Kaisa Sorsa (ed.)

PROACTIVE MANAGEMENT AND PROACTIVE BUSINESS LAW

A Teacher's Guide

TURUN AMMATTIKORKEAKOULU
TURKU UNIVERSITY OF APPLIED SCIENCES

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PREFACE

The aims of the *ProActive Management and ProActive Business Law* project were two-fold: firstly, to develop core curricula and teaching modules on proactive management and proactive business law in a master's degree, and secondly, to develop the contents of the concept of proactive law. The project forms a continuum with a research and development project entitled Corporate Contracting Capabilities conducted in Finland in 2006–2009. The funding allocated by the European Union Life-Long Learning Erasmus Curriculum Development Programme made it possible to start the project in October 2009. The project was completed in December 2011.

The primary outcomes of the project are the core curriculum, where the pedagogical background for the teaching modules is explained, the teaching modules themselves and the Handbook which can be used as the course reader or textbook. This *Teacher's Guide* is an accompanying volume to the Handbook and will provide teachers and instructors the rationale behind the knowledge base offered in the Handbook, pedagogical views and assessment tools as well as suggestions for course plans and schedules, and proposals for assignments, quizzes and questionnaires. The core curriculum consists of courses altogether of 24 ECTS and in addition the teaching materials. The teaching modules are organised into three topics: 1) Proactive Business Law and The Prevention and Resolution of Disputes, 2) Proactive Contracting and Risk Management and 3) Proactive Management and Business Ethics. In addition to these, academic articles on the topics have been published and references are given in the bibliography.

All the partners to the project consortium are institutions of higher education. The eight partner institutions represent both business schools and faculties of law at science and research universities and universities of applied sciences; both undergraduate and graduate schools. One of the institutions is a higher education centre which offers postgraduate and university studies, vocational training, secondary education, and continuous, occupational and language training. One partner is a small law firm. The lead partner responsible for

the project administration is Turku University of Applied Sciences. The eight partners represent both Southern and Central European countries. The partner institutions are:

Turku University of Applied Sciences (FI), Hogeschool Utrecht (NL), Florida Centre de Formacia (ES), The University of Aarhus (DA), FerensLegal (NL), ICN Business School (FR), Universidade de Santiago de Compostela (ES) and The University of Turku (FI).

BACKGROUND AND COMMON FRAME OF REFERENCE

❚ BACKGROUND TO THE CORE CURRICULUM

Kaisa Sorsa

The practical aim of this curriculum and teacher's guide for ProActive management and ProActive Business Law (PAM PAL) is to offer the potential instructors of these courses a curriculum consisting of course modules of 24 credits (ECTS) in extent. The curriculum will explain the pedagogical background of the teaching modules on proactive management and proactive business law. It explains the core competences developed and defined in the project and how the core curriculum and teaching materials can be used at master's and bachelor's levels depending on the programme.

One of the findings of the contracting capabilities research project[1] was that business professionals need not only proactive contracting competences (Sorsa 2009b; Sorsa & Salmi-Tolonen 2006), but also to expand their knowledge and skills concerning business ethical issues (Sorsa 2008a; 2008b; 2011a) and law in pursuing opportunities for value creation in today's globalised economy. Respectively, legal professionals working in business environments need more knowledge concerning business, ethical issues in today's economy and in general how to manage in cross-professional legal and business environments.

There is a need for more innovative educational solutions for teaching proactive management and proactive business law in an integrated way. Sustainability as a contextual element for the businesses today, and even more so in the future, offers concrete examples of the business reality. Business professionals today have to solve difficult problems – we want to educate students who will be able to innovate by giving them insights into proactive management and proactive business law. These insights are based on a combination of the research fields of proactive law and contracting, risk and opportunity management, research on innovations and on different aspects of sustainability.

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1   The project was funded by the National technology Agency of Finland (Tekes) and the Academy of Finland (Liike 2). Kaisa Sorsa and Tarja Salmi-Tolonen participated in the project. Sorsa was the project manager for the sub-project at Turku University of Applied Sciences. Soili Nystén-Haarala was the project manager for the whole project.

Ethical issues in business have risen to the agenda as a consequence of a need for more sustainable production and consumption in the global economy. Today, organizations are becoming more and more interdependent, but increasingly different parts of these organizations display more independent behaviour and make independent choices. Consequently, the importance of systemic thinking is growing. Global climate change, health and food problems, communication challenges and the sustainability of our planet will require proactive development of systemic innovations and not only autonomous innovations. Autonomous innovations have a character of modularity; systemic innovations, however, have a character of integrality (Kaivo-oja 2011, 4–5). The radically changing system performance requires an active control over the dynamic configuration of multiple simultaneous and complementary systems and activities. It requires proactive management of a change network that directs drivers of complementary innovations systematically to envisioned goals. It assumes empowering all associated stakeholders, such as future business managers, consumers, civil society actors, public sector employers etc., by giving them active ownership of the change process (Van Dorp 2011, 23)

Already in 2004, Roome (2004) stressed that the experiences and capabilities developed in dealing with environmental issues will become increasingly strategic and important to all areas of business. This observation was supported by Sorsa's study (2011a) on global value chain management, CSR and the role of proactive law as a governance tool. These new capabilities include the capacity to build relationships for innovation, learning and change with a variety of partners, to create products and operations that are more sensitive to local contexts, together with the ability to judge between the competing interests and needs of a diverse set of actors (Roome 2004).

The penetrating idea throughout the development of the PAM PAL curriculum and teaching is that students from different fields of study (business schools, law schools, technical fields) learn in the same groups. The idea is to educate our students to communicate and cooperate with different professionals with different background knowledge. In order to solve complex challenges we need a group of professionals from different disciplines. Real-life problems are not one-discipline concerns: they require multidisciplinary and, more commonly, interdisciplinary approaches.

1.1 TEACHING MATERIAL BASED ON MULTI- AND INTERDISCIPLINARY RESEARCH

Traditionally, disciplines have been very dominant in the organization of science and education systems as well as in the career systems. Traditional "disciplinary science" is where the academic interest in "pure" knowledge prevails. The aim is to produce theoretical knowledge of nature – physical and human. The locus of this kind of a disciplinary system is in the universities organised along disciplinary lines in faculties and departments. A disciplinary research field can be defined as a group of researchers working on a specific set of research questions, using the same set of methods and a shared approach.

In an interdisciplinary or multidisciplinary field, again, attention is focused on application-oriented knowledge. The objective of research is not only to discover the "laws of nature" but also on studying artefacts and the operation of complex systems.

> In multidisciplinary research, the subject under study is approached from different angles, using different disciplinary perspectives. However, neither the theoretical perspectives nor the findings of the various disciplines are integrated in the end.

> An interdisciplinary approach, on the other hand, creates its own theoretical, conceptual and methodological identity. Consequently, the results of an interdisciplinary study of a certain problem are more coherent, and integrated.

Education in Finnish universities and Universities of Applied Sciences as well as other European universities is required to be based on academic-scientific research conducted with contested methods. The previous research projects have broadened the scope of proactive law. Our teaching materials have been produced based on research conducted using non-disciplinary approaches because we wanted to use application-oriented knowledge and to develop outcome orientation competences. The piloting of these three teaching modules and the use of materials have deepened our understanding of teaching and learning.

1.2 EUROPEAN QUALIFICATIONS FRAMEWORK AS THE BASELINE

The European Qualifications Framework (EQF) has defined a set of general criteria in descriptive statements – descriptors – indicating the learning outcomes relevant to qualifications at bachelor and master's level education. These are common to all different educational fields. The curriculum development process is based on these general qualification requirements which are applied to our new curriculum on "ProActive Management and Proactive Business Law". Level 6 represents the bachelor's degree and level 7 applies to the master's degree. The learning outcomes from *knowledge* perspective are defined to be:

Level 6: advanced knowledge of a field of work or study, involving a critical understanding of theories and principles.

Level 7: highly specialised knowledge, some of which is the forefront of knowledge in a field of work or study, as the basis for original thinking and/or research and critical awareness of knowledge issues in a field and at the interface between different fields.

The outcomes of knowledge seem to aim a high level and critical understanding of theories which mean challenges to interdisciplinary courses. As level 7 requires highly specified knowledge, this means that we have had to face the challenge of deciding what the fields of knowledge are that we consider being in the forefront of proactive law and proactive management.

In the proactive law chapter, we have decided to focus on self and private regulation issues combining them with the knowledge related to system level innovations. Both themes have become relevant to global business but they have not so far become part of the higher education courses. Both themes require critical awareness of knowledge at the interface between different fields, e.g. self and private regulation and their relation to law or quality management, risk and opportunity management issues in business studies or system level innovations and their relation to traditional innovation research and innovations in the regulatory field.

The EQF outcomes relevant to *skills* are defined as:

Level 6: advanced skills, demonstrating mastery and innovation, required to solve complex and unpredictable problems in a specialised field of work or study.

Level 7: specialised problem-solving skills required in research and/or innovation in order to develop new knowledge and procedures and to integrate knowledge from different fields.

Finally, the *competences* are described in the European Qualifications Framework in terms of responsibility and autonomy. According to these requirements:

Level 6: students should manage complex technical or professional activities or projects, taking responsibility for decision-making in unpredictable work or study contexts and take responsibility for managing professional development of individuals and groups.

Level 7: students should manage and transform work or study contexts that are complex and take responsibility for contributing to professional knowledge and practice and/or for reviewing the strategic performance of teams.

These competences highlight the student's capability of immediate application of a range of profession-oriented attributes, and an independent approach to complex professional demands as well as managerial competences – even immediately after completing the bachelor's degree. On master's degree level the requirements become higher and strategic thinking is underlined. These requirements set by the EQF induce a challenge to education which means moving from a rational, orderly system of knowledge provision to a system that empowers creative, competent knowledge handlers who can cope with the demands of supercomplexity (Barnett and Hallam 1999). To meet this challenge, the university needs to be creative and enable multidisciplinary learning that can be harmonised with a multitude of professional value structures to serve an increasingly diverse student population.

At the national level, for instance, in Finland, these competences are translated into generic competences by the Rectors' Conference of the Finnish Universities of Applied Sciences (ARENE). These generic competences for universities of applied sciences are learning, ethical, working community, innovation and internationalisation competences.[2] These national competence requirements can vary from country to country but these upper level competences are common to all European higher education institutions.

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2   The Rectors' Conference of the Finnish Universities of Applied Sciences (ARENE) has developed national guidelines for the Finnish higher education organisations of applied sciences in 2010.

There are notable differences between the curricula of the participating organizations in the PAM PAL project. The major differences are the disciplines – some organizations educate business professionals, some lawyers. Another difference is between the majors – in business subject (TUAS, DE, ICN, FLORIDA), the major is generally a business topic (marketing, entrepreneurship, accounting, business and law, law and economics), whereas the University of Aarhus offers a combination curriculum of business and law and economics. The Utrecht University of Applied Sciences awards a bachelor of laws degree and the traditional science and research universities, the Universities of Turku and Santiago de Compostela, award degrees in law at bachelor's and master's levels with the major in law. In the TUAS's bachelor's degree, the first one and a half years of the basic studies are business studies and after that, one can focus on legal studies. These differences between the partner universities have posed a challenge to incorporating the new curriculum into their programmes.

Keeping in mind these general European EQF requirements, we have developed the core competences of proactive management and proactive business law and will explain them in chapter two. Teaching proactive management and proactive business law aims at developing creative thinking, cross-professional communication and networking, multi-disciplinary analysis and outcome orientation competences. These competences emphasise the behavioural outcomes of our students after completing the PAM PAL studies.

1.3 ABOUT THE TEACHING AND LEARNING METHODS

The objective of the studies will be improving the learners' practical skills in proactive thinking and behaviour in the context of management and business law. The outcome orientation is an especially important competence in proactive law and the prevention and resolution of disputes. Proactiveness will turn into willingness and ability to take action in order to change a situation (in business or as a consumer or customer) to one's advantage.

Proactive behaviour in general involves tasks, such as recognising business challenges, applying intellectual rules in order to classify them, developing a cognitive strategy for dealing with them, and taking some form of action to implement the chosen strategy. The proactive approach brings a totally new and innovative aspect to the mainstream legal education and to business studies showing how law affects the firm's competitive environment and value chain.

In terms of pedagogy, higher education (HE) needs to educate and train graduates that are capable of dealing with and thriving within complexity. Barnett and Hallam (1999, 152) argue that we need to see a shift from what they call 'Pedagogy I' – the established approaches to and conceptions of learning and teaching, to 'Pedagogy II' a "pedagogy for supercomplexity [which will] …enable graduates to purposively effect change in the world, and to have the enduring will to do so". Currently, knowledge is sourced, combined and disseminated in many parts of society, formally, informally and non-formally, with knowledge transfer and learning facilitated by many of the new media-centred tools. Education is no longer the main supplier of knowledge. The impact on education is that it must redefine its role as a knowledge provider, and help teach students to effectively deal with societal change. They must be taught to exercise choice in the face of a far greater complexity. Students must be taught how to source, combine and judge knowledge. (Van Dorp 2011, 7)

Turku University of Applied Sciences (TUAS) has emphasised the innovation pedagogy approach in its education development. Innovation pedagogy redefines how knowledge is absorbed, produced and used in order to create innovations. According to the Rector of TUAS, "the philosophical foundations of innovation pedagogy are based on the humanistic way of understanding people as creators of their own future". This kind of teaching calls for applied research and development activities that support regional development and the production of innovations in working life are integrated into multidisciplinary teaching in accordance with the principles of innovation pedagogy. The education offered by the university promotes entrepreneurship and includes service activities while taking into account both the needs of the region as a whole as well as the constantly changing trends of working life. These guidelines have also directed the research conducted by the TUAS staff in this project.

For the PAM PAL curriculum the above described pedagogical approaches have been found useful. Such pedagogy will need to attend to the domains of knowledge, action and self, such that in addition to learning about things, students will develop a capacity to act on that knowledge and will connect that knowledge and actions to their own lives and behaviour. The pedagogical challenge then "is to produce a set of experiences that in turn encourage the formation of human qualities able to engage effectively with multiple frameworks, contesting value systems and open-ended action situations" (Barnett 2000, 263).
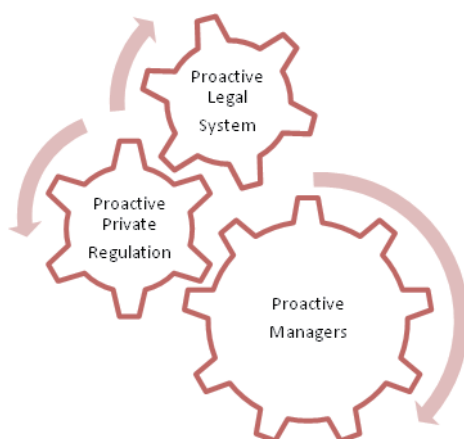
FIGURE 1. *Proactive actors can make the change.*

As a result of the application of these kinds of pedagogical approaches we will hopefully have proactive managers who will be the change makers of the future (See figure 1). As law *per se* is not a permanent institution and as it is an output of individuals, the idea in this curriculum is to develop students' abilities and capabilities to enable them to participate and make changes also in the field of regulation. We also suggest how the legal system in itself can be proactive and continuously self-correcting (discussion of self and private regulation systems). It develops in time and it can have both permanent and dynamic elements. If our students become proactive actors in the society, they will be able to participate in the society's development more efficiently than those who are reactive. Our students may be working either in companies, non-governmental organizations, in the public sector and furthermore they are also consumers. Proactive skills are needed in all these roles. In order to reach these outcomes we need to develop our learning environments so that they also encourage students into action and taking initiative.

