

EBEF Paper **One**

# The Evolving Responsibilities & Liabilities of Ethics Representatives: **A practical guide**

**Prepared by Dr. Nicole Dando and Judith Irwin,  
with Sean Jeffrey, Kate Brearley, Murray Grainger and Tim C. Mazur**

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**The Evolving Responsibilities & Liabilities of Ethics Representatives: A practical guide**

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## About the European Business Ethics Forum

The European Business Ethics Forum (EBEF) provides an opportunity for learning and sharing among those responsible for the ethics, compliance or business conduct programmes within their organisations. The organising committee for EBEF is a collaboration of the Institute of Business Ethics (IBE) of the United Kingdom, the Cercle d'Éthique des Affaires (CEA) of France, the Ethics and Compliance Officer Association (ECO) of the United States and the European Business Ethics Network (EBEN) (see p39). For more information on EBEF visit: [www.ebef.eu](http://www.ebef.eu).

**Note: The material in this report is for general information only and is not intended to provide legal advice.**

## About the Authors

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## Part 1: Introduction

Recent years have seen ethics and compliance programmes become the norm in large businesses. The trend has been driven in part by the high profile ethical and compliance failures within global organisations. These have led to more intensive public scrutiny of business behaviour and a strengthened regulatory and legal framework around ethics and compliance programmes, including the Sarbanes-Oxley Act 2002 (US), the Bribery Act 2010 (UK) and the amended Sentencing Guidelines 2010 (US). In some cases these have extraterritorial application and include provisions for personal liability.

There is more emphasis on boards overseeing the design, implementation and monitoring of effective programmes to embed ethical values and reduce misconduct. Such programmes are usually led by a Chief Ethics and Compliance Officer, a Head of Ethics or equivalent, who in some organisations will report directly to a board member. They are supported by 'Ethics Representatives'. Ethics Representatives (ERs)

*“Within our organisation, it’s being seen as a more serious position – we’ve moved from generally having part time Ambassadors who do this in addition to their day job to full-time dedicated employees”<sup>3</sup>*

refers here to those with an explicit ethics role - either working directly from the ethics/compliance office, or as full-time or part-time 'ethics ambassadors' within other functions, sometimes on a voluntary basis in addition to their 'day job' (e.g. as ethics champions).<sup>1</sup> These varied roles could include managing the different elements of the programme, monitoring, providing advice to employees, carrying out investigations into misconduct and advising the ethics/compliance office on local issues.<sup>2</sup> In

some cases, duties may be subject to regulatory or statutory standards.

The visibility of both the ethics function<sup>4</sup> and these ERs has evolved at all levels of a company which, along with the increasing profile of ethics matters in business generally, has created new opportunities and responsibilities for ERs. For some, this will include a greater emphasis on fiduciary duties (being entrusted to put company interests above all others) depending on their specific duties, seniority and the regulatory environment. Consequently, ERs may find themselves facing a new exposure to personal risk and, in some

<sup>1</sup> The term Ethics Representative is used throughout to include such analogous roles as ethics officer, compliance officer, and certain types of ombudsmen.

<sup>2</sup> See IBE (2010) *Good Practice Guide to Ethics Ambassadors*.

<sup>3</sup> Quotes in boxes throughout this report are based on the responses of business ethics professionals to an email survey by the authors in 2012.

<sup>4</sup> In some organisations, ethics is managed from the compliance office or from other functions, including legal and audit.

cases, legal liabilities. Liability may arise where an ER either knowingly or unknowingly, for whatever reason:

- fails to prevent or detect misconduct,
- fails to report misconduct or to escalate it sufficiently,
- fails to act professionally or in accordance with her/his contracted or assumed duties, or
- fails to act with integrity.

*“The expectations placed on ERs have increased, and although this is not universal throughout the entire organisation, increasingly it’s seen as a core management role – especially in those markets with heightened compliance risk.”*

Conversely, the authors are also aware of claims that ERs have been dismissed because they did act with integrity but contrary to the interests or wishes of their superiors. We recognise that, as well as the liability that arises due to a failure to act, ERs will be concerned with liabilities and other consequences arising because of acting - including being ostracised or dismissed for stepping into sensitive areas and finding something that seems wrong while fulfilling their duties.

### 1.1 Background

In 2008, the Head of Internal Audit and Legal at a public cleaning service company, ‘Berliner Stadtreinigung’ (owned by the State of Berlin), was convicted for failing to act on evidence of customer overcharging. When he became aware of the systematic overcharging, in the region of some €23 million, he informed a member of the company’s board, who instructed him not to correct the error. The German Bundesgerichtshof (Federal Supreme Court) convicted and imprisoned the Head of Internal Audit and Legal on the basis that he had assisted fraud by failing to act, i.e. to take his concerns to a higher level.<sup>5</sup>

In another case in November 2011, the UK’s Financial Services Authority (FSA) imposed a fine of £14,000 on a compliance officer at a hedge fund management company (Dynamic Decisions Capital Management). She had failed ‘to challenge a colleague, [and] investigate and act on the information she received’ following concerns raised by investors around the sale of a bond. The FSA concluded that she ‘did not engage with her responsibilities...and therefore failed to act with due skill and care’ and neglected ‘to understand the importance of her role and the wider regulatory obligations it brings’.<sup>6</sup>

<sup>5</sup> ‘Germany: The Compliance Officer’s Function within a Company – The Federal Supreme Court decides on compliance officers’ criminal liability regarding violation of their duties and challenges the compliance organisations within the companies’. 2<sup>nd</sup> January 2010. See: [www.mondaq.com/article.asp?articleid=91716](http://www.mondaq.com/article.asp?articleid=91716)

<sup>6</sup> ‘FSA fines and bans hedge fund Compliance Officer £14,000 for failing to act with due skill, care and diligence’. 22<sup>nd</sup> November, 2011. See: [www.fsa.gov.uk/pages/Library/Communication/PR/2011/099.shtml](http://www.fsa.gov.uk/pages/Library/Communication/PR/2011/099.shtml)

Such legal cases are rare and alone do not suggest a trend regarding all ERs. Exposure to such personal risk will not apply to all ERs and is very dependent upon sector, seniority and professional duties (a trend to increased liability is perhaps evident for senior roles). The cases do however, suggest that ERs need clarity around their responsibilities and liabilities, and to understand how to protect themselves while also upholding and fulfilling their designated duties to the organisation. They also suggest that employers of ERs would be advised to provide the right support to increase employee confidence, to emphasise the opportunities the role brings and to avoid employees feeling inclined to opt out of their voluntary ER roles.

## 1.2 Challenges of the role and influences on liability

In many cases, the role of ERs within organisations is still being defined. There is no standard, one-size-fits-all job description as responsibilities will depend on the context and the needs of the organisation. The

*“Our ethics ambassadors are getting more approaches from other staff for advice.”*

position could involve policy owning responsibilities, such as ensuring that controls are in place, managed appropriately and complied with, or the ER may be a voluntary, supportive part-time role with the employee simply acting as a local point of contact.

Many factors influence an ER’s exposure to personal liability. Since, of itself, it is an unrecognised and unregulated profession in any official sense, there is little formal protection or guidance directed at ERs with respect to this. While all employees have a responsibility to abide by the law and the terms and conditions of their employment contract (whether that be written or not), it is not always the case that employees understand their responsibilities (documented or assumed), nor their potential exposure to personal risk and liability. This is particularly so where ERs are operating without a formal job description covering their ethics role and responsibilities. Evidence suggests that this is a common state of affairs for ERs – particularly in the US.<sup>7</sup>

Furthermore, the spectrum of employees carrying out the ER role is likely to include those with specified professional duties, e.g. accountants and lawyers, and/or varying seniority. The obligations imposed by their professional body or their ‘officer status’ in the company will influence the liability context within which these ERs work. Also, some job titles are significant. For example, ombudsman, auditor and ethics officer can be defined in some jurisdictions as technically and legally specific roles and this will determine their legal responsibilities and privileges etc.

