel confident they will be supported in doing so. When disclosures are made they need to be identified, investigated, escalated if appropriate, and not brushed under the carpet. Many of the instances where a whistleblower has notified a US regulator (and may have been compensated) started as internal complaints that were ignored.

Managers and other employees will take whistleblowing seriously if the board does. The tone from the top is critical on this issue. A board should therefore consider how to demonstrate its view of the importance of whistleblowing.

In the box below we highlight some key steps a board can take to improve its awareness of whistleblowing disclosures, the way in which these are investigated and managed and how the issues raised are addressed.

### Five ways the board can improve whistleblowing outcomes

1. Include sufficient reporting mechanisms in the whistleblowing policy so that the board is briefed and involved when serious whistleblowing complaints/disclosures are made.

2. Allocate responsibility for identifying whether disclosures are concentrated in a particular business area. Underlying issues in problem areas can then be addressed. Where no or limited disclosures have been made, steps can be taken to improve.

3. Assess how many whistleblowing issues have been raised, the quality of the investigation into these, and the outcome. Ensure the results are reported to the board.

4. Arrange for staff to be asked about their awareness and understanding of whistleblowing procedures and confidence in using them. Ensure the results are reported to the board.

5. Communicate the importance the board places on whistleblowing, and its support for good whistleblowing practice and training, directly to the workforce.
Successful succession planning

Board succession has been a high profile issue for a number of listed companies in recent months and it is set to be a particular focus of the UK’s corporate governance regulator, the Financial Reporting Council, in 2015. It is also a topic on which companies may see increased shareholder engagement.

Internal indicators

Boards will be well aware of the risks of sudden loss of a key executive whether through illness, accident, strategic differences or the lure of a competitor. A vacuum in leadership may create uncertainty at best and lead to real operational problems at worst. The desire to avoid a vacancy can also weaken the company’s bargaining position in negotiating terms with a new executive.

It can be just as difficult to handle an exit or retirement that is long planned. There are obvious internal issues, such as how a replacement can be sought and found without destabilising both the current incumbent and any internal candidates for the position. Is it desirable to go public on the timing of the expected departure while searching for a successor? Or is it practicable to wait until the departure and the successor can be announced together? These issues are compounded, in the case of a listed company, by the need to engage in dialogue with major shareholders on new board appointments, while it may be in the interests of the company for confidentiality to be maintained.

Market disclosure issues

In addition to any specific rules requiring disclosure of board changes, companies need to be particularly careful where a board change constitutes inside information. The question of whether a particular director or executive’s likely departure is itself price-sensitive may be a fraught one. The safest and most politic course may be to assume that any board change will be inside information – especially in the case of a Chair, CEO or CFO, but also bearing in mind that there have been instances where the market has reacted positively to news of other executive appointments.

In the case of a planned succession, the issue of exactly when a prospective move becomes inside information is also important. The EU Court of Justice considered, in the case of Gelti v Daimler, whether the prospective early retirement of the chairman of Daimler’s Management Board had been notified to the market at the appropriate time (the company’s share price rose on the announcement). The court’s decision, that intermediate steps in a prolonged process could constitute an event regarded as “reasonably likely to occur” for the purposes of the definition of inside information, illustrates that discussions that a director has with the board about his departure may themselves be inside information.

Companies may be able to delay disclosing inside information about a particular appointment or departure while contractual terms are negotiated, but this does not mean that, where a decision to remove a director has been made, announcement can simply be postponed until a successor is found.

Any engagement with investors must be on a strictly confidential basis and be carefully managed to avoid a disclosure obligation being triggered. However, engagement will be hampered where investors do not wish to receive inside information and thereby be prevented from trading in the company’s shares.

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<tr>
<th>Five succession planning points for the board to consider</th>
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<tbody>
<tr>
<td>1. Do the board and the nomination committee take a long-term, strategic view of succession planning?</td>
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<tr>
<td>2. Does the board consider the importance of a diverse management team, particularly for high-risk jurisdictions?</td>
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<tr>
<td>3. Are nomination committee and/or board processes relating to succession planning effective – including in relation to board evaluation; diversity; assessing the pipeline of executive talent; the recruitment of non-executive directors; and investor engagement?</td>
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<tr>
<td>4. Do the company’s procedures for identifying and handling inside information encompass the different stages of board succession, including dealing with both unforeseen events and longer-term planning?</td>
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<tr>
<td>5. Are the board and, in particular, the chairman and the senior independent director, well-prepared for engaging with investors on succession issues?</td>
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Human rights becoming hard law

Businesses address human rights issues primarily through their commitment to voluntary human rights standards and guidelines. Many multinationals commit to implement the UN Guiding Principles on Business and Human Rights, and the OECD Guidelines on Multinational Enterprises which contain similar human rights principles. As the Guiding Principles were adopted in 2011, there is growing pressure on adopting companies to show they have processes to identify, avoid, mitigate or remedy any adverse impacts that their activities (and the impacts they contribute to through their business relationships) may have.

In this context, various European governments and the US Government, have endorsed the UN Guiding Principles. Several European governments are now looking into whether additional regulation is required to impose corporate obligations with regard to human rights breaches. As a result, what may have started as a topic for the corporate responsibility team is one that requires consideration from a broader, risk management perspective.