Many educational institutions are moving towards problem-based learning as a solution to educating students who will be creative and can think critically and analytically, and solve problems. Knowledge is no longer an end but a means to making better problem solvers. Problem-based learning has become increasingly popular in educational institutions as a tool to address the inadequacies of traditional teaching. It encourages students to question what they have learnt and to associate with previously acquired knowledge (Teo

& Wong, 2000). Problem-based learning is seen as an innovative measure to encourage students to learn *how to learn via real-life problems* (Boud & Feletti, 1999). Problem-based learning teaches students to solve problems and concretises theoretical issues.

We aim at raising the student's proactive thinking and skills by using innovative teaching methods and techniques. As the possibilities to use different pedagogical techniques depend partly on the size of the group of students, it is the competence of the teacher to analyse which methods and techniques will be feasible in each case.

1.4   THE STRUCTURE OF THE TEACHER'S GUIDE

This Guide is organised into four major sections: The *Common Frame of Reference* section clarifies the concept of proactive behaviour and the background and rationale to the *Competence Chart* and explains how the tool for assessing development is constructed and how it can be applied with the help of clearly defined detailed criteria – rubrics. The *Proactive Law and the Prevention and Resolution of Disputes* section accompanies the respective Handbook section and explains first of all the regulatory level of proactive law and then the proactive law approach, giving practical suggestions for course organization, teaching methods and assignments. The *Proactive Contracting and Risk Management* section explains how to use contracts as a risk and opportunity management tool both in bilateral contracting situations as well as in the value chain context and what the role of standards, self and private regulation tools and the importance of learning how to measure that the goals set for contracting and business in general. In addition, this section clarifies and accentuates the role of contract management as an organic part of the organizations. The *ProActive Management and Business Ethics* section combines the proactive law and proactive management issues and aims to further develop the discussion on innovation towards system level innovations. The final section Closure draws together the ideas and topics presented in the Teacher's Guide.

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2 THE COMMON FRAME OF REFERENCE

Amparo Camacho, Enrique Garcia & Patricia Santateresa

2.1 THE CONCEPT OF PROACTIVE BEHAVIOUR

The concept of proactive law is currently developing and therefore it has various different contents and meanings. The concept of proactive behaviour at the organizational level has been the focus of research by authors such as Bateman and Crant (1993), but, for the purpose of the PAM PAL project and its outcomes, it was necessary to define the concept of proactiveness as related to proactive law and proactive management. For this purpose, the PAM PAL competence framework was developed. It describes the proactive profile understood as a set of professional achievements that a person shows when faced with different situations at work within their own occupational area, once the training process has been completed.

Professional competence is a comprehensive set of capabilities that people bring into play in real work situations to solve problems they are faced with, according to the level of professionalism and characteristic of the different professional areas. The competences can be formulated by analysing the practice in the various work situations in which the person can perform, with the utmost professionalism in their performance, identifying the skills involved in the realisation of the task to be developed. Also, the competences are characterised by the transfer of knowledge and skills to other contexts, and moreover are completed with the acquisition of new knowledge, skills and abilities.

Thus, it is advisable, for example, companies to develop a requirement profile as the basis for planning recruitment processes since it defines characteristics to be fulfilled by persons occupying the jobs, so they can carry out the functions and tasks involved in an efficient and effective, safe and satisfactory way. In this regard, the requirement profile must stem from an analysis of how people

who perform successfully at the job behave, and the job is defined according to these characteristics. As a result, the requirement profile is composed by a set of perfectly observable conducts (See Figure 2).

FIGURE 2. *The behavioural iceberg according to the trait approach (Pereda and Berrocal, 2006).*

In the past, organizations adopted a trait approach, which dealt with constructs such as intelligence, aptitude and personality, but all this is not directly observable, even though many studies show the validity of intelligence and psychological tests to assess skills and personality. These traits are located in the invisible section of the behavioural iceberg (Figure 1.1) and are defined as follows:

1) Motives: They are considered the needs or ways of thinking that drive or guide the conduct of a person, such as the achievement motivation.

2) Personality traits: It is the general predisposition to behave or react in a certain way, such as tenacity, self-control, etc.

3) Attitudes and values: It is what the person thinks, values, does or is interested in doing, such as teamwork orientation.

4) Knowledge: Includes technical knowledge as well as knowledge related to interpersonal relationships, such as IT skills, market knowledge, etc.

5) Skills and abilities: Ability of the person to carry out a specific type of activity, such as numerical reasoning, public speaking skills, etc.

By applying the trait approach, personal issues that underlie behaviour (i.e., observable conducts of the individual) are defined and assessed.

However, using this approach may involve a number of risks, because some variables are assessed in order to make predictions about performance in other subjects, even if the relationship between the two is not significant. Nevertheless, the search for greater accuracy in predictions and more valid assessment tools is how we reach the concept of competence in the business context.

That being said, the adoption of a competence-based approach does not entail a break with the trait approach. Assessment of people's intelligence, aptitude, personality, attitudes, interests and motives is not only still used but it is also very important in order to make decisions in relation to company staff. In turn, the competences refer to conducts that are performed when knowledge, skills and personality traits are put into practice, and are considered an underlying characteristic by several authors (such as Boyatzis, 1982), as it is seen as a feature we can observe and which depends on individual characteristics, but others differ on that and define competences as observable behaviours that are above the surface of the iceberg and are composed of:

1) Knowledge that will enable the person to perform according to the behaviours described in the competence.

2) Know-how: Individuals should be able to apply the knowledge they have in order to solve problems arising in their workplace. In short, skills and abilities of the individual.

3) Social poise: It is not enough to perform and carry out the tasks required by the job in an efficient way, but also to behave according to rules and regulations of the organization in general and one's work group in particular. Attitudes and interests.

4) Willingness to do: The person must perform according to the behaviours included in the competence, this being a motivational aspect.

5) Ability to do: This relates to the characteristics of the organization, to people having the means and resources necessary to perform according to the behaviours included in the competence.

Competences are produced by the combined effect of these five components (Figure 3), and in this respect authors like Le Boterf, Barzucchetti and Vincent (1993) indicate that competences are defined and listed within the specific context in which they must be implemented, so a competence is not just knowledge, skill or attitude in isolation, but the integration of all components in job performance.

FIGURE 3. *Competence constituents. Adapted from Le Boterf, Barzucchetti and Vincent (1993).*

As mentioned earlier, a competence may have various associated skills but it is recommended to focus on the ones that best represent or identify with the competence characteristics one intends to emphasise. For instance, as we are speaking about proactive behaviour, we may focus on those skills which represent proactiveness and discard others which are more general.

Pro-action involves creating change, not merely anticipating it. It does not involve only the important attributes of flexibility and adaptability towards an uncertain future. To be proactive involves taking the initiative to act. Professionals who are proactive engage in the following behaviours (Bateman & Crant, 1999):

1) Scan for change opportunities.

2) Set effective, change-oriented goals. Proactive behaviour is focused on accomplishment, but particularly on accomplishment with real impact.

3) Anticipate and prevent problems.

4) Do different things, or do things differently.

5) Take action. Much has been written about the need for an action orientation, including Peters and Waterman's "bias for action" (1982).

6) Persevere. Proactive people persist in their efforts. They do not back off from the obstacles, they do not take no for an answer, they do not settle for less, and they are not satisfied with being able to say after a defeat, "Well, at least I tried."

7) Achieve results. Implicit in the comments above is a clear result orientation. Change must not merely be thought about or attempted, but achieved.

Otherwise, generally speaking, pro-activeness requires a great ability to switch between different competences. Thus, to develop a proactive behaviour, an individual needs to have the big four proactive competences, which are described below in detail.

For every competence, the associated skills, attitudes and knowledge have been identified. In order to assess competence acquisition, various performance levels and indicators are found.

2.2 CORE COMPETENCES

As already noted, before creating the PAM PAL modules it was necessary to define clearly what was understood by Proactive Management and Proactive Law within the context of the project. For this purpose, and taking into account the EQF descriptors for the learning outcomes at bachelor's and master's levels, a common framework for reference and the four PAM PAL core competences were produced.

Below, these four core competences are described. Each competence is expressed in terms of:

- Description of the competence as agreed by the project partners.

- Dimensions of the competence: the competence is described in terms of attitudes, knowledge and skills.

- General indicators: general characteristics of a person who masters the competence.

- Performance levels and indicators: each competence is described in terms of 3 performance levels which describe the observable conducts associated to the competence. Each level is expressed in a scale of 5 indicators, from lower to upper level.

Using the competence framework as a basis, and with the aim of making the assessment task easier by course facilitators and well as company instructors, a rubric has been produced. Rubrics are assessment tools that specify the level of performance expected for several levels of quality. The PAM PAL rubric is described in detail in subsection 2.3.

1) Creative thinking:

DESCRIPTION: Ability to develop new ideas and concepts in order to respond to needs, problems or challenges, by means of an original and previously non-existing result.

Attitudes:
- Curiosity
- Willingness to learn
- Openness and receptiveness to change
- Consideration of ideas generated by others
- Risk-taking attitude, entrepreneurship

Knowledge:

- The creative process
- Lateral thinking: (also known by "thinking out of the box") involves the solution of problems through an indirect and creative approach
- Team thinking: co-operation with others in jointly solving problems creatively within a team
- Idea evaluation and selection
- Practical creative thinking tools to generate ideas and solve problems creatively
- Out-of-the-box thinking

Skills:

- Originality, ability to generate ideas
- Pure (philosophical) analysis, bird's eye viewing
- Co-operation
- Flexibility
- Problem solving, pragmatic problem solving
- Ability to foresee problems and solutions that are not yet developed (it is actually a skill, not an attitude)
- Alternative seeking
- Ability to challenge limitations and beyond

Thus, the creative competence is associated with divergent thinking. Some ability to get out of pre-established thinking is required in order to generate creative proposals. In turn, creative proposals activate divergent thinking, not only in the person who creates the new proposal but also among those who share it, who have the opportunity to face reality through a new perspective.

In addition, it requires some spontaneity and sense of wonder, and in turn can be influenced by self-esteem. Low self-esteem inhibits creation for fear of disapproval and too high self-esteem can lead to very creative but perhaps inappropriate proposals. Adjusted self-esteem allows exercising creativity without fear of social disapproval, but being sensibly aware of what is original, appropriate and enriching and what not.

Similarly, an individual who masters the creative competence will be able to generate and transmit new ideas or generate innovative alternatives to problems or situations that arise, these being high-quality and applicable ideas that affect nearby people and/or processes.

General indicators of the creative competence:

1) Fluency, flexibility, ability to generate solutions.

2) Originality: original, innovative or ground-breaking ideas.

3) Attitude / worldview: critical thinking, unlimited open-mindedness.

4) Method: by analogy or imitation, by association or integration, spontaneity.

5) Ability to do something with the ideas generated: to express them, communicate them, translate them in a formal way, put them into practice.

Performance levels and indicators:

1) Generate and communicate new ideas or generate innovative alternatives to known problems or situations. Indicators:

   i. Provides input to ideas, situations and problems, when faced with them.

   ii. The proposed ideas are innovative in content, implementation, etc.

   iii. Is aware that there are several ways of doing things.

   iv. Based on what he/she knows, creates new ideas or solutions to problems.

   v. Communicates or expresses new ideas to others.

2) Generate original, quality ideas that can translate in a formal way and defend them when faced with known or unknown problems and/or situations. Indicators:

   i. Offers high-quality quality suggestions to problems or situations that are presented.

   ii. The proposed ideas are original or unconventional.

   iii. Open-mindedness to new ideas and perspectives.

   iv. Is able to integrate knowledge from various disciplines, sources or areas to generate new ideas to known or unknown problems or situations.

   v. Is able to formally capture the ideas generated.

3) Contribute original, practical and implementable ideas and solutions, flexible and complex, involving both oneself and processes one is involved in, as well as people and processes nearby. Indicators:

    i.   Is able to generate ideas whose consequences go beyond one's scope or field of action.

    ii.   The ideas proposed are breakthrough in content, implementation, etc.

    iii.   One's attitude does not pose limits to the generation of new thoughts.

    iv.   Uses specific methods to enhance creativity.

    v.   Is able to develop ideas generated.

2) Cross-professional communication and networking:

DESCRIPTION: Ability to act autonomously as well as to co-operate, communicate and solve disputes in interdisciplinary teams or diverse professional settings.

Attitudes:

- Willingness to work and interact in professionally diverse settings and teams
- Openness and receptiveness as regards diversity
- Empathic attitude
- Encouraging communication and exchange
- Willingness to share (knowledge, experience…)
- Willingness to avoid emotional bias
- Openness to criticise and receive critical feedback

Knowledge:

- The principles of teamwork and networking
- Teamwork and networking techniques
- Communication and interpersonal relations
- Emotional and social intelligence
- Negotiation techniques
- Change and process management

Skills:

- Autonomy
- Assertiveness
- Empathy
- Effective communication (includes active listening and responding skills)
- Ability to co-operate
- Interdisciplinary understanding
- Multidisciplinary interested and educated
- Teamwork
- Negotiation skills
- Networking skills

The cross-professional communication and networking competence relates to the promotion of a communicative and constructive relational context in which the individual interacts with the rest of the team members, participates and shares ideas, encourages honesty and sincerity and contributes to reaching an inclusive consensus.

Indicators measuring this capability include the ability to listen, sincerity and honesty, the ability to promote constructive dialogue and respectful interaction with people.

Performance levels and indicators:

1) Establish dialogic relationships with peers and supervisors, listening and speaking in a clear and assertive way. Indicators:

   i. Listens.

   ii. Says what he/she thinks and feels about an issue.

   iii. His/her way of saying things prevents his/her partners from going on the defensive.

   iv. Asks questions to better understand.

   v. Expression is clear and concise.

   vi. Non-verbal language is appropriate and consistent.

2) Use dialogue and understanding to build partnerships. Indicators:

    i. Listens and understands ideas from others even if they are opposed to his/her own.
    ii. Uses constructive criticism. Clearly says what he/she thinks and feels and regrets hurting partners' feelings.
    iii. Communicates in a natural way, creating a climate of equality and partnership.
    iv. Is respectful of the partners both in content and in form.
    v. Adapts verbal and non-verbal communication to the situation and the needs of partners.