<sup>7</sup> Research by the Society of Corporate Compliance and Ethics found that only 30% of compliance and ethics officers surveyed had an employment contract. See SCCE (2009) Compliance and ethics officer positioning: A benchmarking survey [www.corporatecompliance.org/Resources/View/ArticleId/262/Compliance-and-ethics-officer-positioning-A-benchmarking-survey.aspx](http://www.corporatecompliance.org/Resources/View/ArticleId/262/Compliance-and-ethics-officer-positioning-A-benchmarking-survey.aspx)

Finally, liability can be prescribed because of particular duties assigned specifically to the ER role. For example, in the US, ERs in the securities industry are more exposed to the risk of personal liability if they have supervisory duties rather than solely a monitoring role. In some jurisdictions, legal liability may be formally 'delegated' to senior employees in their employment contract. In practice employment contracts are not always updated to reflect a new role or evolving responsibilities and the accompanying changes in liabilities.

In some jurisdictions (for example France and Germany), the Board or a senior officer of the company may, in a separate written document, formally set out a senior employee's delegated duties and authorities with accompanying legal and criminal liabilities. The delegee can further delegate his/her powers, but not the associated liabilities.

Formal delegations are likely to be relevant only to senior ERs, such as the Chief Ethics and Compliance Officer. Where delegations of authority and duties have been formally made, and an employee is acting within the scope of their duties, the employer would generally be expected to be vicariously liable for a wrongdoing, together with the employee. Even if personal liability does arise, the employer should bear the brunt of any claim and be covered by insurance.

For voluntary and part-time ERs, it is unlikely that legal and personal liabilities arising due to particular responsibilities will have been identified or set out formally, nor that cover will exist.

In any case, as we explore in this report, ERs are unlikely to be exposed if they operate diligently and within the scope of their duties. If ERs do inadvertently fail to act according to their assigned duties, or act outside the scope of those duties, then personal liabilities without cover from the employer might arise (see Part 3). However, there is little case history to indicate that this need be a concern for the majority of ERs, and such risks may be mitigated (see Part 4).

Ultimately, the relevance and efficacy of an ER role – on paper and in practice – will be determined within a particular company by the expectations of the board, as well as by the synergies or lack of synergies with line management and other functions such as human resources. However, there are particular challenges associated with the role that potentially make exposure to risk for ERs more likely than for other employees. Box 1 lists some challenges associated with the ER role.

## Box 1: Common challenges faced in the Ethics Representative role

### **Stakeholder trust**

The nature of the ER role usually implies heightened duties to different stakeholder groups and a position of trust including the trust of management around protecting the company and the trust of employees who confide/speak to them about their concerns. This can increase their risk of being in the line of fire, of their decisions and conduct being scrutinised, and perhaps of being a target for litigation or harassment following a case of misconduct, and in turn posing a significant risk to an ER's career and reputation.

### **Split loyalties**

There can be a tension for ERs between building trust with colleagues and the obligation to act on information given to them. Maintaining independence can be difficult where an ER also fulfils a full-time operational role. Where an ER is an in-house lawyer, she/he may be unable to advise an employee because, formally, she/he represents the company's interests and not the employee's (explaining this point appropriately to an employee is known in the US as an 'Upjohn warning').

### **Challenging senior executives**

For those involved in investigations, challenging senior executives can be difficult. Executives are likely to be sensitive to suggestions of omissions or misconduct made against them and, when the misconduct is substantiated, they may use their power to demand no or minimal enforcement against them. In some instances, ERs have lost their jobs when trying to hold executives accountable to ethics standards.

### **Inadequate mandate**

Insufficient sponsorship of or buy-in to the ethics programme at executive level can result in a lack of drive and support throughout the rest of the organisation. This can mean ERs have a lack of mandate. This may be a particular challenge where companies are in joint ventures or have minority participation.

### **Inadequate resources**

Inadequate resources make the discharge of an ER's duties difficult. Lack of resources might include a lack of training, support or guidance for ERs. This is a prominent challenge for volunteer ERs.

### **Lack of follow through**

Concerns or issues raised by ERs may not be followed through adequately by the company. In the USA for example, as with all employees, ERs working in publicly reporting companies now face the personal decision of either attempting to report through the company, or reporting externally to the Securities and Exchange Commission (SEC). SEC and Commodities Futures Trading Commission (CFTC) rules disallow the ER from seeking a bounty when she/he learned about the misconduct from another employee, but they may report to either of these agencies if they have new information and suspect that the company will not act expeditiously. In these instances, they may file a claim not only to pursue the monetary reward as a buffer against economic retaliation but to benefit from the anti-retaliatory provisions of the Dodd-Frank Act (2010).

### **Lack of an independent reporting line**

Some ERs may not have access to the board, the executive management team or have the ability to go 'outside the chain of command' with their concerns (e.g. to a non-executive or independent director).

### **Conflicts with professional obligations**

Some ERs hold dual roles in their organisation. Where the ER holds a role such as Legal Counsel or Head of Internal Audit or is a qualified or chartered professional such as an attorney or accountant, there is the possibility that a clash will occur between her/his professional obligations and duties to the company as an ER. For example, such employees will have a heightened fiduciary responsibility to raise concerns and uphold a public interest requirement.

### **Ombudsman privilege**

Where the ER is an 'ombudsman', she/he may in some jurisdictions have special professional privilege obligations around non-disclosure (which does not extend to other ERs). The challenge for these individuals is not to be compromised by what they are told and their need to react.

### **Scrutiny**

ERs may be held to higher standards than other employees. They are expected to 'walk the talk' and demonstrate exemplary conduct with their behaviour scrutinised more so than other employees.

### **Exposure**

There is a risk of exposure in relation to taking part in investigations into misconduct (which may be subject to external legal scrutiny) because of the growing need to follow appropriate or even strict protocols, and to demonstrate that they were followed.

### **Unclear scope of responsibility**

Where the ER's remit with regards to integrity risks posed by third parties such as suppliers, customers, joint ventures have not been made sufficiently clear, the ER may be exposed where they handle incidents incorrectly.

### **Variations in local law**

Where an ER represents or acts across more than one national jurisdiction, being sufficiently familiar with differences in local laws and regulations may pose a challenge. For example, in France, the law around data protection and promoting speak up procedures may be limiting on some ER responsibilities.<sup>8</sup> Another example is Works Councils in Europe. Their role and function will need to be taken in to account when handling ethical issues and this will vary in practice across Europe.

Also ERs may have to promote or challenge behaviours which are in accordance with local laws but which represent a lower ethical standard than the company demands.

## **1.3 About this report**

The aim of this report is to prompt ERs, and their employers, to consider whether their evolving responsibilities are likely to pose any increase in personal liability. It aims to provide practical guidance in order to reassure those in an ER role and their employers that exposure to risk can generally be avoided and mitigated.

Its main focus is on employees in roles supporting the Chief Ethics Officer or similar, rather than those with responsibilities at or just below executive or board level who may be exposed to liability arising mainly from their directorship. The focus is also on anticipated or inadvertent exposure to personal liability, rather than that arising from incompetence or intentional misconduct.

Below, **Part 2** will explore the nature of the evolving responsibilities, risks and developments outlined above through the perspectives of a senior Ethics Officer from a global aircraft manufacturer based in Europe, a UK based international law firm and a Chief Operating Officer of a membership association in the US for individuals responsible for ethics and compliance in their organisation.

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<sup>8</sup> See [www.cnil.fr](http://www.cnil.fr)

**Part 3** will briefly outline sources of legal risk including some recent legal developments in Europe and the United States, and will suggest developments on the horizon likely to impact on the risk climate.