While soft law norms do not create direct legal obligations, they have an increasingly important indirect effect. This is because a company’s public adoption of, and performance against, them may be and increasingly is:

(i) relevant to its ability to attract certain types of finance and investment – this is a growing area of interest to fund managers where retail brands are concerned. It is also relevant in the context of project finance and export credit;

(ii) a threshold criterion in competitive tenders and public procurement, or the subject of contractual warranties or undertakings;

(iii) the subject of corporate reporting obligations (for example, guidance on the UK narrative reporting obligation in respect of human rights draws on, and refers to, the UN Guiding Principles);

(iv) considered by a court in deciding whether a company may owe duties in tort to particular stakeholders; and

(v) subject to public challenge under the OECD complaints mechanism that is creating the “case law” in this area.

The UN Guiding Principles can create real challenges for some sectors. For example, FMCG companies with complex supply chains have a huge task to minimise supply chain risks such as child labour or over-use of scarce water supplies. For an ICT company, addressing the competing needs of governments who wish to monitor data for security reasons against an organisation’s stated adherence to human rights principles of privacy and freedom of expression poses particular challenges.

“Few could have predicted, even a few years ago, how human rights could impact on how an organisation functions.”

As regards suppliers and customers, best practice is for companies to adopt a risk based approach, and diligence those engagements where there are risks of gross or material human rights abuses first, and take appropriate steps to mitigate the risk.

While English, US and much European law has not hitherto placed many specific “hard” law human rights obligations on companies (as opposed to state entities who may be bound by human rights legislation), this is slowly evolving.

There is a trend in case law and legislative proposals towards imposing additional requirements on companies with regard to human rights. For example:

(i) Reporting requirements were introduced in California in 2012 through the Transparency in Supply Chain Act which requires disclosure of supply chain due diligence processes by companies selling material volumes of consumer goods in the state.

(ii) The EU has adopted a directive applicable to large and listed companies which requires reporting on a number of non-financial topics including environmental impacts, human rights, workforce diversity and supply chain management.

(iii) The UK has passed the Modern Slavery Act aimed at combating human trafficking, which includes reporting obligations based on the Californian requirements.

(iv) Switzerland has narrowly rejected a proposal to require parent companies to undertake due diligence on human rights and environmental impacts arising out of their operations, while the lower chamber of the French assembly is considering a similar proposal.

(v) Cases have been brought in Canada in which the claimants have asserted parent company liability in respect of social impacts arising out of subsidiary operations elsewhere in the world.
Given the rapid pace of change, boards will wish to consider the extent to which the company’s policy position and reporting is matched by its internal approach.

Given the rapid pace of change, boards will wish to consider the extent to which the company’s policy position and reporting is matched by its internal approach. They will want to consider how best to manage the more tricky issues that arise in their business or as a result of particular business relationships. Some of the more difficult questions relate to the Group’s ability to guarantee workplace rights in some places, what steps are appropriate and consistent with best practice to minimise the risk of forced labour or child labour, how to minimise adverse impacts associated with resettlement or economic displacement while not compensating speculative claims, and how to manage the risk at the point of sale that your products could be misused to infringe the human rights of others.

<table>
<thead>
<tr>
<th>Four human rights points boards should be considering</th>
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<tbody>
<tr>
<td>1. What governance and processes exist to enable the organisation to fulfil any commitment it has made with regard to human rights?</td>
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<td>2. What level of due diligence is done to identify human rights impacts which the company, or its business partners, might have?</td>
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<td>3. How satisfied is the board with the application of procedures to audit its supply chain or to diligence potential business partners?</td>
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<tr>
<td>4. How well does the organisation communicate to stakeholders its approach to identifying and mitigating human rights risks?</td>
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Contacts

We hope that you have found this guide useful. Please feel free to contact any of the people below, or your usual Linklaters contact, if you would like to discuss any of these matters further.

Richard Cumbley  
Partner, Cyber/Data  
Tel: (+44) 20 7456 4681  
richard.cumbley@linklaters.com

Jillian Naylor  
Partner, Employment & Incentives (Whistleblowing)  
Tel: (+44) 20 7456 5486  
jillian.naylor@linklaters.com

Vanessa Havard-Williams  
Partner, Human rights  
Tel: (+44) 20 7456 4280  
vanessa.havard-williams@linklaters.com

Paula Riedel  
Partner, Competition  
Tel: (+44) 20 7456 3537  
paula.riedel@linklaters.com

Clara Ingen-Housz  
Partner, Competition  
Tel: (+852) 2901 5306  
clara.ingen-housz@linklaters.com

Tanguy Van Overstraeten  
Partner, Cyber/Data  
Tel: (+32) 2501 9405  
tanguy.van_overstraeten@linklaters.com

Nicole Kar  
Partner, Competition  
Tel: (+44) 20 7456 4382  
nicole.kar@linklaters.com

Lynne Walkington  
Partner, Tax  
Tel: (+44) 20 7456 5718  
lynne.walkington@linklaters.com

Jean Lovett  
Partner, Employment & Incentives (Succession planning)  
Tel: (+44) 20 7456 3698  
jean lovett@linklaters.com