3) Develop a sincere and empathetic communication aimed at constructive dialogue. Indicators:

    i. Is receptive to communicative proposals from others, even to criticism. Listens to enrich the dialogue.
    ii. Offers suggestions for quality communication focused on constructive dialogue.
    iii. Creates contexts based on honesty and sincerity among participants.
    iv. Communication is aimed at finding shared meanings and negotiating differences.

3) Multidisciplinary analysis:

DESCRIPTION: Ability to identify the key factors for success and opportunities based on the necessary scientific analysis, including interdisciplinary analysis and best business practice analysis.

Attitudes:

- Willingness to move beyond the "comfort zone" of one's discipline in order to understand ideas, concepts, techniques and methods from other disciplines
- Openness to understanding new ideas, concepts, techniques and methods
- Self-confidence
- Humility
- Self-criticism, self-reflection

Knowledge:

- Interdisciplinary research methods
- Data mining
- Basic knowledge of supplementary disciplines e.g. in case of law: finance, psychology, sociology, communication, management etc.

Skills:

- Ability to use cognitive as well as practical skills from relevant sciences
- Ability to analyse complex and unpredictable problems in specialised fields of work or study
- Ability to carry out scientific analysis incorporating, amongst others, legal, ethical, management, CSR, risk and conflict management aspects
- Ability to understand new ideas, concepts, techniques and methods as well as ideas, concepts, techniques and methods from other disciplines
- Interdisciplinary communication skills
- Problem-solving and problem-formulation skills from different perspectives (including social, ethical and environmental responsibility perspective)
- Ability to understand and apply multiple disciplinary perspectives

One of the features of this multidisciplinary analysis is that it involves dealing with uncertainty since, when faced with specific situations, people do not always have all the information necessary for decision-making. The use of scientific information-gathering methods and reasonable assumptions can be indispensable for progressing in the analysis process.

The mastery of multidisciplinary analysis is reflected in the ability to faster identify steps to achieve the established objectives, and a better ability to argue why these are adequate. It is also reflected in the ability to critically assess the arguments of others, which facilitates the leadership, or at least playing a role of authority in groups.

Performance levels and indicators:

1) Using one's own skills and resources to achieve the objectives in common situations, following instructions. Indicators:

   i. Identifies specific objectives to accomplish the assigned tasks.

   ii. Correctly uses the information available.

iii. Takes account of clear criteria for evaluating the quality of the information provided.

iv. Makes proper use of information procedures related to the topic.

v. Translates situation analysis in concrete decisions or actions.

2) Addressing new or complex situations with a specific approach that leads to designing and developing a plan with concrete actions to resolve them. Indicators:

    i. Sets specific objectives in relation to the situation that is presented.

    ii. Identifies the information required to address the situation.

    iii. Sets own criteria for assessing the validity of this information.

    iv. Selects appropriate procedures for processing information.

    v. Makes a coherent plan to resolve the situation.

3) Addressing new or complex situations in collaboration with others to get to design a coherent action plan. Indicators:

    i. Reaches agreement on appropriate targets for the situation that is faced.

    ii. Reaches agreement on the information required to address the situation.

    iii. Reaches agreement on common criteria for assessing the validity of the information.

    iv. Reaches agreement on the procedures to use in order to process information.

    v. Reaches agreement on a coherent plan to resolve the situation.

4) Outcome orientation:

DESCRIPTION: Ability to establish goals and to take appropriate and sustainable decisions in order to implement the necessary strategies which secure success and new opportunities.

Attitudes:

- Motivation towards challenging goals
- Being able to formulate a concrete vision or mission statement
- Leadership
- Future orientation
- Commitment
- Perseverance
- Self-efficacy
- Positive attitude

Knowledge:

- Goal setting techniques
- Strategic scanning and planning techniques
- Decision making techniques
- Monitoring and evaluation methods and instruments
- Time management techniques

Skills:

- Strategic scanning and planning
- Effective goal setting skills: ability to establish specific, measurable and time-targeted objectives
- Decision making (situation evaluation, implementation)
- Ability to turn strategy into operational objectives
- Ability to manage unpredictable changes as well as projects and activities in order to achieve the established goals
- Ability to measure the achievement of goals and results

This competence suggests that the individual is able to define clear and concise goals and objectives to be achieved, and organises allocation of resources in time to do so, trying to optimise the time and effort in achieving the goals.

It involves establishing a system which enables periodical monitoring showing the degree of progress achieved and facilitates the taking of measures to correct potential deviations. At the same time, it clearly defines all the people involved, the final status to be achieved, and the means deemed necessary to pursue the path between the present situation and the desired goal.

Performance levels and indicators:

1) Establish goals and objectives, plan their implementation and control its progress. Indicators:

   i.   Sets own goals and objectives in the short and medium term.

   ii.   Solves by him/herself the basic problems faced in order to achieve the objectives.

   iii. Adapts an action plan and resources to the goals set.

   iv.   Sets tasks, deadlines and basic controls on the goals and objectives.

2) Effectively pursue the objectives and goals, analysing and responding to the challenges and appropriate adjustments. Indicators:

   i.   Agrees and is committed to the objectives and goals.

   ii.   Identifies problems and finds ways to overcome them to achieve the objectives.

   iii. Use resources efficiently.

   iv.   Systematically reviews the action plan and modifies it so as to improve it.

3) Setting challenging goals and sharing them with others so as to achieve them, designing a short-term oriented project with clear guidelines. Indicators:

   i.   Describes the situation that justifies the need for the project.

   ii.   Sets clear objectives for the projects.

   iii. Plans actions to take in order to achieve the objectives and appoints those responsible for them.

   iv.   Provides and allocates the time needed to complete the planned actions.

   v.   Plans an evaluation of the project results.

As an outcome from proactive behaviour our students will be able to contribute in the development of legal environment, especially in the field of fast developing private regulation and standardisation as well as in the field of contracting and management. The pedagogical background for each module will be explained next.

2.3 TOOL TO ASSESS DEVELOPMENT

Assessment of competences is not an easy task. If, as said before, competences are a set of capabilities that are brought into play in real-life situations, it is essential that the assessment of the effective acquisition and development of competences is based on actual skills and knowledge that a person can demonstrate. Assessing competences differs from other approaches where there is no requirement to demonstrate knowledge and skills (e.g. using a question-answer test) and where only knowledge is verified, but a guarantee of what the person can actually "do" is lacking.

To make competence assessment easier, rubrics are used. Rubrics are scoring tools rating the student's performance in areas of the curriculum (subjects or topics) that are complex, vague and subjective. This matrix could be explained as a list of all the specific and fundamental criteria for evaluating the learning, knowledge and skills achieved by the student in a particular task or field. Rubrics also present a gradation of the quality levels for each criterion, from excellent to poor.

Rubrics enable assessing such imprecise and subjective aspects as attitudes and skills based on observable conducts in an objective and consistent way. At the same time, rubrics allow course facilitators to specify clearly what is expected from the course participants, and what the criteria are, which will qualify a previously established goal, a job, a presentation or written report, according to the type of task to be carried out.

Rubrics can be considered to be a formative assessment tool since they determine how students are learning and, in that sense, they become an integral part of the learning process. Students can be involved in the process of evaluating their own work (self-assessment), the work of their peers or even participate in the rubric design when they are familiar with them.

Apart from evaluating, rubrics are a very useful tool for learning and offer various advantages, such as:

- They are a powerful tool for trainers and evaluation.

- Promote healthy learning expectations as they clarify the objectives for the course and how students can achieve them.

- Serve as an orientation for the trainer to specifically determine the criteria to measure the students' progress.

- Allow the trainer to describe the different levels of achievement that students should reach in terms of quality.

- Allow the students to in advance be aware of the criteria to be used when their work and that of their peers is evaluated.

- Provide the trainer with feedback on the effectiveness of the teaching process implemented.

- Provide feedback to students about their strengths and weaknesses in the areas that need improvement.

- Reduce subjectivity of the evaluation.

- Increase students' responsibility towards the learning process.

- Help maintain the achievements of the learning objectives focused on established performance standards and student work.

- Provide specific criteria to measure and document student progress.

The PAM PAL rubric is presented as a comprehensive tool aimed at evaluating the acquisition and development of the proactive competences in relation to proactive law and proactive management as defined within the framework of the project.

So as to facilitate navigation through the various sections, it is presented in an Excel file with four spreadsheets, one for each core proactive competence:

- Creative thinking
- Cross-cultural communication and networking
- Multidisciplinary analysis
- Outcome orientation

Each competence is described in terms of three performance levels, which define the actions associated with the competence. For example, the "Outcome orientation" competence involves:

1) Establishing goals and objectives, planning their implementation and controlling their progress.

2) Effectively pursue the objectives and goals, analysing and responding to the challenges and appropriate adjustments.

3) Setting challenging goals and sharing them with others in order to achieve them designing a short-term oriented project with clear guidelines.

However, the performance levels are rather broad and thus not very useful for evaluation. They need to be broken down into smaller units, called performance indicators, which describe, in more detail, the observable conduct that, ideally, is shown by a person who masters the competence. For example, performance level 1. "Establishing goals and objectives, planning their implementation and controlling their progress" out of the "Outcome orientation" competence, involves the following tasks:

- Setting one's own short and medium term goals and objectives.

- Solving the basic problems faced in order to achieve the objectives.

- Adapting an action plan and resources for the goals set.

- Setting tasks, deadlines and basic control on the goals and objectives.

These smaller units are more easily observable and thus can be used in order to establish learning objectives and define the criteria against which the students' performance is going to be assessed. Still, when using performance indicators in order to assess competence acquisition and development, each person will perform differently. For this reason, and in order to make the assessment as objective as possible, each indicator is graded from 1 (poor) to 5 (excellent). These grades are called "descriptors" and describe the various quality levels in which a task can be performed. They are examples of what a poor performance would be, and what a superb performance of the task would look like.

For example, the indicator "Setting one's own short and medium term goals and objectives" would present these possibilities, 1 being the lowest and 5 the highest.

1) Does not define own goals and objectives.

2) Sets inappropriate goals or does not commit to them.

3) Is able to set own goals and act accordingly.

4) Sets well established goals and means to their achievement.

5) Has a well-established plan, is able to justify it, shows involvement and is able to implement it.

The PAM PAL rubric is, as said before, a comprehensive tool for describing the four core competences in detail, useful for course planning and description. However, when using the PAM PAL rubric for students' self-assessment or peer evaluation, it is advisable to use a questionnaire form instead, to make the task easier. The questionnaire has been simplified and students are just asked to range themselves (or their peers) by choosing from levels 1 to 5 for each indicator, but the full description of each descriptor has not been included. In any case, it is advisable that rubrics are made available to students as part of the course material, since it will contribute to their learning process, as mentioned before in this section. For this purpose, an online questionnaire has been created using Google Docs, and it is also available in Word-PDF format.

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APPENDIX: PAM PAL ASSESSMENT TOOL

Competence	Levels	Indicators	Descriptors				
			1	2	3	4	5
CREATIVE THINKING	1. Generate and communicate new ideas or generate innovative alternatives to known problems or situations. Indicators:	i. Provides input to ideas, situations and problems, when faced with them.	Never makes suggestions or does not generate them in an autonomous way.	Offers suggestions on external demands or those suggestions are limited.	Contributes own suggestions to problems or situations that are presented.	Generates a wide range of ideas and / or solutions to the issues raised.	Generates a lot of alternative ideas fluently, anticipating external requirements.
		ii. The proposed ideas are innovative in content, implementation, etc.	Refuses to consider innovative ideas.	Proposes new ideas that bring new approaches to what already exists.	Proposes innovative ideas.	Makes innovative contributions so as to improve the processes he/she is directly involved in.	Stands out for his/her innovative contributions.
		iii. Is aware that there are several ways of doing things.	Does not question the situation or the reality. Works according to the manner provided.	Questions, but accepts reality as unchangeable.	Argues that there are several ways of doing things. Shows disagreement (when applicable).	Challenges traditional ways of doing things and suggests new ways of doing things so as to improve.	Detects opportunities for improvement and proposes innovative solutions.
		iv. Based on what he/she knows, creates new ideas or solutions to problems.	Is not able to extrapolate knowledge to other fields.	Is able to extrapolate knowledge, but this does not lead to generating new ideas.	Recognises valuable ideas and practical solutions that have worked in other environments.	Generates new ideas by analogy with other situations or problems based on experience.	Recognises valuable ideas or solutions that have worked in other environments and adapts and develops them.
		v. Communicates or expresses new ideas to others.	Is unable to express new ideas.	Shows difficulty in generating ideas.	Shares the ideas generated.	Shares the ideas generated and makes them understandable to others.	By sharing ideas, generates a creative environment.

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Competence	Levels	Indicators	Descriptors				
			1	2	3	4	5
CREATIVE THINKING	2. Generate original, quality ideas that can translate in a formal way and defend them when faced with known or unknown problems and/or situations. Indicators:	i. Offers quality suggestions to problems or situations that are presented.	Is unable to look at a problem from different points of view.	Proposes ideas to new situations from different points of view.	Contributes own ideas to problems or situations from different perspectives.	Generates own alternatives to problems and / or situations from different perspectives.	Generates a lot of quality ideas to choose from, including the most appropriate.
		ii. The proposed ideas are original or unconventional.	Simply repeats ideas.	Proposes new ideas which are not original.	Proposes original ideas.	Proposes original ideas that improve processes or groups he/she participates in.	Originality of contributions and approach of solutions proposed are remarkable.
		iii. Open-mindedness to new ideas and perspectives.	Does not conceive the existence of other realities other than the own one.	Remains open only in certain areas and situations.	Has an open mind to new ideas and perspectives.	Is able to transfer open-mindedness to others.	Generates an open environment where new ideas are considered without resistance.
		iv. Is able to integrate knowledge from various disciplines, sources or areas to generate new ideas to known or unknown problems or situations.	Is not able to integrate prior knowledge to generate new knowledge or ideas.	Integrates knowledge from various fields but this does not lead to generating new ideas.	Generates new ideas integrating knowledge from different disciplines, fields and sources.	Integrates knowledge to generate new ideas that improve previous solutions to a problem or situation known.	Integrates knowledge and ideas to generate new thinking applied to new or unforeseen situations.
		v. Is able to formally capture the ideas generated.	Is unable to organise own ideas.	Struggles to properly structure the new ideas generated.	Can formally capture the innovative ideas generated.	Can understand new ideas from others and translate them formally.	To translate ideas formally, encourages creative input from the rest of the team.