Example cases will illustrate where ERs may face personal consequences and liabilities in the context of corporate practice, laws and regulations in those jurisdictions.

**Part 4** provides guidance to ERs on how to manage and avoid risks and so protect themselves from personal liability. It also suggests how senior executives might fulfil their duties to ERs in their organisation, thereby enabling them to perform their role confidently and effectively.

*“I am aware of ERs who have left their organisations because management did not support their decisions, or had asked them to engage in unethical behaviour that conflicted with either the organisation’s or their personal values.”*

## Part 2: Exploring Responsibility and Risk in the Ethics Representative Role

Below, we explore the topic of evolving responsibility and its associated risks through the perspectives of two individuals with experience as senior ethics practitioners in large corporates and two partners of a UK law firm:

- **Murray Grainger** is Head of the Ethics & Compliance Programme Office at Airbus.
- **Tim C. Mazur** is Chief Operating Officer at the Ethics and Compliance Officer Association and was formerly a corporate ethics officer in the US.
- **Stephenson Harwood LLP: Kate Brearley** is Head of Employment Law and **Sean Jeffrey** is a Regulatory Partner in the London office.

### Q1. What do you see as the key trend for the Ethics Representative role, and what is influencing this change?

**MG:** This really depends on the organisation. Different organisations have E&C programmes at different maturity levels. For organisations with relatively mature programmes, one key trend is a focus on efficiency. It is not only the quantity of ERs but also the quality of the ER coverage which matters. This becomes especially important as companies strive to ensure that they have best practices, i.e. that their programmes are effective and their procedures adequate.

**TM:** In the past, ERs have not been taken very seriously by companies in the US. There is no statutory or legal requirement for US companies (unless they operate in a small number of regulated industries, like healthcare or securities) to have ERs and, therefore, over 90% of members of the ECOA are in voluntary roles. Following the number of ethical scandals that we have seen, the ER role is slowly growing in importance and becoming an integral part of the organisation's management structure – this is a clear trend. The result has been a change in expectations of the role and an increased legal framework. If ERs don't meet these new standards, they may suffer.

**SH:** Standards in the corporate culture are becoming more rigorous than ever before, with both lawmakers and regulators asserting the right to punish companies for ethical failure, and to censure companies for having weak systems that allow for failure to occur. We can see this in the approach taken by the UK

financial services regulator and in relation to the UK Bribery Act 2010. In light of these sorts of developments, the role of ERs is likely to become more central to the business decisions that companies take. Standards, practices and expectations can vary dramatically, and in particular can be different outside of the financial services sector.

## **Q2. What might be the consequences of this change?**

**MG:** We are starting to see organisations looking at the performance and longevity of ERs. Complacency must be avoided! What we want is individuals serving as 'positive viruses' on E&C, taking on the ER role with passion, enthusiasm and availability! In reality, as with any group, there are bound to be different levels of experience and performance among ERs, which can be for all sorts of reasons, personal and professional. It therefore becomes important for programme managers to assess quality levels and to consider rotating ERs. An 'ER alumni community' can be a real asset to an organisation's E&C programme! Companies should keep their ER network dynamic and relevant, striving always to improve coverage on ethics and compliance. This becomes essential in cases where the business itself reorganises, but is good practice in any event.

**TM:** Organisations will need to offer greater levels of protection and support for their ERs. Inevitably there will be some 'casualties' before organisations react – there is always a lag time.

A key point in the history of ERs was 1991, when the US Sentencing Commission guidelines became US law. Yet it wasn't until 1996, in the Daiwa Bank case, that we saw the first impact of the guidelines, whereby organisations began to change in response. I think now we are similarly in the midst of one of these lag times.

95-96% of ERs carry no license to practice - only those in the securities industry need a license to fulfil their ER role (while it's true that probably one-half of the 95% are attorneys with a license, the license isn't necessary for their ER role). The ECOA would like to see the ER become a recognised profession in its own right. This would help provide members with support and credibility.

**SH:** The various roles that come under the umbrella of what we might call ERs, must become more clearly defined and this clarity ought to be reflected in both reporting lines and employment contracts. One of the key jobs of an ER is to step in and 'self regulate' certain business decisions and, in order effectively and credibly to do this, both the ER and the company need to be aware of what responsibilities each has been entrusted with. There can be particularly harsh punishments for 'scapegoat' individuals who happen to be the first to be caught out by new laws that punish previously unscrutinised behaviour.

### Q3. What do you see as the generic takeaways from the Berliner case mentioned in Part 1?

**MG:** The Berliner case created a certain amount of confusion. The case occurred under Berliner state law, so does not even apply to Germany as a whole, let alone other jurisdictions in Europe or beyond. So in my humble opinion, this has been something of a storm in a teacup. In practice, there does not appear to have been a significant extension of any legal liability of ERs.

In many cases, ERs will have taken on this role as an additional responsibility. They usually do this for altruistic motives and do not receive additional remuneration. So, if they are exposed to additional liabilities, this is going to be an issue of concern. Shortly after the Berliner case, there was a possibility that people would walk away from their roles as ERs because of the perceived risk and the lack of clarity.

I think what we are generally talking about here is simply the common sense rule. You don't need ERs to be legally trained or to alarm them. They need to be sensible, responsible professionals in their respective fields, effective communicators and capable of dealing with sensitive matters. They need to be willing to speak out themselves through appropriate channels if they feel they have been put in an uncomfortable position or told to 'be quiet' by managers. There is an expectation that ERs will have 'moral capital'. This is a challenging responsibility and not for everyone! You need therefore to look at the procedures you have in place for appointing and training ERs.

**TM:** External stakeholders' expectations of company's behaviour have increased and are even higher for companies with ERs. Companies will suffer if they fail to live up to those expectations.

There was a legal case in the United States six years ago featuring a serious problem with eye products. They convicted the CEO and the Chief Compliance Officer. During sentencing, the US federal judge said, 'How can you say you're an excellent ER if you're not a member of the ECOA?' He suggested that Chief Compliance Officers should do more than take their paycheques. They should pursue excellence — including, for example, being part of the professional organisation — and keep up-to-date with current events and best practice.

In the Dow Corning breast implant case, it has been said that some professional engineers suggested they were told by their business managers that their engineering professional code of ethics didn't count in the workplace - only the company's conduct code counted. This attitude, some believe, contributed to the deaths and other harms from the breast implant scandal. We must design standards of professional conduct for ERs with this scandal in mind, such that an ER code can support them in their fight against solely profit-minded interests pushed by those higher than them in the organisation.

**SH:** In the Berliner case, the professional in question had a specific audit responsibility. He was found to have turned a blind eye to someone else's error which impacted historic audit figures. Sensible takeaways might be:

- be clear about one's responsibilities
- if in doubt, seek help and report anomalies upwards, and if appropriate seek external advice
- be especially careful in cases where public money may be at stake - courts and decision makers can be swifter to exercise power to protect 'ordinary' customers/individuals than they would be to protect large companies or sophisticated investors
- be confident that, even if you are initially rebuffed, it is right nevertheless to proceed with pursuing your concern.

#### **Q4. For ERs, what sorts of personal risks arise from their particular responsibilities?**

**MG:** ERs have to be willing to 'stick their neck out' and speak up on sensitive issues. This may confer career risks in terms of raising issues that management may on occasions not want raised. This takes a lot of courage and autonomy. I would say that, provided you act as ER in a professional manner and don't ignore sensitive issues that are brought to you, you would be considered to be discharging your general duty of care. If ERs accord enough time and ask appropriate questions, they would be expected to have a valid defence if something went wrong. Seek counsel from colleagues, management and appropriate advisors if you're not sure of the appropriate line to take. There is a risk of making yourself unpopular and perhaps a risk of being distanced or ostracised, although personally I have not come across it. A related risk exists were you to be appointed solely by the management of a business area in order to maintain the status quo and to avoid any tricky issues being escalated. This can be mitigated by having appointment approved by both local management and Ethics & Compliance.