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Competence	Levels	Indicators	Descriptors				
			1	2	3	4	5
CREATIVE THINKING	3. Contribute original, practical and implementable ideas and solutions, flexible and complex, involving both oneself and processes one is involved in, as well as people and processes nearby. Indicators:	i. Is able to generate ideas whose consequences go beyond one's scope or field of action.	Generates ideas with very low impact.	Generates ideas that have a direct impact, but do not affect or improve other areas.	Generates ideas that have consequences beyond oneself.	The ideas generated affect more than one field of application, thus improving the overall results.	Notable for introducing leading-edge unique solutions and improve various aspects or spheres of activity.
		ii. The ideas proposed are breakthrough in content, implementation, etc.	The ideas presented do not show uniqueness or originality.	The ideas presented are innovative but based on existing solutions.	Breakthrough ideas proposed. Appreciates radical or unconventional ideas.	Proposes breakthrough ideas that promote others to question the existing "modus operandi".	Really takes new approaches, generates new ideas and creative input in what he/she does, improving systems, procedures and processes.
		iii. One's attitude does not pose limits to the generation of new thoughts.	Sticks to the limits established by social, cultural, perceptive blockages.	Struggles to take divergent views when generating ideas.	Has an open mind which overcomes limits when generating new ideas or solutions.	Is able to think "outside the box" in various complex fields.	His/her divergent perspective helps develop the creative capacity of the team.
		iv. Uses specific methods to enhance creativity.	Does not apply any method to improve one's creativity.	Uses a unique method for generating new ideas to address problems or situations that are presented.	Applies different approaches that allow to generate creative ideas.	The practice in the different approaches allows to generate some creative ideas spontaneously.	The competence has been sufficiently developed so as to generate ideas spontaneously.
		v. Is able to develop ideas generated.	Is unable to elaborate the ideas proposed. The ideas proposed are not viable.	Is able to generate viable ideas, but is unable to implement them.	Is able to implement own ideas generated.	Is recognised as a generator of creative and valuable ideas.	Is recognised as a generator of creative and valuable ideas, which are applicable to improve outcomes.

Competence	Levels	Indicators	Descriptors				
			1	2	3	4	5
CROSS-PROFESSIONAL COMMUNICATION & NETWORKING	1. Establish dialoguing relationships with peers and supervisors, listening and speaking in a clear and assertive way.	i. Uses listening.	Does not listen. Wants to impose own ideas at all costs.	Is distracted and does not get all the messages.	Listens carefully to his/her partners.	Listens in order to ensure understanding of partner's ideas.	Listens to ensure understanding and commitment from his/her partners so that they know they are heard.
		ii. Says what he/she thinks and feels about an issue.	Is extremely quiet, it's hard to know what he/she thinks.	Does not take a position, his/her messages are ambiguous.	Expresses what he/she thinks and feel respect for the subject that is being discussed.	Clearly shows what he/she thinks and feels.	Assertive. His/her partners always know where they stand and their reactions to what is being dealt with are taken into account.
		iii. His/her way of saying things prevents his/her partners from going on the defensive.	Evaluates and constantly judges what others say. Is always on the defensive.	When speaking, expresses superiority and/or excessive certainty	When speaking, avoids value judgments or messages showing superiority. Does not become defensive.	When communicating, takes account of others and supports them.	His/her ways of communication create a climate of understanding and dialogue.
		iv. Asks questions to better understand.	Does not ask. It is taken for granted that he/she understand partners.	Asks few questions, poorly timed or poorly structured.	Makes open-ended questions to better understand others' ideas and positions.	Makes sensible questions and allows partners to expand their communication.	His/her questions are intelligent and help move forward in the dialogue process or a better communication climate.
		v. Expression is clear and concise.	His/her speech is poor and confusing.	Expresses in an uneven way and not only transmits one's ideas.	Conveys ideas concisely in familiar surroundings.	Expressses ideas with ease and fluency.	Stands out for her/his ease of expression and clarity of communication.
		vi. Non-verbal language is appropriate and consistent.	Nonverbal communication is inconsistent with the verbal message and inappropriate to the communicative situation.	Non-verbal communication does not reinforce verbal communication.	Transmits information using body language in accordance with the message to be transmitted and the communicative situation.	Non-verbal language provides valuable information and enriches his/her verbal expression.	Non-verbal communication is highly expressive, coherent and appropriate, allowing a better flow of communication.

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Competence	Levels	Indicators	Descriptors				
			1	2	3	4	5
CROSS-PROFESSIONAL COMMUNICATION & NETWORKING	2. Use dialogue and understanding to build partnerships	i. Listens and understands ideas from others even if they are opposed to his/her own.	Does not satisfy his/her partners and only pays attention to his/her own interest.	Hinders the flow of communication so as to carry out his/her own ideas.	Listens to all without reproach and without judging their opinions.	Shows interest others' ideas and opinions.	Demonstrates understanding towards all opinions.
		ii. Uses constructive criticism. Clearly says what he/she thinks and feels and regrets hurting partners' feelings.	Uses destructive criticism.	Always shows opposition.	Expresses him/herself without disregarding others.	Justifies one's of view avoiding personal judgment.	Highlights the positive aspects in others, arguing the differences.
		iii. Communicates in a natural way, creating a climate of equality and partnership.	Shows superiority and detachment. Causes rejection by the audience.	Uses communication to make a difference.	Is relaxed and open when communicating.	Helps create a relaxed and constructive atmosphere.	Builds trust and openness among partners.
		iv. Is respectful of its partners both in content and in form.	Generates tensions intentionally, to one's own benefit.	Does not respect partners and imposes own ideas.	Uses compliance as a criterion of understanding and dialogue.	Uses understanding and dialogue to build constructive attitudes.	Appreciates and respects the opinions of others.
		v. Adapts verbal and non-verbal communication to the situation and the needs of partners.	Uses non-verbal means to interfere and disrupt.	Does not take into account what partners are contributing.	Verbal and nonverbal language is tailored to each partner and situation.	Demonstrates attention and interest to integrate the contributions from others.	Is very flexible in his/her communication. Fits all types of partners.
	3. Develop a sincere and empathetic communication aimed at constructive dialogue.	i. Is receptive to communicative proposals from others, even to criticism. Listens with the aim of enriching the dialogue.	Not tolerate the questioning of their beliefs. The emotionally charged stands.	Disregards opposing views.	Pays attention to all opinions.	Expresses interest in opposing views.	Actively seeks critical views and incorporates them.
		ii. Offers suggestions for quality communication focused on constructive dialogue.	Wanders and runs without clarity of ideas.	Does not incorporate ideas from others.	Offers suggestions on how to better manage the dialogue and communication.	Incorporates dialogue and reacts to suggestions from others objectively.	Excels in the ability to integrate own and others' ideas.
		iii. Creates contexts based on honesty and sincerity among participants.	Disqualifies those who disagree with his/her ideas.	Systematically questions and opposes views of others.	Expresses him/herself with sincerity and respect.	Openly acknowledges his doubts and mistakes.	Encourages honest communication, is sincere and open to others.
		iv. Communication is aimed at finding shared meanings and negotiating differences.	Focuses mainly on differences.	Rates globally without identifying points of agreement.	Focuses first of all on points of agreement.	Highlights shared opinions and is willing to commit.	Takes the initiative in creating consensus.

Competence	Levels	Indicators	Descriptors				
			1	2	3	4	5
MULTIDISCIPLINARY ANALYSIS	1. Using one's own your skills and resources to achieve the objectives in common situations, following instructions	i. Identifies specific objectives to accomplish the assigned tasks.	Confuses goals and procedures (the goal to be reached / steps to reach them).	Merely repeats the instructions, mixing objectives and procedures.	Clearly differentiates the objectives to achieve and the procedure to achieve them.	Defines, using one's own words, the specific objectives of the tasks to be performed.	Defines the objectives and relates them to the steps to achieve them.
		ii. Correctly uses the information available.	Does not take into account all the information available.	Mixes relevant and irrelevant information elements.	Identifies clear criteria to evaluate different types of information available in accordance with instructions received.	Also identifies relevant data elements that are missing.	Raises reasonable assumptions on the information gaps.
		iii. Takes account of clear criteria for evaluating the quality of the information provided.	Does not evaluate the information. Considers all types of information equally valid or reliable.	Uses arbitrary criteria and variables throughout the assessment process.	Uses clear evaluation criteria for the different types of information available in accordance with instructions received.	Explains (also shows) the application of evaluation criteria.	Consistently applies evaluation criteria throughout the process.
		iv. Makes proper use of information procedures related to the topic.	Does not use the procedures that have been indicated.	Misuses the proposed procedures.	Uses procedures that have been proposed correctly	Explains the steps taken to implement the procedures.	Correctly interprets the results.
		v. Translates situation analysis in concrete decisions or actions.	No concrete conclusions are proposed. Lost in digressions and ambiguities.	Proposes actions, but they do not lead to the defined objective.	Proposes actions to achieve the objectives.	Consistently argues the relationship between information, proposed actions and objectives.	Identifies weaknesses or risks involved in the proposed actions.

Table continues...

Competence	Levels	Indicators	Descriptors				
			1	2	3	4	5
MULTIDISCIPLINARY ANALYSIS	2. Addressing new or complex situations with a specific approach that leads to designing and developing a plan with concrete actions to resolve them.	i. Sets specific objectives in relation to the situation that is presented.	Objectives are not considered.	Defined objectives appropriate to the situation.	Sets specific objectives appropriate to the situation.	Establishes final goals and intermediate steps to achieve them.	Establishes achievable number of targets simultaneously and explains the relationship between them.
		ii. Identifies the information required to address the situation.	Is unable to list the types of information needed to address the situation.	Forgets some types of information relevant to address the situation.	Makes a complete list of information needed to resolve the situation.	Finds information, covering the gaps with assumptions argued.	These assumptions include several possible values for the missing information.
		iii. Sets own criteria for assessing the validity of this information.	Does not clarify the criteria used to evaluate the information.	Uses unsuitable criteria to evaluate different types of information.	Uses appropriate criteria to evaluate different types of information.	Explains and argues for the appropriateness of the criteria used.	Establishes procedures to ensure consistent application of evaluation criteria.
		iv. Selects appropriate procedures for processing information.	Uses procedures inappropriate to the situation.	Selects the proper procedures, but they are misused.	Correctly uses appropriate procedures for processing information.	Satisfactorily explains the procedure for processing the information and its relevance to the situation or the type of information.	Correctly interprets the results in relation to the initial situation and established objectives.
		v. Makes a coherent plan to resolve the situation.	Poses a theoretical plan not suited to the particular situation or not concrete actions.	The plan is not consistent. Proposes a series of uncoordinated actions that do not lead to achieving the objectives.	Designs a coherent plan for achieving the objectives.	Clearly explains why the plan is feasible and leads to the objectives.	The plan includes a risk analysis and at least a contingency plan (plan B).

Table continues...

...Table continues

Competence	Levels	Indicators	Descriptors				
			1	2	3	4	5
MULTIDISCIPLINARY ANALYSIS	3. Addressing new or complex situations in collaboration with others to get to design a coherent action plan.	i. Reaches agreement on appropriate targets for the situation that is faced.	Does not accept other than his/her own approaches.	Delays or prevents, by means of agreement, critical approaches proposed by others.	Agrees on objectives including different approaches on the situation in question.	Agreement facilitates the identification of targets by finding middle ground.	Prepares a draft ranking or weighting of the objectives and the relationship between them, acceptable to all.
		ii. Reaches agreement on the information required to address the situation.	Refuses to take into account factors other than those supporting one's point of view.	According to difficult questioning, without evidence or convincing arguments, the information provided by others.	Agrees to consider all types of information elements proposed by others.	Helps identify information gaps and to incorporate uncertainty into the process.	Proposed assumptions made about the information gaps take into account the different sensitivities.
		iii. Reaches agreement on common criteria for assessing the validity of the information.	Does not accept other criteria other than his/her own, to assess the information	Hinders agreement by insisting on imposing one's views despite others' arguments against them.	Agrees on major criteria for assessing the validity of the information.	Identifies errors in the evaluation test and proposes ways to overcome them.	Proposes a consistent system for assessing the validity of the information, obtaining the agreement from all.
		iv. Reaches agreement on the procedures to use in order to process information.	Accepts only cases already known and applied.	Waits until results are obtained in order to accept or reject the procedures.	Agrees on the procedures considered most appropriate and the results obtained.	Proposes simple procedures or guaranteed by experts to facilitate agreement.	Offers a reasonable interpretation of the results, taking into account the various objectives and sensitivities.
		v. Reaches agreement on a coherent plan to resolve the situation.	Uses false dilemmas or other fallacies to reject the plan.	Accepts only depending on actions but rejects the plan a whole.	Gets involved in plan design, accepting the action proposals suported by the majority.	Collects all the proposals to facilitate agreement on the collective action plan.	After identifying the risks, incorporates origional options as possible contingency plans.

Competence	Levels	Indicators	Descriptors				
			1	2	3	4	5
OUTCOME ORIENTATION	1. Establish goals and objectives, plan their implementation and control its progress.	i. Sets own goals and objectives in the short and medium term.	Does not define own goals and objectives.	Sets inappropriate goals or does not commit to them.	Is able to set own goals and act accordingly.	Sets well established goals and means to their achievement.	Has a well established plan, is able to justify it, shows involvement and is able to implement it.
		ii. Solves by him/herself the basic problems faced in order to achieve the objectives.	Is blocked by basic difficulties.	Needs help when faced with fundamental difficulties in planning.	Finds resources to solve the basic difficulties faced.	Solves basic difficulties encountered as to implement foreseen plans.	Proposes appropriate solutions to overcome the basic difficulties encountered.
		iii. Adapts action plan and resources to the goals set.	Action plan is inappropriate in relation to available resources to achieve set objectives.	Although with clear objectives, manages resources appropriately.	Action is consistent with the objectives and available resources.	Makes efficient use of available resources to achieve established goals.	Incorporates a way to improve the integration of resources and methodology so as to achieve the goals.
		iv. Sets tasks, deadlines and basic controls on the goals and objectives.	Action plan includes no control indicators or they are not used.	Formulates mistracking indicators.	Planning to use indicators to track tasks and deadlines.	Keeps track of tasks and deadlines, through control flags.	Adjusts the plan based on ongoing contron and analysis.
	2. Effectively pursue the objectives and goals, analysing and responding to the challenges and appropriate adjustments.	i. Agrees and is committed to the objectives and goals.	Struggles to agree on the objectives, or does it unwillingly.	Abides by the goals that others set.	Assumes the objectives (integrates them, asks about them, etc.).	Assumes the goals set in a committed way.	Agrees with the objectives and contributes to their clarification and achievement.
		ii. Identifies problems and finds ways to overcome them to achieve the objectives.	Hardly recognises the difficulties that arise.	Recognises the difficulties that arise, but knows not how to resolve them.	Finds ways to overcome the difficulties identified.	Solves in a practical way the problems identified.	Resolves the difficulties brilliantly and with personal contributions.
		iii. Use resources efficiently.	Uses available resources inappropriately.	Uses the resources available, but without reaching the objectives.	Achieves the desired objectives with available resources.	Knows how to use resources efficiently to achieve the objectives.	Performance is optimised by the use of available resources to achieve set objectives.
		iv. Systematically reviews the action plan and modifies it so as to improve it.	Systematically lacks the time to review action plans.	Is unstable in the review of action plans in accordance with established control parameters.	Periodically analyses and adjusts action plan, within the established control parameters.	Systematically analyses action plan, providing indicators and original control methods.	Carefully monitors and controls improvements, even exceeding the ones specified by control parameters.

Table continues...

...Table continues

Competence	Levels	Indicators	Descriptors				
			1	2	3	4	5
OUTCOME ORIENTATION	3. Setting challenging goals and sharing them with others so as to achieve them, designing a short-term oriented project with clear guidelines.	i. Describes the situation that justifies the need for the project.	Is unable to contextualise a project or action plan.	Identifies project aims and team to involve, but is unable to link it to actual needs.	Justifies the project referring to the needs it tackles.	Accurately identifies the need or needs that the project seeks to respond to.	Provides evidence about the needs that justify the project.
		ii. Sets clear objectives for the projects.	Incorrectly formulates project objectives or does not know how to formulate.	Formulates ambiguous and vague objectives.	Defines clear objectives for the project.	The project objectives are precise and operational.	The project objectives are realistic and ambitious.
		iii. Plans actions to take in order to achieve the objectives and appoints those responsible for them.	Lists intentions without specifying the actions and responsibilities	Plans actions but without defining responsibles for each of them.	Establishes specific actions and defines responsibles.	Assesses the feasibility of the planned actions.	Establishes an optimal sequence of actions so as to achieve the objectives.
		iv. Provides and allocates the time needed to complete the planned actions.	Does not plan the necessary time for actions to be implemented.	Provides roughly the time needed for the actions to be implemented.	Plans in detail the necessary time for actions to be implemented.	Incorporates an estimate of additional time for contingencies.	Provides mechanisms to ensure compliance with deadlines.
		v. Plans an evaluation of the project results.	Does not consider evaluation of results.	Is aware of the need to evaluate results without planning how to do it.	Defines, in part at least, who, when and how will carry out result evaluation.	Systematically plans who, when and how to evaluate the results.	Systematically plans who, when and how to evaluate the results using testable indicators.

Course Material from Turku University of Applied Sciences 65

PROACTIVE BUSINESS LAW AND THE PREVENTION AND RESOLUTION OF DISPUTES

▌ INTRODUCTION

Kaisa Sorsa

Proactive Law is a topic which possesses the characteristics of complexity and series of interlocking issues. Proactive law as a concept has been developing over the last fifteen years and it is crucial from the learning outcome perspective to make students understand the key concepts and their different nuances. They are developed in academic-scientific research and are now translated into teaching material. The tradition of university teaching is based on scientific research where the primacy of a teacher as an expert and subject specialist prevails (Lane 2011, 35). In the universities of applied sciences there are further requirements for research and for the use of the knowledge, namely applicability.

Proactive law found so far mostly in the global business context is struggling with sustainability issues. Sustainability requirements as all-embracing factors in the business environment add to the level of complexity. Complex issues require a new form of pedagogy that enables students to make change in the world. Hughes (2011, 53) has expressed it fittingly: "Such a pedagogy will need to attend to the domains of knowledge, action and self, such that in addition to learning about things, students will develop a capacity to act on that knowledge and will connect that knowledge and actions to their own lives and behaviours." Our students will learn about legal issues in the global and local economies, interconnectedness of legal and business systems and how individuals like students can be part of the change using their knowledge actively.

Complex issues of a networking society present several opportunities and challenges to teachers and learners and therefore to pedagogy. For example, business practices have been studied in business management but business practices are not that well known in legal studies. Legal analysis is very often focused on analysing court cases, i.e. when something has already gone wrong. In proactive law, the focus will not be on court cases. The fundamental idea is to avoid legal conflicts. In order to achieve this goal in education, one needs to understand business from a practical perspective (business system) and to

combine that reality with theoretical issues. As the regulations are in many cases set by private actors and not only by public law makers, there is a need to teach students the mechanisms of how to use this right in practice. They also need to understand how to apply legal rules (legal system) proactively in practice.

In the context of sustainability, the knowledge base, what is known, unknown or indeterminate is continuously being re-constituted (Hughes 2011, 51). This poses challenges to teaching and learning. The same kind of dynamic development can be found in some industry sectors like the IT sector, media and telecommunications. Some of the complexity challenges can be overcome by using the so-called constructivist pedagogy which actively takes the learners' own experiences into consideration during the learning process.

An inter- and multidisciplinary nature of an issue like combining business and law sets high level requirements to the teachers who have to enter the fields of research that they are not familiar with. Many law teachers may not have experience and knowledge on business or they have it only via analysing court cases. Inter- and multidisciplinarity are, however, built in the handbook and the teacher's material and the aim is that these aspects are highlighted during the teaching process.

To sum up, the key pedagogical concerns are "what" and "how" these complex issues should be taught and how they should be learned. Ideas which will be presented here are influenced by several pedagogical sources such as the innovation pedagogy applied in TUAS, pedagogy of climate change (2011) and several others. We do not want to flag for any specific theories or methods, but we focus on sharing experiences we have gained while piloting these courses over two years. The different pedagogical approaches are mentioned as examples.

1.1   WHAT AND HOW TO LEARN IN THE PROACTIVE LAW MODULE

Proactive business law and the prevention and resolution of disputes focus first on the new concepts of proactive law, the content and structural elements as well as integrated regulatory and business processes, and secondly, it aims at developing students' proactiveness skills. First, some characteristics of

the knowledge base of this chapter need to be explained. The proactive law field of study is under development and there is still much uncertainty or even indeterminacy. Because of the multifaceted nature of the topic, research findings may seem controversial and even contradictory and cause confusion which is typical of all emerging fields of study. Also, the topic of sustainability which is interwoven with proactive law is full of assumptions derived from incomplete, uncertain or indeterminate scientific understanding (Hughes 2011, 52). Good theory is possible only in interaction with practice. Many of the publications and articles on proactive law are written by practitioners and have raised the interest of researchers to find more evidence on the phenomena under discussion. We can not escape the reality; on the contrary, we need to prepare our students to become analytic and capable of critically considering different perspectives and approaches.

Inter- and multidisciplinary perspectives have an influence on the issue of proactive law from different fields of social sciences, such as management, sociology, economy and legal and regulatory studies, and especially contracting related research. Normally, learning and teaching mostly operates within the boundaries of a particular subject or discipline. Inter- and multidisciplinary issues expect teachers and learners to engage in perspectives and areas of knowledge outside of their immediate areas of expertise. This is done using different kinds of assignments (descriptive essays, argumentative essays, comparison essays) and educating students to analyse "real" world cases.

The knowledge base of the subject, both proactive law and sustainable development as a contextual fact, is constantly being developed, added to, and reconstituted. In the areas of policy development and scientific knowledge there can be a considerable lag between advances in the knowledge base, and reflection of this within the course texts. The dynamic reconstitution of knowledge induces challenges for learning – how do learners access and navigate the new knowledge that is being generated? (Hughes 2011, 52) Cutting edge academic-scientific knowledge cannot be found in textbooks. It can be found from other sources and accordingly we need to educate our student to use the most updated knowledge base.

Sustainable development in the business context does not only mean new "expert" knowledge being created. On the contrary, it is populated by extensive coverage in mass media, in alternative media, and in popular culture. Much of the pre-existing knowledge base of students comes from

these sources. (Hughes 2011, 52) Therefore, exposing students to authoritative sources, informal sources and their own experiences is an invaluable learning opportunity. Critical thinking capabilities are the necessary learning skills and a presumption for learning proactive law.

1.2 THE SUBSTANCE OF PROACTIVE LAW AND THE PREVENTION AND RESOLUTION OF DISPUTES

The substance areas covered in the proactive law chapter of the Handbook have been selected on the basis of the researchers' experience and interests. The proactive law content and process elements are discussed in the food industry context. It has been kept in mind that we should find such real world contexts of business that are not too far removed from our everyday life to be difficult to understand (e.g. biotechnology). If the student feels in some way familiar with the topic, there will not be so many barriers to learning.

The first part of the chapter will focus on proactive law in the food industry and sustainability context. Foodstuff, food production and retail business are present in every student's life. One can assume that all students are interested in one way or another in the food they consume. It is also quite easy for a student to imagine the issues under discussion from the perspective of different actors: consumers, farmers, sellers, buyers, public authorities and so on. One can easily find examples from real life and the business context is not too complicated compared, for example, with information technology or more technological industries. Further, it will be easier to teach students new ideas in a context which is familiar to them.

Food industry is also a sector in which public policy and the way of regulation has moved from reactive to more proactive. In the beginning of the 21st century, public lawmakers realised that they are not capable of regulating and monitoring the food industry using the traditional public law instruments. There was a need to move towards a more proactive regulatory system. The EU food law reform illustrates the change from the reactive to a more proactive regulatory system.

In the EU white paper on food safety in 1999, it is stated that "This White Paper makes proposals that will transform EU food policy into a proactive, dynamic, coherent and comprehensive instrument to ensure a high level of human health and consumer protection." (COM (1999) 719, 8).[3] After the white paper several amendments have been made and implemented in the field of legal framework for food safety and animal feed, animal health and welfare, hygiene, contaminants and residues, novel food, additives, flavourings, packaging and irradiations, emergency measures and decision making processes.

In conclusion, the change has materialised in the structures of the food regulatory system, on the level of different processes, both on regulatory and business processes, and on the use of different regulatory instruments. This demonstrates that the systems can be compared using the reactive and proactive scale.

The basic concepts of "proactive law" and "proactive approach to law" are the threshold concepts which need to be clarified at the very beginning. Because the concepts of proactive law concerning public law are not examined as extensively as in private regulation, the first chapter will focus on the private regulation examples. Proactive law as a concept is unknown to most students at the beginning of the course. Some law students may have some presumptions about the topic but a shared understanding of the content of the concepts needs to be established at the very beginning.

The first chapter of proactive law also elaborates proactive law in the context of the prevention and resolution of disputes. This substance area is selected because it is the sector where public law has developed towards proactive law. One can find examples of proactive law both in public law in mandatory law (hard law) and in private regulation (soft law).

The second part of the proactive law module focuses on the proactive approaches to law by different professionals. This part of the chapter aims at developing students' practical skills and, for instance, a business game can be used as a teaching and learning method.

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3   One of the weakest links in the system is the lack of a clear commitment from all interested parties to give an early warning about a potential risk, so that the necessary scientific evaluation and protective measures can be triggered early enough to ensure a proactive rather than reactive response at the EU level.

1.3 CRITICAL AND CONSTRUCTIVIST THINKING

Taking into account these characteristics of the knowledge base and the proactive management and proactive law competences the pedagogical challenge "is to produce a set of experiences that in turn encourage the formation of human qualities able to engage effectively with multiple frameworks, contesting value systems and open-ended action situations" (Barnett 2000, 263).

The importance of pedagogical methods encouraging critical thinking becomes a necessity as well as the ability of the students to build their own understanding of these frameworks. Paul and Elder (2006, 4) describe the capabilities of a critical thinker. According to them a critical thinker "raises vital questions and problems, formulating them clearly and precisely; gathers and assesses relevant information, using abstract ideas to interpret it effectively; comes to well-reasoned conclusions and solutions, testing them against relevant criteria and standards; thinks open-mindedly within alternative systems of thought, recognising and assessing, as need be, their assumptions, implications, and practical consequences; and communicates effectively with others in figuring out solutions to complex problems". These capabilities entail effective communication and problem solving abilities which are needed in the future business world.

There are many ways to teach one and the same content so that students progress as thinkers. Elder and Paul (2010) guide teachers to teach in such a way that students are regularly required to do the mental exercises listed in Table 1. Keeping in mind and following these guidelines in our teaching, I suppose that we are able to educate students in a way that they receive the four general competences we are developing: creative thinking (CT), cross-professional communication and networking (CPN), multidisciplinary analysis (MA) and outcome-orientation (OO). The activities which lead to certain competences are marked in the table with abbreviations.

TABLE 1. *Mental exercises.*

Mental activities	PAM PAL competences
1. state and explain goals and purposes,	MA, OO
2. clarify the questions they need to answer and the problems they need to solve,	CT, MA,
3. gather and organise information and data,	MA, OO
4. explicitly assess the meaning and significance of information you give them,	MA, CPN
5. demonstrate that they understand concepts,	CPN, OO
6. identify assumptions,	CT, OO
7. consider implications and consequences,	CT, OO
8. examine things from more than one point of view,	CT, CPN
9. state what they say clearly,	CPN
10. test and check for accuracy,	MA, OO
11. stick to questions, issues, or problems,	CT, CPN
12. express themselves precisely and exactly,	CPN
13. deal with complexities in problems and issues,	MA, OO
14. consider the point of view of others,	CT, CPN
15. express their thinking logically,	MA, OO
16. distinguish significant matters from insignificant ones.	MA

Constructivism is a philosophy of learning founded on the premise that, by reflecting on our experiences, we construct our own understanding of the world we live in. Each of us generates his/her own "rules" and "mental models," which we use to make sense of our experiences. Learning, therefore, is the process of adjusting our mental models to accommodate new experiences. Critical thinking gives concrete tools to the student for evaluating his/her beliefs. From a teacher's perspective, constructivism means that the emphasis shifts from the presentation of the information to guiding the student's learning process.

Curriculum–Constructivism calls for the elimination of a standardised curriculum. Instead, it promotes using curricula customised to the students' prior knowledge. Also, it emphasises hands-on problem solving. Using constructivism means that teachers focus on making connections between facts and fostering new understanding in students. Instructors tailor their teaching strategies to student responses and encourage students to analyse, interpret, and predict information. Teachers also rely heavily on open-ended questions and promote extensive dialogue among students.

1.4   COLLABORATIVE AND INNOVATIVE THINKING

The topic proactive law suggests that the legal environment nowadays is decentralised, implying that the state based regulation is not so much in focus in comparison with the other sources of law as it used to be. The actors and processes constructing this reality are multiple and interlinked. They are built in networks of regulatory systems and management processes developed and reformulated by public and private actors. Our students will participate in these networks already during their education, (e.g. via social media; via groups of activists) and if not before, then after completing their studies.

To understand the systemic nature of our society collaboration with citizens and authorities, companies and a growing number of different groups of stakeholders is called for. As an outcome of studying the proactive law module our students should have an ability to act autonomously as well as to co-operate, communicate and solve disputes in interdisciplinary teams or diverse professional settings. They should also be able of critical and creative thinking: to develop new ideas and concepts in order to respond to needs, problems or challenges, by means of an original and previously non-existing method and achieve previously non-existing results. The complexity of issues related to sustainable business might easily make students feel helplessness and powerlessness in the face of the scale and the gravity of them. In order to avoid these feelings and attitudes, there is a need for pedagogy for action, one that promotes personal and collective efficacy.

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2 TEACHING METHODS

2.1 COLLABORATIVE LEARNING

Kaisa Sorsa

Collaborative Learning (CL) encourages active student participation in the learning process. It encompasses a set of approaches to education, sometimes also called cooperative learning or small group learning. CL creates an environment "that involves students in doing things and thinking about the things they are doing" (Bonwell 1991, 2). It has been shown to be effective in increasing students' academic achievement as well as in gaining teamwork skills.