**TM:** Losing their job is obviously the most common risk. There will be little chance of the ER successfully suing the company. There is also the risk of getting 'black balled' i.e. persons in the organisation will ruin your reputation to the point where no other organisation will want to hire you. So, in addition to losing your job, you can't find new employment as an ER because you chose to stand for principle over the company and too few want to hire someone who doesn't support the company first and foremost.

Under-resourcing is an area of risk. ERs may end up taking on more responsibilities than they have the staff or budget to manage. This could qualify for negligence in a legal case.

**SH:** It depends on what the particular role of the ER is, but they include: job vulnerability, if the ER is perceived unreasonably to stand 'in the way of' the business or lacks the necessary support from the top; reputational damage, where an employer seeks to undermine an individual's standing in the industry; financial penalties arising out of an investigation into personal misconduct; criminal sanctions including fine and/or imprisonment for serious cases of fraud/bribery, where the ER has 'consented or connived' with the principal perpetrator of the act; and potential harassment, online or otherwise. There are, however, relatively few public cases of ERs facing personal sanction.

**Q5. To what extent is exposure to personal liability an issue of concern for ERs and their employers?**

**MG:** ERs are understandably concerned when they read things in the press like after the Berliner case. Having said that, this issue has now gone relatively quiet once again and there are actually not many relevant decisions from authorities on the point in Europe. There are some Financial Services Authority cases in the UK, but these are not directly relevant to non-financial or non-UK companies.

**TM:** Cases where ERs have been fired for doing their jobs too well number at least in the dozens. We are aware of people who have changed careers solely because of the risk and ambiguity that sometimes surround the role of the ER. The profession has not yet advanced enough to offer ERs an appropriate level of professional protection.

Legislation such as Sarbanes-Oxley (SOX) has increased ERs exposure to personal liability. Some ERs, for example, are required to sign a SOX-inspired document every quarter or year to certify that the organisation has done everything necessary in response to potential misconduct, even though executives higher than the ER ultimately decide the company's response. To further the risk, as is typical in the United States for those who are not 'officers of the company', many ERs are not covered under the Directors & Officers insurance policy, meaning that, if the ER's work-related decisions had to be defended in court, she/he might have to bear the litigation costs personally.

For the most part, an ER isn't the one who 'takes the hit' in a case of misconduct breach – it's the persons who commit the crime and/or the senior people above them who should've known it was happening and/or done something about it. Every ER though, must be prepared to answer the question, When would I ever 'look the other way' if asked to by senior management? Would I ever allow misconduct to happen because, if I didn't, I would get fired? On a day-to-day basis, most ERs feel that they work for good organisations so, if they're asked to look the other way for a relatively minor act, they might do so because

it's better to be working in the organisation to prevent truly serious misconduct and to influence change over time than to 'fall on one's sword' in every instance.

**SH:** One identifiable trend is that reported personal liability cases are concentrated around senior executives with regulatory obligations and directors in relation to their specific duties. Another factor is informal, confidential settlements 'out of court'. The availability of certain defences to liability is driving changes in behaviours. In all cases, insurance (including Directors' and Officers') should be explored as a way of managing the individual's risk, including for damages and personal legal expenses.

#### **Q6. What different kinds of personal liability exist?**

**MG:** There is a reputational exposure for ERs, as people of integrity. They have a responsibility to exhibit 'model' behaviour. This is not exactly the same as personal liability per se, but they do have responsibilities, so their reputation will suffer if they 'drop the ball'.

Companies operating in heavily regulated industries are used to a context of regulatory and financial liability. The lawyers are better placed to advise on the legal liability aspect of the potential consequences if ERs do the wrong thing, but let's face it, this applies to any manager or employee, not just ERs.

**TM:** Take the case of the US college football coach Joe Paterno and his role in the Pennsylvania State University child sex abuse scandal. He had received ethics training. A low-level coach reported his having seen the misconduct to his manager Joe, who then reported it to the Compliance Officer. The Compliance Officer reported the allegation up, but the abuse continued and Joe was aware that management's response was insufficient. Joe reasoned that he had 'ticked it off his to-do list' by reporting it to the Compliance Office and that it was someone else's problem to fix. He took the attitude that they are aware of it, they know what they are doing, and I'm not going to intervene. Ultimately Joe and his boss lost their jobs as a result of this 'tick the box' mentality— Joe died a short time later partly, they say, because of the stress associated with this incident.

Translate this into a corporate setting. How much action by an executive like Paterno, or a compliance officer, is enough or sufficient?

**SH:** ERs in any industry may be responsible to their companies for mistakes made by employees further down the reporting line, depending on what the individual's contract provides. Those in the UK financial services industry can be responsible to the regulator for mistakes made by others in respect of whose behaviour they are found to be responsible.

### **Q7. Is the situation different for different categories of employees?**

**MG:** All employees have a fiduciary obligation towards the company that employs them. There should not be extra duties per se for being an ER. Remember also that certain professionals are governed by their own regulatory bodies and codes of ethics. Those in heavily regulated industries (such as banking or pharmaceutical) may have additional ethical and regulatory obligations. Today we do not yet have a professional body for E&C Officers, but this could be an interesting idea for the future. It could put these types of questions on a level playing field and provide clarity for practitioners.

**TM:** In the US many ERs are not deemed 'officers' of the corporation. If they are officers they have a higher fiduciary duty and are covered by Directors & Officers insurance. There's confusion around this. Some calling the organisation's helpline or calling the ER directly think they are speaking to officers - because of the job title (e.g. Ethics Officer). Often they discover that they're not only when something goes wrong.

**SH:** Yes, it can be, for example in the UK financial industry. Separately, some roles attract direct statutory responsibility for a particular individual such as directors in a health and safety context.

### **Q8. Is exposure to risk different for ERs working in different sectors?**

**MG:** It probably is. The Berliner case involved the financial sector, which is in some ways distinct from many other sectors – you can be in a working-level position in a financial function and find yourself dealing with large sums of money.

**TM:** Precedent in US law, especially as it involves ethics and compliance, is very important. When there has already been a similar case of misconduct within the organisation or indeed, the industry, then enforcement will be more serious. The legal system presumes that you should have been aware and learnt from the misconduct – you should have personally had it higher 'on your radar'.

**SH:** Yes, partially if the sector is regulated, and/or involves multi-jurisdictional use of third party payments. Different regulators can have different rules and standards.

### Q9. What are the key features for your jurisdiction?

**MG:** In the UK, there is a culture in other social arenas of reporting to an independent ombudsman, so the concept of an ER in companies fits quite naturally with this. In France, culturally, it can be challenging. There can be established local loyalties where people would rather deal with issues locally, within their own team, with their manager and trade union. There can be slow take-up of the services offered by the ethics function. Germany is somewhere between the two. The Siemens example means now we can get in front of German audiences in the organisation without problems...crisis represents a great help for organisational change! In the US there are important cultural differences – colleagues there are very much more exposed to compliance requirements, legal requirements and litigation threats. Having said that, when we explain the 'ethics over compliance' argument and show them our presentations and videos, etc, they respond positively.

**TM:** The United States is a highly litigious environment. The legal system is designed to encourage lawsuits and may feel it favours the wealthy and powerful. This creates an imbalance for ERs, where they must accept that they have little recourse if an executive arranges for an ER to lose her job because she was trying to enforce ethics standards against him. The US government features the Equal Employment Opportunity Commission, but it is under-resourced and will support an ER's claim only in limited circumstances (if the ER can prove that she lost her job because of her race, her gender, her age, etc.).

**SH:** In the UK, employers are placing further duties on ERs, in order to prevent mistakes and the accompanying reputational damage and financial penalties.