According to Bonwell and Sutherland (1996), CL can be thought of as a continuum incorporating four components (Bonwell and Sutherland, 1996):

1) Course Objectives: From Acquisition of Knowledge to Acquisition of Skills/Attitudes

    Acquisition of knowledge refers to the mastery of concepts and facts while acquisition of skills and attitudes can refer to an appreciation of how a course impacts our daily lives in a more practical sense. (This continuum can be thought of, if one considers a majors' course that typically emphasizes knowledge acquisition while a non-majors' course often emphasize less factual and more topical and practical information.)

2) From Simple to Complex Tasks

    The simple tasks are less structured and shorter in duration while complex tasks are more structured and may last throughout the entire class or several class hours.

3) Interaction in the Classroom: From Limited to Extensive

   The degree of interaction between the students and the instructors and among students is dependent on the instructor's teaching preference, personality, and need for control. Limited interaction is less spontaneous and flexible for the students.

4) Level of Student Experience: From Inexperienced to Experienced

   More structured activities are initially often better for inexperienced students who may feel threatened in an unfamiliar learning environment. The activities can become less structured as the students become more experienced.

2.2   PROBLEM-BASED LEARNING AND CASE STUDIES

Kaisa Sorsa

Teaching and learning styles are, by their very nature, changing and during the last 15 years there has been a noticeable move from lecture-based activities towards more student-centred activities. Problem-based learning and case studies are two well-known examples.

Problem-based learning is defined as a learning philosophy; "an instructional strategy in which students confront contextualized, ill-structured problems and strive to find meaningful solutions" and a set of learning principles. The learning principles can be modelled into different types, such as the project approach and the case approach. Even though there are several PBL models, the common feature for them is that students learn via contextualised problem sets and situations. Because of that, and all that goes with it, namely the dynamics of group work and independent investigation, they achieve higher levels of comprehension, develop more learning and knowledge-forming skills and more social skills as well. This approach to teaching brings prior knowledge into play more rapidly and ends up fostering learning that adapts to new situations and related domains as quickly and with the same joyous magic as a stone skipped over a body of water. (See a profound description of best practices of PBL in Davies and Kolmos (2011).

Case studies have many different definitions but our definition is in keeping with Davis and Wilcock (2003). Case studies are "student centred activities based on topics that demonstrate theoretical concepts in an applied setting". This definition covers the variety of different teaching structures ranging from short individual case studies to longer group-based activities. According to Davis and Wilcock (2003, 6) case studies can be used to:

- Allow the application of theoretical concepts to be demonstrated, thus bridging the gap between theory and practice.

- Encourage active learning.

- Provide an opportunity for the development of key skills such as communication, group working and problem solving.

- Increase the students' enjoyment of the topic and hence their desire to learn.

In practice, a case study may be thought of as a story with an important educational message. The content of the case study may be based on fictional elements or include real persons and events. Typically authentic content is preferable. The use of case studies is very flexible because the cases can be relatively short and self-contained for use in a very limited amount of time, or rather long with significant detail and complexity that make them more appropriate for use over several class sessions.

A good case study can be described with four C's which comprise their fundamental elements: context, conflict, complexity and challenge. They foster the development of critical thinking skills, which is the key competence of the PAM PAL curriculum.

Case studies aim to provide students with real-world enquiries into environmental problems, using the cases as a source of information. There are plenty of sources for case studies[4] and the instructor can also develop them by him/herself. (Davis & Wilcock 2003, 6)

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4   E.g. "Cases and Scenarios" Online Ethics Center for Engineering 7/6/2009 National Academy of Engineering Accessed: Sunday, January 08, 2012 <www.onlineethics.org/Resources/Cases.aspx> and another one: Teaching materials using case studies. UK Center for Materials Education. Retrieved December 28, 2011, from Higher Education Academy websitehttp://www.materials.ac.uk/guides/casestudies.asp.

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2.3 ACTION LEARNING – A SCHEDULE BASED ON A BUSINESS GAME

Tarja Salmi-Tolonen

A business game as a tool for learning is well suited for both *the proactive law and the prevention and resolution of disputes* and *the proactive contracting and risk management* modules. The course can be organised according to the action learning principles where knowledge acquisition, co-learning in teamwork, acquiring skills through experiential learning in simulated practical work and where feedback by the teacher and peers alternate.

Action learning is an offshoot of experiential learning and has a long history in adult education. Action learning combines many leading theories of problem-solving and learning by doing approaches. Since its development in the 1980s, the method has been used extensively by private organizations and academia as a management and leadership development tool (Marquardt, 1999).

Action learning has proven to be effective both in company and academic settings in developing future leaders in "real world" tasks. In a classroom this method involves students as "consultants" in a virtual and simulated

"real world" project to benefit their potential "client". The students benefit directly by resolving "real" current issues, and indirectly by developing several competences within the team such as cooperation and building relationships in an ideally cross-disciplinary team.

In the business game the instructors' role may be either to act as mentors or coaches to the teams or they can take a role as the manager or the CEO of the virtual company and interview the teams when they present their proposals. If there is more than one instructor on the course, different roles can be assigned to them such as CEO, Sales Manager etc. as in the Proactivia Ltd. explained below.

Since many of the basics and principles of action learning are in accordance with developing the proactive competences explained in Chapter 2 above, it can be applied in planning the course schedule. The method has been proved successful and can well be adapted to teaching the two course modules – *Proactive Law* and *Proactive Contracting*. The readers of this teacher's guide can either create their own business case or use the virtual Proactivia Ltd case explained in 2.4 below. The plan below is based on an assumption that there will be 20 contact hours organised in five four-hour sessions and the students will be awarded 5 ECTS credits, which means that the students will be also working independently in teams outside the classroom.

Session I

1. Knowledge acquisition – The background and motivation for the course are explained and the concept of proactive law clarified; the public and private regulation levels are discussed (Handbook, Section II, Part I, Chapters 1 and 2)

2. Team formation – If the business game method is used, it is best to form the teams at an early stage of the course. This will give the team members an opportunity to get to know each other and it also starts creating the feeling of "being in the same boat". The teams are often formed spontaneously, but the teacher can also appoint the teams. Depending on the size of the whole group there should be three to eight members in a learning team. Ideally, members will be a mix from different disciplines (law, business, technology) to bring a diversity of knowledge and experience to the project and expand the learning opportunities for the teams. The members will communicate with each other and with the instructor and the virtual "client" by the means available: in face

to face meetings and by email, the social media, Skype and, if necessary and feasible, through teleconferencing.

3. Co-learning – Students discuss the concept of proactive law or proactive contracting in groups/teams. Business case information (e.g. Proactivia Ltd.) is given to the students.

4. Experiential learning – Students start information mining in teams on similar size enterprises as the virtual company; their potentials and risks in the present day markets.

Session II

1. Knowledge acquisition – the history of the proactive approach to law (Handbook, Section II, Part II, Chapters 1 and 2); introduction to the proactive approach and proactive lawyering (Handbook, Section II, Part II, Chapters 1, 2 and 3). Corporate social responsibility issues are discussed. The parameters of assessment are explained to the students (see Section 2 above).

2. Co-learning – the tender to bid is given to students and they discuss and analyse the issues given and try to find a proactive approach to it, find more information, and discuss their own reactions and options to tender.

3. Experiential learning – although the virtual case is fictitious, it is based on real life cases and the students do similar information retrieval and calculations and analyses as they would in a real situation.

Session III

1. Knowledge acquisition – The rationale and criteria of the main standardisation systems and their function in value chains are introduced. Some basics of business analyses are explained from both the legal and the financial point of view (Section II, Part II, Chapters 1 and 2).

2. Co-learning – The teams define their own goals and prepare a tender and send it to the "CEO" of the company. Inquiry is a key component of this method of learning. It is critical to question why the proposal/project is important, to whom, what the parameters are, who else may be impacted, or the unanticipated consequences of action or lack thereof.

3. Experiential learning – The virtual case company is naturally functioning simultaneously with the course and situations change. The CEO of the company informs those who have confirmed that they are intending to bid (i.e. the teams). The teams need to consider their strategy and calculate their own interests. The team should ask for more information at this point at the latest. It is for the teacher to decide whether the students should be instructed to do so or whether they should think about it themselves.

Session IV

1. Knowledge acquisition – Proactive law in relation to alternative dispute resolution mechanisms are explained. Law students usually know the different types of dispute resolution methods but it is necessary to emphasise the attributes and role in private regulation. Furthermore, the students from other disciplines may not have encountered these mechanisms in their previous studies. (Handbook, Section II, Part I, Chapter 2).

2. Co-learning – The teams engage in finding both the legal and business solution to the problem through information mining. They reframe the problem and try to pose new questions and potential solutions. They form their strategy based on their findings. Questions are also encouraged about the group's process, learning, individual contributions, and participation. This type of inquiry enables the group and its individuals to employ creative methods of data-gathering, interpretation, introspection, and decision making that can lead a group through an experience of transformative learning.

3. Experiential learning – A complication has appeared in the company; information is sent to the teams who have already committed themselves to bidding. The teams decide whether they need more information and contact the CEO. The teams submit their written bid and the material (presentation, graphics etc.) they consider necessary to the CEO of the virtual company. At this point the teams should also make up their minds on their own terms for the negotiations.

It is important that a deadline for the proposals is set. If there are any irregularities, the students should find a solution. The teacher/s read/s and acknowledge/s receipt of the material and gives each team an interview time.

Session V

1. Knowledge acquisition – proactive law, public and private regulation and dispute resolution mechanisms are discussed and their impact on proactive lawyering is summarised and discussed.

2. Co-learning – the students learn to "act" together while orally presenting their proposal. Each team member should have a role which the team has agreed beforehand. In an ideal case, if the team is a mix of two or more disciplines, every member should have a role according to his/her major.

3. Experiential learning – the teams present their bids and solutions to the CEO of the company. It is also important that the teams ask further questions on the company and what their own role would be and are able to moderate their presentation accordingly. This part is conducted as a "job interview" either face to face, by teleconferencing or Skyping, depending on the situation i.e. whether the instructor plays the role of the CEO or whether the CEO is a colleague, say, in another university also responsible for a similar course module.

There is no learning without feedback. The "CEO" and teachers/mentors give feedback on the proposals and possibly declare which proposal is the "winner". The proposals are assessed on the principles presented in the proactive law rubrics and the competence chart (see Section I, Chapter 2 of this volume).

All proposals are then presented in class. The students assess their own performance and consider its strengths and weaknesses in comparison with the other teams' work and with the aims of the course and the competence chart.

One of the key principles of action learning is that there is no learning without thorough feedback (see e.g. Marquardt (2004). The course instructor should allow enough time to him or herself to prepare what and how to give constructive feedback. It goes without saying that criticism should be based on what the teams and the individuals in the teams did and how their work developed according to the competences and their presentation and NOT on their personalities. All comments should also be justified. If a winner is announced, one should very carefully consider the justifications and show what was "innovative" and why it was more innovative than the other proposals.

It is not possible to emphasise the importance of reflecting the process of the team and individual development too much. In using a business game as a teaching method, allowing ample time for personal and group feedback is imperative. The necessary prerequisite is naturally a clear definition of the parameters and explaining them to the students at the beginning of the course.

This example is drawn based on the assumption that it is used in the proactive law module, but it can equally well be used in teaching of the proactive contracting module. The knowledge acquisition part is drawn from Section III of the Handbook and the emphasis of the business game is shifted more clearly to contracting.

REFERENCES

Marquardt, Michael J. (1999) *Action Learning in Action*. Mountain View, Cal; Davies-Black Publishing.

Marquardt, Michael J. (2004) *Optimizing the Power of Action Learning*. Mountain View, Cal; Davies-Black Publishing.

http://www.proactivia.eu.

2.4   BUSINESS GAME

Casper Wissink

Different types of learning and development are required for different purposes. Conventional teaching and training are based mainly on knowledge/skills transfer, but this does not address individual growth and potential particularly well. As stated before, the aim of the development of core curricula and teaching modules is to raise the students' proactive thinking ability in the context of management and business law in order to work in the global economy.

People typically need to "persuade themselves" through their own experience to learn. More and more attention is now being paid to the management of learning, as well as the modelling of learning outcomes rather than pure facts, content or theory. The economics of failure from making uninformed and

untested decisions have accelerated the need for proper risk management practices in all aspects of business. Practice in real time has become the default risk management approach to organization change. Add to the mix the built-in interaction, collaboration and competition, and you get the perfect formula for a business simulation.

For one of the courses (Proactive Law) we have created a business game, called "Proactivia Ltd." The game is based on a fictional company called Proactivia. The objective of the company is to develop and deliver generic diagnosis and advice tools on a wide range of legal cases in administrative law and civil law. One of the main features of Proactivia is a "semi-artificial" intelligence system, called Legal Intelligence Services System© (LISS©) which combines querying and browsing legal databases which are fed by all information provided on the Internet.

Students receive, simultaneously with the theoretic part of the course, all kinds of information such as financial data, competition info and background information. During the theoretic part of the course, they will receive "real-time" info about four different events, to see how the students will react or act. The objective for the student is to present a proposal for Proactivia Ltd. on cooperation with the management team of Proactivia Ltd. for the next coming three years on management level and legal strategy in competition with other students. The outcome of the business game can be two-fold. Firstly the students will not wait until they hand in their proposal and will act and present their ideas as soon as an event has come up. Secondly, the proposal does not only have reflections of the events presented, but also gives new ideas, insights and opportunities for Proactivia.

3 CONTENTS AND TOOLS FOR THE PROACTIVE LAW AND THE PREVENTION AND RESOLUTION OF DISPUTES COURSE MODULE

Kaisa Sorsa

The project group defined the contents of the "Development of proactive law and the prevention and resolution of disputes" course module as follows:

Course Description

After completing this course the student:

- can apply the underlying principles and mechanisms of proactive law to prevent problems and promote responsible business behaviour in a value chain, in public and private networks;
- is able to manage a company's stakeholder relationships in order to use the law as a source of competitive advantage;
- is able to manage conflicts and resolute disputes.

Course material

- ProActive Management and Proactive Business Law Handbook (Sorsa 2011b)
- A selection of case studies.

This general description of the study module can be modified according to the purposes of the university. The use of different teaching methods and tools depend on the length of the period over which the module is taught – a two-week intensive course with classes five times a week or one term with classes

once a week etc. Section II of the PAM PAL Handbook (Sorsa 2011b) provides the knowledge base and reading for the Proactive law module. The Section is organised into two parts: Part I: Proactive law in public and private regulation and Part II: Proactive approaches to law. The first part concentrates on the legal structures and processes which are the outcome of proactive behaviour in a networked business environment. Law is seen here as an evolving and developing phenomenon which is created in dialogue between the different actors of the society (Sorsa 2011a).

The second part focuses on the proactive approach to law by different professional groups. Law and the legal environment are in this case seen as "given" and the proactive approach to legal knowledge and different stakeholders can improve the company's competitiveness.

Next, we will give some examples of assignments which can be used in addition to the handbook and the slides (accompanying the PAM PAL websites).

Corporate social responsibility[5] (CSR) is the underlying value and context for global business. The core value of CSR is expressed through partnerships that incorporate interdependent relationships supporting the viability and sustainability of both. The development of this value which demonstrates the responsibility of the businesses to stakeholders and shareholders, and the responsibility of the community to businesses which support prosperity will be the basis for CSR learning in the 21st century. Weaving mutual responsibility as a part of business ethics into the education of future business owners and managers can help embed CSR in the central beliefs and practices of the next generation of global and European enterprises (Morrissey & Kleedehn 2011, 7).

Example

The Proactive law course (5 ECTS) was piloted with bachelor students in a very short intensive period over two weeks at TUAS in May 2011. The course was offered to both international and Finnish students[6]. The contents and objectives of the course were the following:

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5   This value is mentioned also in the national level e.g. in Finland, these competences are translated into generic competences by The Rectors' Conference of the Finnish Universities of Applied Sciences (ARENE).

6   There were altogether 10 students who had registered for the course but four students from abroad did not arrive. Finally we had a mini group of six young male students one from Finland, two from India, one from Nigeria, one from Greece and one from the UK. The background of them was also diverse as they were studying IT, international business management or other issues of social sciences. None of the students were familiar with the topic of proactive law before starting the course.

Course Description

- After completing this course the student:
    - has an overview of proactive law and he/she understands its role in the global economy;
    - can apply the underlying principles and mechanisms of private regulation to prevent problems and promote responsible business behaviour in a value chain, in private and public networks;
    - is able to manage a company's stakeholder relationships in order to use the law as a source of competitive advantage;
    - is able to manage conflicts and resolute disputes.

Core contents

- Introduction to proactive law: what it is and how it has developed?
- The legislative, executive and judicial functions of private regulation.
    - An assessment of the effectiveness and efficiency of these regulatory methods in the context of global and world-wide national trade.
- Types of actors engaged in defining and implementing standards or other private regulation rules.
- Problem solving, the need for alternative dispute resolution and its different forms.

The main working methods were: lectures (20 hours) in a one-week intensive course, case studies, team work, a final written exam and students' self-assessment. The students evaluated their own learning experiences in a self-evaluation report. According to these reports the module helped them understand the concepts of proactive law and also clarified the importance of this area in today's business world. The following ideas are based on this course and to another piloting course for the law students at the University of Turku, Faculty of Law.

Course participants read the ProActive Management and Proactive Business Law Handbook Sections I and II. A set of PowerPoint slides for the module and a business game are also available. The accompanying PAM PAL website is available at http://pampal.turkuamk.fi/index.php.

3.1 TEACHING THE PROACTIVE LAW MODULE THROUGH ASSIGNMENTS

Kaisa Sorsa

The learning methods differ from mere passive participation to lectures or writing in the students' main subjects. Writing activities can involve a range of text types – essays, reports, papers based on case studies, literature reviews and problem solving of tutorial questions. An academic essay is essentially a piece of writing which answers a question, presents a point of view in a clear and logical way and is supported by evidence from academic-scientific sources. Through writing an essay, students will familiarise themselves with the discipline, its cognitive systems and concepts containing knew knowledge and demonstrating a wide range of skills.

Writing assignments in university studies must be based on reading and investigation. It is expected to represent more than the writer's personal opinion based solely on past experience and general knowledge. Opinions must be supported by references to knowledge achieved through research conducted with methods contested by the academic community. Writing is a product and process of learning – the completed assignment displays learning. It is also a tool for learning – through the process of writing, students can clarify their thoughts and refine their understanding. Depending on the number of class hours, some of the assignments can be used as bases for discussions in class.

3.1.1 Assignments related to the basic concepts

At the very beginning of the module, before the teacher goes through the content of the module, he/she can, for instance, ask the students to write a short essay (a descriptive essay[7]) *about the concept of proactive law.* The purpose of this exercise is to encourage the student to express his/her intuitive understanding and connotations on the topic and reflect the topic with the issues he/she has learnt before this course. At the end of the course the students are required to write a learning journal and in writing the journal they are again requested to answer the same question. This kind of an exercise will enable the teacher to see how the students' understanding has developed during the course and whether the students have learnt to assess the new concepts critically.

Assignment 1: Please write a short essay about proactive law. Describe how you understand proactive law at present and what kind of associations it evokes. What are you expecting to learn during this course? You have a half an hour to finish this task.

After the teacher has explained the contents of the course and is proceeding to elaborate the contents of the concept of proactive law and how it is defined in the handbook, the second assignment will then focus on the comparison of proactive law and "traditional law". At this stage of the lectures when the students are still strangers to each other, it is practical to encourage them to work in small groups. The goal of the assignment is to compare the concepts and background assumptions of traditional law and proactive law in a multidisciplinary group.

Assignment 2: Discuss in your group what the main differences between proactive law and traditional (reactive law) are? Try to concretise your ideas by pointing out when and how, and by whom the law and proactive law are applied?

Summarise the results of the group discussions with the students before the end of the introductory lecture.

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7   Descriptive essays are often subjective tasks. According to the Private Writing instructions, descriptive essays are opinions and the student can write and describe anything he/she desires. It is writing something just as one sees it. Therefore it can be the most liberating and pleasurable essay to write. www.privatewriting.com

The teacher may ask the students to read certain chapters of the handbook before the next lecture. This would enable the lecture to be more interactive and students are better equipped to discuss the topic during the lecture. After the first introductory lecture, the teacher will ask the students to read Chapter I (Introduction) and the first chapters: Proactive law and public and private regulation, 1.1–1.4. in Section II "Proactive law and the Prevention and Resolution of Disputes" before the next lecture.

> *Assignment 3:* Analyse critically the handbook text on proactive law and private regulation. What is private regulation and why is it considered to be proactive law? *To analyse critically means* to ask questions of a text in order to judge the contribution it makes to the issues or debate at hand. You should consider how recent the text is, the assumptions the author makes, the arguments presented, the supporting evidence provided and where this work stands in a wider debate.

One important requirement is that the student actually answers the questions being asked. It is therefore important to understand the question. The purpose of this assignment is that the student reviews what he/she has already learnt about the legal environment, reflects these ideas with this new material, finds additional information in the handbook text and in the research articles referred to.

The core question here is that the student learns to see the legal environment as a multi-level governance system (Figure 1, Sorsa 2011b: Section II, Part I) and not only as a system governed by the statutory law. Active debate may be evoked between law students and students from other disciplines as law students are usually more focused on statutory law and underestimate the importance of private regulation.

Depending on the size of the group, you can ask students to write different types of essays based on the same chapter (http://www.privatewriting.com/types-of-essays.html), e.g. a reflexive essay (http://www.privatewriting.com/reflective-essay.html) or a compare and contrast essay (http://www.privatewriting.com/compare-contrast-essay.html). All these analytical skills necessary when writing the essays develop the students' critical thinking.

The next core issue of this chapter is to understand the different angles of CSR. The following exercise can be used as a written assignment or for discussion during the lecture. A recommended type of essay could be an argumentative essay. In this kind of essay, one not only gives information but also presents an argument with the pros (supporting ideas) and cons (opposing ideas) of the topic. The writer should clearly take a stand and write as if he/she is trying to persuade an opposing audience to adopt new beliefs or behaviour. The primary objective is to persuade people to change beliefs that many of them are reluctant to change.

Assignment 4: Evaluate why corporate social responsibility (CSR) is a relevant context to discuss proactive law? Weigh up or give your assessment of the relevant matters, citing positive and negative features, advantages and disadvantages for taking CSR as a contextual factor.

In addition, the reader needs to be able to see a 'clear line' of argument throughout the paper. That is, the paragraphs or points being made in the paper should all be relevant to the argument, and follow in a logical sequence. It is also expected that these points will be set out in the main body of your assignment, and that you will include an introduction and a conclusion.

There are many barriers to the development of CSR in global economy. These barriers are raised by technology, regulation, and different approaches to conceptualising the phenomenon, consumers' buying behaviour etc. Recognising the barriers facing consumers in making sustainable choices shifts the focus to the training of professionals who manage the resources, educate the public or design the options from which choices are made. These professionals are educated and trained in higher education institutes. In fact, there are many who argue that the higher education sector bears a significant responsibility for sustainability by virtue of its influence on society and academic freedom to explore ideas (Davies et al., 2003; International Association of Universities (IAU), 2006; Sherren, 2006). This provides a strong justification for investing in this social institution as an agent to bring about change (Sibbel 2009, 74).

3.1.2 Proactive law's content perspective

The self and private regulation part of the course focuses on some world-widely known private regulation schemes in order to concretise proactive law at the rules and structures level. Private regulation schemes play a more and more crucial role in global governance. As our students will be managers or workforce in the future business world they need to be active towards different groups of stakeholders and not only towards sellers and buyers. These groups are trade associations, civil society activists, media, professional networks and authorities.

Proactive law
Content

Prevention ← Expressed goals → Promotion

Risk management

Opportunity management:
Competitive advantage
*Product differentiation
*E.g. eco -labels
*Creation of new markets
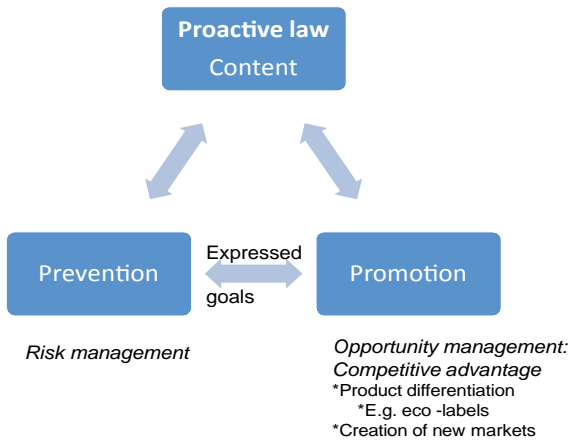
FIGURE 1. *Proactive law: content related factors (Sorsa 2011b; Section II, Part I: chapter 1.2).*

The concept of systemic innovation is presented in the handbook (Section II, chapter 1.2). It is a set of interventions that shift a system to a desirable path (www.forumforthefuture.org). Self and private regulation schemes and contracting are regulatory examples of interventions which redirect a system (e.g. the product value chain) to a sustainable path. As these schemes are developed, monitored and updated by private actors, it is evident that the future managers need to be capable to be involved in all the relevant processes and networks in order to take advantage of these regulatory tools. This, however, requires the capability to engage in different stakeholder forums which are relevant for the company.

In the proactive law's content perspective chapter, the idea is to focus on the content and goal of certain schemes. The example schemes are chosen from some of the world's most well known food industry self- and multi-stakeholder schemes. Because the core idea in proactive law is enabling and empowering, it is necessary to demonstrate presenting a number of examples on how systems and processes can enable and empower the societal actors.

Systems and processes are management and governance tools. In the private regulation life cycle, we can distinguish five different stages: standard-setting, adoption, implementation, conformity assessment and enforcement. The outcome of the regulatory process is self or private regulation or in public law. The goal of these instruments, as the goal of a single contract, is an outcome of the negotiations between different actors and different people.

Ask students to read Chapter 1.5 of the handbook. There is one familiar CSR scheme for all students (Fairtrade) and two more unknown (GLOBALG.A.P and UTZ Certified).

Assignment 5: Compare the three different regulatory schemes from their proactive law content perspective. Show the similarities and differences of these three systems from their focus, target, content and application perspective. Write a short report of your findings.

This exercise should train students to focus on the goals of these tools, and what are the purposes they have been developed for. You can also remind students to ponder who has developed these different schemes. After the students have learnt the details of these three types of schemes you can ask students to find examples of them in different industry sectors.

Assignment 6: Go to a supermarket and find out at least five different product and eco labels. Explain what their main messages are. After having done that, search the internet or other available sources what the real message the eco-label owner wants to get through is.

Discussion around different eco-labels is generally rather vivid in class because this is the area the students are familiar with. You can broaden the perspective from food stuffs to textile industry or electronic industry which are also familiar to most students.

The goal of these assignments is to teach the students to evaluate different regulatory tools and their usability for the purposes the actors have set for them. The main difference which should be kept in mind is risk management thinking and promotion thinking. In addition, the students will learn to know the different actors and forums which set these rules. The contextual elements are present as well and these issues should be taken into account while considering which tools are used when companies operate on b2b, b2c or b2c markets.

3.1.3 Proactive law's Process Perspective – standard-setting, implementation, monitoring

The legislative, executive and judicial functions of private regulation are analogous to the public sector law making and enforcement processes. What separates them from the traditional notion of law and what is emphasised in proactive law are the enabling and empowering elements, user friendliness and the facilitative characteristics of these schemes (Sorsa 2011a, 140–147). In order to participate to relevant standard setting, implementation or monitoring activities one needs to know what kind of stakeholders are relevant from the company perspective. Identification and engagement with stakeholders is fundamental to proactive law as well as to CSR. Here we use the definition of ISO 26000 for the stakeholder: *Stakeholder* is an individual or group that has an interest in any decision or activity of an organisation (ISO 26000, 2.20).
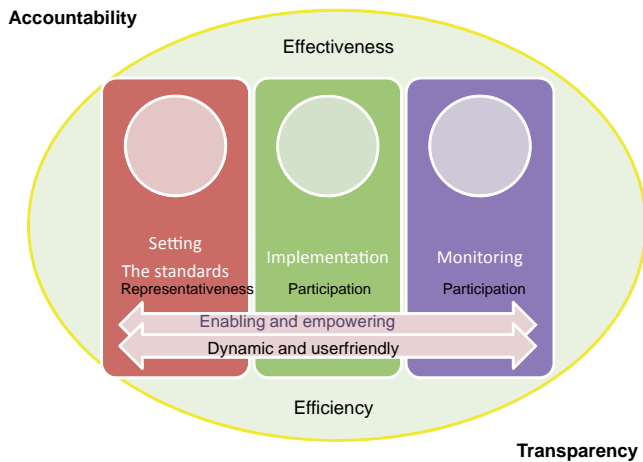
FIGURE 2. *Proactive law: process related factors (Sorsa 2011b: Section II, Part I: chapter 1.2).*

The first two assignments of proactive law's process perspective relate to the identification of the company's stakeholders. Give students examples of different types of companies.

Assignment 7: You should find out as many stakeholders as possible for these companies. List and discuss what kind of interests each group of stakeholders might have.

Assignment 8: Name at least one private standard-setting or monitoring stakeholder organization from the company X's business environment. You should also describe the main stakeholders of the standard-setting organizations.

Figure 2 in the Handbook (Sorsa 2011b) helps the work as the standard-setting organizations in the figure are quite well known in the world. Finding the monitoring organizations may be a more difficult task but not an insurmountable problem. You can ask students to read newspapers and watch TV and ask them to find some scandalous news items. Frequently many non-governmental-organizations are naming and shaming transnational companies. In Finland, some headlines in which NGOs' monitoring activities are reported appear almost every week.