### Q10. What contexts do you think are likely to exacerbate risks for the ER role?

**MG:** In the main it's when things go wrong and ERs are blamed. For example, we consider that some 75% of the activities of an effective ethics programme involve training, communication and awareness-raising. In other words, the focus is on prevention, not cure. So if organisations experience failures and ERs are implicated, to evoke JFK, we all become Berliners. What I mean by this is that the consequences of an ER being dragged into a compliance or ethics failure are damaging. People always remember one negative over dozens of positives.

Regulation is becoming more complex and increasingly extra-territorial. The UK Bribery Act and the FCPA remain important pieces of legislation which ERs need to be aware of and able to steer the business on.

Also important is the training and support which are being provided to ERs. At Airbus, our Business Compliance Representatives have an induction session and regular events to keep them up to speed, but it is an ongoing challenge which means we must all avoid complacency. Our ERs are in the field and not in a central HQ team. They may not have the benefit of talking directly to experts like the IBE and sharing best practices with peers.

Also, in some cultures the fear of being made a scapegoat if things go wrong is more acute. In that context, extra measures are needed to ensure ERs are protected.

**TM:**

- A 'shoot the messenger' or 'profit over principle' culture
- Lack of access to the board of directors
- When the correct process following the identification of misconduct is undefined
- When ER's budgets are too small, i.e. they are under-resourced
- Lastly, being required to go to the general counsel first will exacerbate risk (they may tell the ER not to investigate and, thereby, she/he will have to follow that order).

**SH:** An environment where the role of ERs is not valued is one of the most significant ways that exposure to risk is increased. Another key factor is whether the business has a history of regulatory, enforcement or litigation scrutiny.

**Q11. What is the most important thing that ERs can do to help themselves? (see Part 4)**

**MG:**

- Ask all the questions they need to
- Make sure they get all the support internally that they need
- Make sure they are comfortable with the perimeter of their responsibilities.

**TM:** Very few ERs in the US have employment contracts. Getting one is an important step towards limiting your exposure to risk. Establish protocols, approved by the board of directors, for raising concerns (e.g., if an allegation comes in about senior management). If an ER raises a concern and is told not to act, they can hold up a board-approved protocol and refuse the order not to act. Leading ERs will create 3 or 4 protocols on multiple topics so they have a clear path about what they can do and there's no question about what they have to do should the need arise.

**SH:** Individuals should be clear about the legal rules and their contractual role. At least the most senior ERs should have a pre-approved process with the board, dictating how the procedure should work in the event of an unresolved or intractable ethics issue or dilemma. In the UK, this should draw on the experience of non-executive directors, the senior independent director and the company's audit committee. External advisers can, in appropriate cases, assist with resolution, for example by means of an independent investigation, reporting to the audit committee.

**Q12. How could companies best respond to these developments in order to support their ERs?**

**MG:**

- Avoid complacency!
- Always challenge yourself to make your ethics programme more effective.

**TM:** Provide the ER a level of authority commensurate with the seriousness and importance of their position. Provide them with enough resources to do their jobs well. Provide them with access to the board of directors for support. Make them part of the senior management team, so that they are positioned well not only to respond to misconduct but can prevent misconduct by being a part of strategic decision-making.

They need to provide ERs with insurance by default, such that their legal costs would be covered by the organisation should they end up in a situation where it's needed. Ensuring legal representation to the ethics officer would make a huge difference.

If there is a criminal case against the ER, the insurance policy will pay for her/his expenses at the beginning of the process. If the ER is found guilty then she/he will have to repay the money to the insurance companies.

**SH:** Companies should empower ERs by increasing their understanding of their role and giving them the right tools. They should give them access to and backing of the board. Policies and resourcing play a critical role. Appropriate insurance and indemnities will provide individuals with reassurance. Finally, companies should plan ethics programmes properly, select ERs whom management trusts, and then provide full support to these individuals in the exercise of their duties.

## Part 3: Legal Trends and Case Examples

We have acknowledged that concerns among ERs about the consequences arising from actually seeking to fulfil their responsibilities are likely to be more widespread than their fear of legal liability arising from a mistake. In addition, there are very few high profile instances of ERs being found liable for failing to take appropriate action. However, Part 1 explained that the position of the ER as a trusted figure and the evolving exposure of such roles could make personal liability and professional stigma more rather than less likely in the future. Generally, this is more so for senior ERs than those who have taken on a voluntary ER role.

This section of the report provides an overview of the legal climate for ERs working in Europe and the United States, giving some recent illustrative cases. It also points to legal developments on the horizon which are likely to impact on the risk climate for ERs. While this legal context applies to employees generally, ERs can find themselves particularly exposed where there is tendency for their specific responsibilities to be 'assumed' rather than formally documented from the outset.

### 3.1 Sources of legal risk for the ER

When any ER takes on new duties, they may find themselves also taking on new responsibilities that could lead to incurring potential liability not obvious at the outset. Legal liability exposure for ERs may arise under civil, regulatory or criminal law.

A sea change is occurring in relation to all three of these sources and also to the quantity of new laws and regulations coming from each source. For example, one of the principal responses to the current financial crisis has been the consideration of changes to regulatory systems. There is likely in consequence to be more complexity as different investigations and legal processes compete. We are likely to see more law and regulation, together with more enforcement under the existing regime.

**Criminal:** Criminal cases raise specific substantive and procedural issues, in particular concerning the higher standard of proof that is required to establish liability in a Court, and the fact that criminal cases may be brought for the wider good. ERs who are directors are at greatest risk under criminal law. Other employees can be punished for failing to detect fraud, for example, but only if this duty is provided for in his/her contract or if there has been assumed responsibility by that individual.

There is a strong interplay between regulatory intervention on the one hand and the criminal law on the other. Prosecutions for crimes such as insider trading and market abuse can be influenced decisively by regulatory action.

**Regulatory:** Regulators are showing an appetite in many jurisdictions for bringing regulatory proceedings against senior business and compliance executives whom they consider responsible for cases of misconduct. This is also of concern when ERs are regulated professionals (such as in the financial services sector – e.g. the Financial Services Authority in the UK and Federal Financial Supervisory Authority BaFin in Germany), or in a regulated sector (such as foodstuffs, commodities, utilities and environment) or a qualified member of a professional body, such as a lawyer, accountant, surveyor or insolvency practitioner, with duties under the rules of their professional body.

**Civil:** Although individuals within a corporate can theoretically face civil liability to an external third party (e.g. in a slander, libel, or defamation of character suit in the US), in practice the liability will more typically be that of the company, not that of the individual. Also, in practice civil liability is significantly more likely where an ER is also a board director. For example, in health and safety law and under the UK Companies Acts, a director may be held accountable for any breaches, meaning he/she may have to pay compensation. This should be an important factor when any employee considers the advantages and disadvantages of becoming a director. If an ER decides not to become a director, they should always be mindful of the risk of acting in such a way that they are treated by the law as a shadow director (and so exposed to the liabilities of a director).

*“Of course, actual involvement in criminal behaviour would expose the rep to personal liability. However, enabling behaviours and looking the other way in the face of serious misconduct would be likely to lead to personal liability.”*

Civil proceedings an ER faces can be broadly divided in terms of those who might initiate them; namely, the organisation itself, a third party or a regulator (or similar). Examples of significant areas of civil liability for the ER include:

- Negligence, misappropriation of assets, abuse of trust or fraud
- Breach of a fiduciary duty, namely a duty which involves going beyond exercising reasonable care and skill, for example not putting oneself in a position of a conflict of interests
- Securities issues such as market abuse
- Discrimination, for example in an employment or procurement context
- Defamation, especially in connection with new media such as social networking websites.

## When liability applies

In the three legal areas, liability will fall on ERs primarily as a result of either their personal participation in wrongdoing or their failure to satisfy a directly imposed duty under a statutory regime or one which the individual has accepted.

**Participation in wrongdoing:** Unfortunately, there are examples of ERs being found liable for inadvertent and advertent participation in wrongdoing. A job title that includes ethics does not of itself offer immunity. ERs who commit a wrong, partner with someone to commit a wrong, or help to conceal a wrong after it has occurred, may expose themselves to personal civil and criminal liability. ERs should familiarise themselves with the laws and regulations that apply to their industry and ensure that they are *personally* compliant with those laws and regulations.

**Failure to satisfy a statutory duty:** In some cases, ERs may be given the duty, to varying extents, of 'policing' their fellow employees for compliance with applicable laws, regulations and organisational policies. However, US and European law does not currently provide that ERs will generally be held personally liable for **failing to detect** wrongdoing within an organisation. The exception is where their contract, documented in writing or otherwise assumed, does specifically include a responsibility to prevent something, e.g. discrimination.

*“Non-reporting of breaches is probably the key risk for our ERs. One of the core responsibilities is to make sure potential breaches are reported to the right levels of management. This can sometimes be unpopular, although our senior management have a very low threshold of negative consequences arising as a result.”*

In the event that wrongful conduct is suspected or committed by another individual within the organisation, ERs may risk personal liability if they **fail to act**, i.e. ignore or conceal the misconduct, or face potential disciplinary action (such as firing or demotion) if they fail to investigate obvious 'red flags' or to disclose. In the US, the Dodd-Frank Act makes illegal any attempt by an ER to obstruct or otherwise undermine the process by which an employee rightfully reports suspected misconduct to the SEC or the Commodity Futures Trading Commission.

Similarly, legal liability for failure to supervise others, i.e. **failure to prevent**, arises only in egregious cases or where the ER is specifically required by legislation to supervise and fails to do so. This is most likely to apply to directors. For example, in the US, ERs who are also members of the board of directors of the organisation can be liable for failing to implement a reporting system or controls or for consciously failing to monitor or oversee the operations of those systems, but that liability is related to board membership, not the professional title of ER.

However, following the example mentioned in the introduction to this report, the German *Bundesgerichtshof* (Federal High Court of Justice) expressly stated that a *compliance officer* (not at board level) is obliged to *avert* criminal acts committed by employees of the organisation to the detriment of third parties. As a result, it would seem that an ER with a compliance role – in principle – can be considered criminally liable following offenses committed not by himself, but by other persons in his area of specific responsibility, such as bribery, tax evasion, fraud etc., by virtue of not preventing the offense. There is, however, no case history yet supporting this.

*“The expectations upon ethics representatives, especially senior ethics officers, are higher today than before. These ethics representatives have to expect personal responsibility not just for their own transgressions, but for enabling or ignoring their colleagues' misconduct. This is especially so in highly regulated industries (such as Pharma) and in large organisations.”*

Although there are similarities between key EU and US bodies of legislation, it is perhaps true to say that the US has a more developed culture of enforcement. In the United States, the specific monitoring or supervisory duties of non-board member ERs actually varies by industry. Presently, ERs in the securities industry are the most heavily regulated. They make up a very unique subset of the ER profession in the US, so it is difficult to say whether the guidelines provide an indication of where the law of personal liability for other ERs might head, but following them may minimise their risk of personal liability under US law.

Then again, securities firms are required by law to have chief compliance officers with primary responsibility for administering those policies and procedures designed to prevent violations of the applicable securities laws and regulations. The SEC is authorised to sanction securities firms and their officers for failing to reasonably supervise another person who is subject to their supervision.

However, two things are worth noting. Firstly, in order to address concerns about the scope of personal liability, having the title of chief compliance officer does not, in and of itself, carry supervisory responsibilities. They have to be formally assigned. Secondly, even where compliance officers are deemed to be ‘supervisors’, US regulation states that they will not be deemed to have failed to reasonably supervise another person if they had reasonably discharged their supervisory responsibilities in accordance with the correct procedures. The SEC’s stated intent is that the monitoring role of a chief compliance officer does not itself subject the officer to liability.

The US Sentencing Commission Guidelines provide sentencing relief for organisations whose chief ER reports directly to its governing body or subset thereof. In most US entities, this is the board of directors or a committee of the board, such as the audit committee or governance committee or ethics committee. If this reporting structure is utilised, ERs face less risk for properly fulfilling their obligations.

### 3.2 Cases illustrating the legal climate for ERs

The cases below illustrate some areas of law where liability may attach. These include publicly known as well as hypothetical or anonymised cases, but there are of course many examples where a settlement is confidential and so the case has not reached the public domain.

#### Bribery

An employee working in the sales team of a US oil company discovers that a colleague has made a cash payment to a customs officer employed by a port authority in an overseas jurisdiction. This was in return for the official ensuring that the company's oil tanker is granted authority to enter the port in a timely fashion. The employee reports this matter to his local ER in Houston, Texas. The part-time ER has come across this situation before and his first response is to take no further action. He (correctly) assesses that the facts describe a 'facilitation payment' (in this case, paying a foreign official to perform a function that he was already duty bound to perform), which is legal under US law. However, upon reading a monthly legal update from his UK legal team, the ER discovers that a facilitation payment is illegal under UK law and, in addition to personal liability, can result in corporate liability, if the company has a UK presence and fails to take steps to prevent payment of the bribe.

The ER reports the situation to his UK legal team, which in turn reports the matter to the UK Serious Fraud Office. The Serious Fraud Office, in this instance, takes the view that the payment is not of a sufficiently large amount to warrant further action, and decides not to pursue the matter. However, as a result of the incident, a decision is taken to provide training on the UK Bribery Act to the entire Houston office, and the company's systems and controls are tested. This ensures that, even if bribes are paid in the future, the company can hope to avail itself of the defence that '*adequate procedures*' were in place to prevent such illegal payments.

Had the employee not reported the payment, he may have found himself facing personal sanction, whether for the omission or for some related failure to act.

## Market Abuse

On 9 June 2009, the compliance officer in question received an order to sell Greenlight's entire shareholding in Punch Taverns plc, despite being made aware that Greenlight had spoken to Punch a matter of minutes before the decision to sell. Six days later, Punch announced a fundraising, with the result that its share price fell by around 30% and Greenlight avoided losses of £5.8m. The FSA took the view that the circumstances of the sell-

*“Giving wrong or inappropriate ethics advice, or when responses haven’t respected policy deadlines or protocols ... may lead to legal cases and appeals.”*

order should have alerted the compliance officer to the risk that the trade was being conducted with the assistance of inside information. The regulator personally fined the individual £130,000 and made the point that it is not simply the job of the regulator to identify and tackle market abuse, but also the duty of compliance professionals and staff on sales and trading desks: *“Approved persons should be in no doubt as to their responsibilities in this area and the FSA will not hesitate to take tough action where they fall down on these”*.

This case shows that the UK financial regulator takes market abuse extremely seriously and will fine and ban ERs even in circumstances where the individual concerned is not the primary author of illicit practices which are uncovered. ERs should always ensure that they are clear on the legal line between right and wrong. Ignorance of law is not a defence, and certain wrongs (such as breach of some regulations) can even involve 'strict liability' meaning that there are no permitted defences or exonerating explanations available to the perpetrator.

## Systems and Controls

A tie-vote forced the SEC to dismiss a case against a former compliance officer for not taking sufficient action to either fire Stephen Glantz, a broker, or better monitor his activities to prevent securities fraud.

*“We perceive that there is a risk of exposure in relation to investigations (which may be subject to external legal scrutiny) and the growing need to follow appropriate processes.”*

Theodore Urban, who headed up Ferris Baker Watts' compliance, human resources and internal audit departments, was alerted to the suspicious activities of Glantz. After investigating further, Urban wrote a memo to the vice chairman of the board and assistant head of retail sales in December 2004 urging that Glantz be sacked. Urban stated in the memo that the firm risked being accused of 'churning customer accounts (i.e. selling accounts with 'little customer benefit but significant commissions')'. The vice chairman

refused to sack Glantz and accused Urban of wanting to 'drive a good producer out of the firm'. They did however, place Glantz under 'special supervision' by Urban.

In 2007, Glantz pleaded guilty to securities fraud, resulting in a fine and imprisonment. The SEC said that Urban's efforts to alert senior management to Glantz's potential wrongdoings and recommendation for dismissal were reasonable. They ruled that it would not have been effective for Urban to overrule the vice chairman and take the matter to the firm's board, threatening to resign if they did not fire Glantz. However, in late 2010, the SEC's division of enforcement action appealed the ruling to the SEC's commissioners on the grounds that Urban violated securities laws by failing to properly supervise Glantz in his capacity of compliance officer. Urban claimed that the 'special supervision' of Glantz failed because he was rarely in his office. He also handled both retail and institutional accounts making it even more difficult to monitor his activities.

Compliance departments do advise brokerages on how to protect themselves from the misconduct of an employee, but US securities laws are vague as to whether they have actual 'supervisory' responsibilities. If they do, they can be the target of SEC enforcement action as evidenced by this case.

This case shows that, for those with oversight roles, there must be appropriate checks in place to identify failings, together with a robust and effective system for resolving issues once they arise.

### **Speaking up**

In the US, Clifford Jagodzinski — a former Complex Risk officer at Morgan Stanley Smith Barney, the bank's wealth management arm — sued the bank in federal court, alleging that it violated the Dodd-Frank Act by firing him in April 2012 for being a whistleblower.

Jagodzinski claims that he told his supervisors in December 2011 that a new wealth manager at Morgan Stanley Smith Barney, Harvey Kadden, was making trades that generated tens of thousands of dollars in commissions but often made clients lose money. According to the lawsuit, he was told not to investigate because of the revenue Kadden generated. Similarly, Jagodzinski discovered that another wealth manager, Bill Siegel, had made more than 80 unauthorized trades that violated the law and to which Siegel admitted, according to the lawsuit. But Jagodzinski's supervisor, David Turetzky, told him not to investigate the case further. Jagodzinski also reported unauthorized Treasury trades by financial adviser Michael Paisano, and alleged drug abuse by an unnamed financial adviser, according to the lawsuit. Again, Turetzky ordered him not to report the unauthorized trades to the legal department or to investigate them further.

In early April 2012, Jagodzinski said that the trades should be reported to the independent securities regulator FINRA (Financial Industry Regulatory Authority). He was fired on April 13th 2012, on the basis of poor performance. The lawsuit said that all but one performance review indicated that he 'exceeded expectations,' and the only performance review that did not say so came after Jagodzinski had raised his concerns. Legal proceedings continue at the time of publication of this report.

Legislation such as the Dodd-Frank Act in the US and the Public Interest Disclosure Act in the UK gives employees reason to become more confident about bringing their complaints into the open since it prohibits company retaliation against those that speak up. This is particularly relevant for ERs as they are under more pressure than other employees to speak up about wrongdoing due to the nature of their role.

### **3.4 Concluding remarks**

Although cases involving personal liability remain relatively rare, the legal trends suggest that the picture is becoming ever more complex, and ERs need to be aware of their particular role and what responsibilities they have accepted in the course of their employment. The perspective of those charged with enforcement has been rapidly evolving making it difficult to rely upon precedence from seminal cases and enforcement actions. Thinking and planning ahead is advisable, so that when an ethical issue or crisis for an ER or for the company does arise, no time is lost in getting good advice and putting in place an appropriate response.

Part 4 looks at what ERs can do to manage their own liability risk and protect themselves, and what their organisations can be expected to have in place to minimise any exposure.

## Part 4: Practical Guidance

Part 4 suggests how ERs can reduce risk and protect themselves from personal liability. The guidance is aimed at all types of ERs, from part-time volunteers to full-time ethics managers.

We also suggest what senior executives might do to fulfil their duties to the ERs in their organisation by mitigating risk, thereby enabling the latter to perform their role effectively.

### 4.1 Guidance for ERs

#### Job description

- A job description that outlines your responsibilities as an ER should be drafted and agreed upon, particularly if yours is a voluntary role. Request that, if there could possibly be personal liability resulting from the role, such as being made aware of corruption or financial irregularities, it is made explicit. Be clear whether the role is likely to involve the awareness and management of significant issues which may have legal and financial implications for the organisation, for example managing a speak up line.
- It may be appropriate to get these additional responsibilities and a possible risk of liability reflected in your contract of employment.
- Your performance goals should make clear your priorities and the standards against which you will be assessed.

#### Dual role

- Consider any disadvantages to holding a dual role (e.g. Legal Counsel and ER) and be aware of any significant conflict of interests between particular professional obligations and those required by the ER role. There may be advantages. An ER who, for example, holds a position as a Group General Counsel may feel empowered to raise ethics and compliance issues with the Board because of their professional credibility as a legal expert.

#### Training/resources

- Ensure that you have received adequate training in the necessary skills to enable you to discharge the role with sufficient authority and independence. Make sure you are clear about what the skills are.
- Specifically, ask about any legal or regulatory implications for the role or specific to the organisation you work for. It may be worth seeking training on the legal context that your particular industry

operates in so that you understand the regulations and pressures that the employees you support are facing.

- Are you clear about the resources you need to fulfil your ER duties and responsibilities effectively? Has your company assessed this?

### Reporting lines

- Ideally, ERs should have at least an informal reporting line into a senior person responsible for ethics in the organisation. It is good practice that this person ultimately reports to a member of the board/executive team. This would demonstrate the importance of ethics and the ER role throughout your organisation.
- The purpose of this reporting structure, which would not include your line management, would be to ensure that you are able to directly flow ethics related information to the right place. It also

*“Most of us have experienced the ‘Is it time to throw yourself in front of the train?’ challenge. Mostly these come up in connection with internal investigations involving the CEO or another senior management team member, or when the Chief Ethics Officer has to bring a matter before the Audit Committee and is either not believed, discounted, or discredited.”*

provides independence and confidentiality and limits conflicts of interest, particularly if your role is voluntary or in addition to contractual duties.

- A Head of Ethics or equivalent would expect to routinely report to one or more executive committees, such as an audit committee or risk committee, on the operation and efficacy of the ethics programme, as well as real-time reports of any allegations of wrongdoing made against senior managers.

### Escalation process

- To further ensure independence, consider the processes available to you for escalating ethical and other misconduct issues that you have been made aware of or have observed. For example, allegations concerning a particular department or function should ideally be managed or escalated through a different function.
- You may need to ask tough questions and put yourself in conflict with other – possibly powerful – people within the organisation. Who can you go to if you are unsatisfied with instructions given to you or the response to a concern that you raised? It is important that you know how to go outside your chain of command. Do you know what the protocol is for this?

- Do you need to be aware of how to access a board level director or a non-executive director? Are you encouraged to or allowed to take the time to investigate whether concerns you have raised are being followed?
- Are there board-approved protocols in place for what an ER must do if an allegation of misconduct is made against an executive or other senior employee?
- Be sure to be clear when it is appropriate to take your concern outside the organisation. This may be influenced by legislation such as the Dodd-Frank Act in the US or the Public Disclosure Interest Act in the UK.

*“ Failure to pursue matters to conclusion presents a risk to ERs. We have just adopted an ‘escalation’ policy in an effort to make sure that matters don’t languish.”*

### **Non-retaliation**

- Is there a clear policy setting out a commitment to non-retaliation in your company? If you are required to escalate what is reported to you, do you feel confident that you will be protected from retaliation by management and those whom the concern involves?

### **Protection**

- If you hold a senior role, such as Chief Ethics and Compliance Officer, are you covered under the company’s Directors and Officers (D&O) and professional indemnity insurances? If relevant, is it possible that this be extended to others in your organisation with an ER role? (see Box 2 on page 36).
- In the US, a company may be required to sue or otherwise harm its employee because of its insurance policy or advice from counsel regarding minimising its own liability. In the US, outside of D&O coverage, ERs could seek indemnification directly from their employers in their employment contract (whether those costs of indemnification are covered under employer insurance or not) – shifting the costs of litigation from the ER to the company.
- Have you been given information on how to seek independent legal advice if the need were to arise and whether the costs will be borne by your company?
- Do you have a clearly defined severance package? This is more common in the US than in Europe. Knowing you have a financial ‘safety net’ in place were you to be dismissed may help give you confidence to challenge misconduct and strengthen your capacity to act independently.

## Legal privilege

- Some circumstances permit companies and individuals to withhold from disclosure the contents of relevant communications between lawyers and their clients, or with third parties for the purposes of litigation. So, if it is relevant to your role, thought should be given during an investigation to whether any documentation (including e-mails and texts) would be externally discloseable at a future point. The rules of legal professional privilege (and similar principles) will be jurisdiction dependent. Great care should always be taken before creating new documents of any kind in a contentious legal situation.

## Checklist for managing and limiting potential liabilities as an ER:

- Be clear on what your role does and does not involve in your organisation!
- Always follow up diligently on concerns and issues that you become aware of, documenting your actions at every stage. This may or may not involve an investigation, but you might need to be able to demonstrate that you, or your colleagues, have treated the concern in a professional manner, according to established protocols and asked appropriate questions to check for substance.
- Know what escalation channels are available to you within your organisation. As an ER, you may need to ask tough questions and put yourself in conflict with other – possibly powerful – people within the organisation.
- Know who you will go to if you are unsatisfied with the instructions given to you or the approach adopted by your organisation.
- Fulfil your delegated responsibility, and when appropriate, necessary or even unclear, involve business line supervisors with direct or ultimate supervisory responsibility over the matter.
- If you don't have the expertise that you need, defer or escalate the issue to someone who does.
- Know how you would handle a situation where the local legal standards are below those of your company or recognised international standards.
- Share your concerns either with a colleague removed from the situation or through established confidential channels.
- Know your walk-away point.

## 4.2 Guidance for employers of ERs

Employers have a 'duty of care' towards their employees. With regards to ERs, this means providing adequate training and resources to carry out their responsibilities. The amended US Sentencing Commission Guidelines place increased pressure on the board to design, implement and monitor effective ethics and compliance programmes and to ensure that those programmes are spearheaded by a senior level ER (such as a Chief Ethics Officer) who reports directly to the board of the company and not to an intermediate executive. Similarly, the extra-territorial reach of the recent UK Bribery Act has increased the pressure on management and boards globally to ensure their company has in place adequate processes and procedures to prevent bribery across international operations. The importance of an effective ethics programme and tone from the top has never been greater.

### Person specification

- Have the key competencies for the role been identified? Does the candidate have the authority, capability, resilience and independence necessary to perform her/his duties effectively?

### Employment contract

- Does the ER role have a job description which clearly sets out responsibilities and liabilities if any?
- Does the newly appointed ER require their contract of employment to be amended to reflect these during their term as an ER?

### Reporting lines

- Does the ER have reporting lines that reduces the risk of unfair dismissal resulting from conflict of interest and ensures her/his independence?
- Is there clear description of correct processes, or remedies, should a member of management want to terminate an ER's employment? For example, consider documentation asserting that the Chief Ethics Officer (or equivalent), or a board level committee or another executive if appropriate, must pre-approve any termination of employment or significant diminishment of duties or compensation of the ER.
- Is there a non-retaliation policy covering ERs that speak up and is it consistently enforced?

### Corporate support

- What measures are in place to support the ER's ability to discharge the role with sufficient authority and independence? Is there adequate training in place to prepare the ER to deal with the variety of ethical issues experienced by employees or other stakeholders, ranging from lack of compliance to harassment, discrimination, human rights abuses etc.?

- Is it relevant or possible for the ER to be covered by existing insurance policies, such as Directors & Officers insurance or professional indemnity insurance (see Box 2).

### **Box 2: Directors and Officers Insurance**

Generally, individuals can be indemnified for the financial consequences (including damages, legal expenses and defence costs) of claims brought by the company or by third parties such as shareholders. Indemnification is also generally possible for the costs of regulatory proceedings and related matters.

There may however, be clawback of legal expenses paid out in the course of the proceedings if the individual is eventually found to be criminally liable or to have breached his or her duties to the company.

The most helpful language from the perspective of an individual's own contract will generally refer to 'indemnification to the maximum extent permitted by law' (or similar).

The purchase of insurance (for example a Directors' and Officers' Insurance Policy) by the organisation for the benefit of the Ethics Representative is usually permissible. The individual would need to come within the definition of the 'Insured' under the Policy to be sure of protection. Policies are available which will pay out even if the organisation itself is unable or unwilling to indemnify. Care should be taken to ensure the Policy provides that there is no excess in relation to a claim by an individual (and only in relation to claims by the corporate).

## Final word

The responsibilities and liabilities faced by ERs are subject to the particular nature of the role in a particular organisation, as well as the varying contexts within which ERs operate across markets, industries and jurisdictions. As demonstrated in the report, while the role of an ER continues to evolve, the legal context lacks clarity as it also continues to develop. Generally speaking, ERs are unlikely to have specific legal risk attached to them as long as they are diligent in fulfilling their responsibilities, ask the right questions and inform the right people of concerns that arise. Employers need to play their part in enabling this and we hope that this report assists them stay ahead of developments on the horizon.

Finally, EBEF and the contributors to this report recognise that being precise about the nature and scale of an ER's exposure to liability has been difficult. There is no single answer and the landscape will continue to change. We welcome feedback and updates from readers regarding anything we may have missed as well as developments that come.



## The European Business Ethics Forum organising partners



The Institute of Business Ethics (IBE) was established in 1986 by businesses to encourage high standards of business behaviour based on ethical values. As a registered charity its vision is to lead the sharing of knowledge and good practice in business ethics.

[www.ibe.org.uk](http://www.ibe.org.uk)



ECO is the professional membership association for ethics and compliance practitioners around the globe and from every industry. Through the ECO, members address the challenges they face every day, and by learning from one another and working together, help foster a global commitment to organizational ethics and integrity.

[www.theECO.org](http://www.theECO.org)



Founded in 1993, the Cercle d'Éthique des Affaires (Circle of Business Ethics) is the benchmark institute in France for the development of fresh research into business ethics issues and, in particular, their effect on corporate management and governance.

[www.cercle-ethique.net](http://www.cercle-ethique.net)



The objective of the European Business Ethics Network (EBEN) is to promote the principles of corporate ethics, of corporate governance, social responsibility in the academic community, EU, public and private sector, non-profit organizations and civil society. Our mission is to promote ethics and excellence in businesses, to increase awareness about ethical challenges in the global marketplace and to enable dialogue on the role of business in society.

[www.eben-net.org](http://www.eben-net.org)

For more information on EBEF visit: [www.ebef.eu](http://www.ebef.eu)



*The Evolving Responsibilities & Liabilities of Ethics Representatives: A practical guide* is the first report published jointly by the organising partners of the European Business Ethics Forum.

The report considers the extent to which ethics representatives are being exposed to personal and professional risks as a result of both the evolving nature of their role and responsibilities and developments in the legal and regulatory context within which they operate.

Drawing on the experience of practitioners and lawyers, the report provides practical guidance to ethics representatives on how to avoid risks, and suggests how companies might fulfil their duty of care to their ethics representatives thus helping them to perform their roles effectively.

This report will be of practical use to those in an ethics representative role (ethics officers, ethics ambassadors, compliance officers etc.), their employers and others wishing to understand the requirements and challenges of the role.

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