The identification of the different stakeholder groups is not enough, however. Somebody in the company needs to take care of the relevant stakeholders. Discuss with the students who the persons or professionals whose task is to take care of these are and which of these professionals are the most relevant from the perspective of proactive law?

After the students are familiar with the idea that also private organizations (companies, NGOs) and individuals can set standards to commercial activities, then the next step is to consider how these standards are implemented in business.

One needs to stress that there is a broad spectrum of different self and private regulation standards. It means that there is also very broad spectrum of different ways the standards are implemented. The next assignment aims at concretising this fact.

Assignment 9: Here is a list of different self or private regulation tools. Try to find concrete examples of real business i.e. how they are implemented into business practices: codes of practice, codes of conduct; standards; industry guidelines; Code of Good Manufacturing Practice (GMP); Code of Good Agricultural Practice (GAP) etc.

These issues are well linked to the topics of accountability and transparency which are important concepts for the evaluation of the different schemes from the general public viewpoint. Especially the schemes which are used in order to improve the company's competitive advantage are under continuous public evaluation in media and in the NGOs' discussion forums.

Accountability and transparency are the most critical issues which should be kept in mind when managing companies. These elements help the company to achieve its business goals in the long run. In order to concretise the importance of the effectiveness and outcomes of different voluntary standards, it is good to use summary reports. There are analysis reports which are written from an interdisciplinary perspective and which can be used for teaching purposes. For instance, "The State of Sustainability Initiatives Review 2010: Sustainability and Transparency" (Potts & van der Meer & Daitchman 2010) illustrates very well the impacts of most world-wide market-driven CSR standards and their capability to solve complicated problems of global economy.

At the end of this chapter you will find links to websites of case studies which can be used to deepen several aspects of the CSR schemes further or other schemes.

Case studies for PL & DR

The following two case studies are developed together with a small Finnish company in the toy industry. The writer has discussed the case with the product manager of the company and the basic information is based on the real business environment. The teacher can use these case studies in the middle of this course depending on the number of hours and the size of the group.

A case study assignment, for example, does not imply that a particular type of writing is expected. Case studies require the analysis of a particular case, that is, an event, an organization, a process, an object, and so on. After analysing the case, a student may be required to write an essay that discusses the issues arising from the scenario. Alternatively, a student may be required to write the assignment as a report, using headings and subheadings and making recommendations to deal with a problem in that setting. These cases can work as an individual assignment or as a small team assignment. In piloting, we have used them in both ways and they seem to work either way.

Case Pro Import: Networking

Wednesday afternoon Jan 15th, 2011, product manager Tiia Laine, of a wholesale company Pro Import, ended a phone call with one of their major customers, the largest hypermarket chain in Finland. The phone call was about factory audit reports which the customer wanted to have in the near future. Tiia felt this was a huge job to do as Pro Import had only made a few audits in the suppliers' facilities and those were not even made by the company itself.

Background

Pro Import, located in the South-West of Finland, was founded in 1988. It was first led by the father of the owner family and since 2001, by the eldest daughter Teija Karama. Pro Import imports consumer goods. It first started out with household and decorative items and then later expanded to toys.

The showroom of Pro Import is a huge playground with all the possible toys and games there are on the market. In addition, future Master Chefs can easily find trendy cooking utensils in their wide range.

The company moved to new premises of their own four years ago. The old rented building, office and warehouse started to be too small as the company has been growing by more than 10 per cent each year. The turnover last year was 12 million euros and the present year also looks promising.

Over the past four years, the company has appointed several new members to its staff to carry out different duties and at the moment there are five product managers working in different product groups. The latest expansion was into fabric business as the company carries a couple of very popular licenses in Finland. The license business and the turnover of that business are very important to Pro Import and it makes about 30 per cent of the total turnover.

Product manager's tasks

A product manager's main tasks were creating the product ranges, purchasing procedures and selling the products to the major department stores and hypermarket chain buyers in Finland. Most of the products, 90 per cent, are imported from the Far East, mostly from China. Tiia's product group was consumer goods and especially household items, cooking and baking products.

Half of the company's turnover comes from toy business and there's a big challenge this year as the toy standard of the EU is changing and new legislation will come into force on July 1, 2011. All Pro Import's products demand a lot of knowledge on legislation, product safety, product testing and following EU standards, and thus the product managers have to be fully aware of how to carry out their work. In the toy section, the Finnish Toy Association gives a lot of support and information to those in the business. Actually, CEO Taina Karama is the chairperson of this association.

Social responsibility and value chains

Pro Import has started to consider how to proceed with the continuous demands and inquiries concerning the social responsibility of the company

and its networks. Both of Finland's major chains, SOK and Kesko, are themselves fully committed to be socially responsible companies in Finland and also in their actions abroad.

As Finland is a very chain orientated country it is very important to have these two chains as customers. This simply means that the company's own values have to be equal or close to the leading chains' values.

Future plans

The need for increasingly transparent actions and cooperation with socially approved partners needs careful planning and written future plans. Factory auditing is a huge cost and needs careful consideration how to invest in these costs. It also has to be evaluated whether it is worth doing these audits to all factories or only the most important ones.

- How to do it better and faster than the competitors?
- Is there any chance of cooperating or networking with some other company abroad or even in Finland?
- Does the Finnish Toy Association give any extra value to Pro Import?
- Are there any other organizations in Finland which could work as a source of information in product safety etc.?
- What kind of extra work or future tasks does new toy standard create to Pro Import?
- How to find the best partners in China?
- How to ensure that contracts are made so that the Chinese partners also agree with them?
- What can be the contradictions between social responsibility and ever tougher competition?
- How to solve them if there are any?
- BSCI (Business Social Compliance Initiative) – does the company need it, does it create any significant value to the company?

The corporate social responsibility case focuses on the relevant issues which a small company is facing. It also illustrates the different CSR topics, such as social responsibility and product safety in the retail industry compared to the food sector. In addition, the toy industry's core target group is children, which further emphasises the relevance of the mandatory laws.

CASE Pro Import – CSR

It was March 2011 when Pro Import's CEO Teija Karama made the decision that the company would start factory audits in the Far East, mostly in China, on a more regular basis. This came as a result of the past 6 months' consideration and searching information about auditing processes.

The impetus for this came from the two major customers in Finland, Kesko and SOK. Teija Karama had attended the annual session of both of the chains to which all the major suppliers are invited. In these sessions, information is shared both regarding the past year and the future prospects. One of the most important focuses for the year 2012 was increasing the social responsibility in the developing and newly industrialised countries.

As Finland is a very chain oriented country it is very important to have these two chains as customers. This simply means that the company's own values have to be equal or close to the leading chains' values, considers Teija Karama.

Background

Pro Import, located in South-West Finland, was founded in 1988. It was first lead by the father of the owner family and since 2001, by the eldest daughter Teija Karama. Pro Import imports consumer goods. It first started with household and decorative items and then expanded later to toys. The showroom of Pro Import is a huge playground with all possible toys and games there are on the market. Future Master Chefs can easily find trendy cooking utensils in their wide range.

Over the past four years, the company has employed several people to different tasks and at the moment there are five product managers working in different product groups. The latest expansion was into fabric business as the company carries a couple of very popular licenses in Finland.

Future plans

The need for more and more transparent actions and cooperation with socially approved partners needs careful planning and written future plans. Factory auditing is a huge cost and it has to be considered how to invest in these costs. It also has to be evaluated if it is worth doing these audits to all factories or only the most important ones.

- What kind of choices are there in the auditing business?
- What is the cost structure on factory auditing? Single payment, yearly etc.
- Is there any change of cooperating or networking with some other company abroad or even in Finland?
- Does the Finnish Toy Association give any extra value to Pro Import?
- What kind of extra work or future tasks does the new toy standard create to Pro Import?
- How to find the best partners in China?
- How to ensure that the contracts are made so that the Chinese partners also agree with them?
- What can the contradictions between social responsibility and ever tougher competition be?
- How to solve the problems, if there are any?
- BSCI (Business Social Compliance Initiative); does the company need that, does that create any significant value?
- Are there any disadvantages with choosing BSCI? Are there any other choices or forms of cooperation between different organizations?
- Would BSCI be more important to some of the company's product groups than others (toys, household – food-related products, fabrics)?
- License business is very important to the company; would BSCI give any extra value for those products?

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3.2 PROACTIVE LAW AND ALTERNATIVE DISPUTE RESOLUTION MECHANISMS

3.2.1 Dispute resolution of self- and private regulation schemes

Kaisa Sorsa

The proactive management of disputes should be started by thoroughly understanding the core reasons for potential disputes. In the standardisation schemes the disputes between different actors may arise, if the implementing organizations do not comply with the standards. Therefore it is important to have proactive approaches for the monitoring of compliance. However, the different schemes are equipped with different tools for them. Figure 3, below,

illustrates the categorisation of complaint handling. The most developed schemes have proactive monitoring methods and less developed systems rely on reactive monitoring.

Components of a compliance system in self- and private regulation			
Monitoring function			Sanctioning mechanism
Approach	Method of assessment	Source of assessment	
Proactive monitoring	Self-assessment	Desk based	Recommendations for corrective action made, but kept confidential.
	Peer assessment	Interviews/ surveys/ visits	
			......
			And disclosed publicly
	Third party assessment	Both	Financial penalty imposed
Reactive monitoring	Complaints procedure	Depends on nature of complaint	Membership suspension/expulsion
			Expulsion publicised

FIGURE 3. *Monitoring compliance and sanctioning in self- and private regulation. (Lloyd, Calvo & Layborn 2010, 5).*

Assignment 10: Analyse at least four private regulation schemes (e.g. Fairtrade, UTZ Certified, Rainforest Alliance, FSC, EICC etc.) and their compliance handling systems searching information from the scheme's web page. You can compare your results with the age of the scheme and examine if there is any correlation between the age and the development phase of the monitoring system.

As an outcome of this exercise students will learn about the development of these different schemes' monitoring systems. This assignment may also raise discussion about the different practices used in different business sectors.

3.2.2 Complaint handling and dispute resolution on company level

Kaisa Sorsa

The different complaint handling mechanisms can also be analysed at the company level. Case Pro Import 3 focuses on the company level monitoring system. Consumer complaints are very important issues from the company's perspective as consumer experiences concerning the services of a company shape the image and reputation of the company. Consumer complaints handling also illustrates the relationship and co-operation of mandatory law and voluntary self-regulatory practices. Some companies have developed these systems on industry level but in some other cases the complaint handling systems might be only company-specific.

Case Pro Import 3: Consumer Complaint system

Case Import's sales assistant Satu Laine was reading and replying to emails that consumers have sent to the company's info email box. The email messages are mostly questions regarding the products or complaints about broken products or even complaints about products that consumers were not satisfied with. Today, March 21, 2011, there were not that many email messages but one was even more disturbing and also needed the managing director's opinion on how to reply.

Background

Pro Import, located in the South-West of Finland, was founded in 1988. The company was first led by the father of the owner family and since 2001, by the eldest daughter Teija Karama. Pro Import imports consumer goods. It started out with household and decorative items and then expanded later to toys. The showroom of Pro Import is a huge playground with all possible toys and games there are. Future Master Chefs can also easily find trendy cooking utensils in the wide range.

The company moved to new premises of their own four years ago. The old rented building, office and warehouse started to be too small as the company has been growing more than 10 per cent each year. The turnover last year was 12 million euros and also the coming year has started well.

The company has employed several people in the past four years to different tasks and at the moment there are five product managers working in different product groups. The latest expansion was into the fabric business as the company carries a couple of very popular licenses in Finland. The license business and its proceeds are very important to Pro Import as it makes about 30 per cent of the total turnover.

Product manager's tasks

The product manager's main tasks in the profession were creating the product ranges, purchasing procedures and selling the products to the major department stores and hypermarket chain buyers in Finland. Most of the products, 90 per cent, are imported from the Far East, mostly from China. Importing outside EU means that most of the goods needed some kind of product safety testing according to the EU. The knowledge about the standards can be found in several websites; e.g. information regarding food related products from the Finnish Food Safety Authority Evira http://www.evira.fi/portal/31614.

The consumer complaint

The worrying email message concerned a children's product that this particular consumer had bought to her two-year-old child. The product was a plastic bottle with a silicon straw. The child had chewed the straw until it was broken and swallowed a small piece of a straw. This is what the mother said as the piece of the straw was not found anywhere. The child was perfectly fine but obviously the mother was very concerned and accused Pro Import about neglecting the law and selling bad quality products. She also demanded compensation for causing huge danger to the child and the stress that all this had caused to the family.

The background to the bottle was that it had been tested before importing to Finland in an international testing company SGS http://www.sgs.com/about_sgs/in_brief.htm. When the goods arrived to Finland, the Finnish Customs tested the bottles before allowing them to be delivered to stores.

- Thus, the law has been observed and documents can be shown but…

- Does the consumer have a case against Pro Import or has SGS or the Finnish Customs neglected something?

- How should Pro Import proceed with this case?

- Can this damage Pro Import's reputation?

- If so, then how to avoid this?

- What if Pro Import had not made any tests beforehand and the Customs had allowed the goods to arrive in Finland without testing?

3.2.3 Assignments – dispute resolution

Tarja Salmi-Tolonen

Case description: Danone v. Wahaha

Confidentiality and privacy are considered to be important merits in favour of most of the ADR mechanisms. Consider how confidentiality is understood by these parties to a contract.

Facts and events:

In 1996, Wahaha Group and Groupe Danone signed a joint venture agreement which included a trademark transfer agreement, non-competition agreement, and confidentiality agreement. Wahaha's founder, Zong Qinghou, became the chairman. The original five joint ventures evolved into 39, enjoying financial success. In 2000, Wahaha Group went through reorganization, becoming a private entity, with the Hangzhou government holding 46 per cent of its stocks. In the following years the reorganised Wahaha Group established a number of separate subsidiary entities, apparently using the Wahaha-related trademark. For years, Danone kept quiet with respect to Wahaha Group's use of the trademark and apparent breach of the non-competition agreement until late 2006. Then Danone made an offer to buy a 51 per cent stake of the non-joint venture companies and make them part of their joint venture, a move

Danone explained as an olive branch to end the irregularities. Zong saw it as a hostile takeover, and publicly rejected the offer.

On 9 May 2007, Danone submitted the dispute to the Stockholm Arbitration Institute as stipulated by Article 26 of the original joint venture agreement. Danone raised eight requests for arbitration. Wahaha, its founder Zong Qinghou, and several of the non-joint venture companies were accused of violation of the terms of the trademark licence, breach of the non-competition clause and of the confidentiality clause. In other words, Zong was accused of having set up an entire production and distribution network in parallel to the joint venture.

On 13 June, Wahaha submitted this trademark dispute to the local Hangzhou Arbitration Commission (HAC) in China, claiming that the trademark transfer contracts were never approved by China's trademark authority and were void. In December the HAC ruled in favour of Wahaha, arguing that the ownership of the trademark had never been transferred. Danone brought the case to the local Hangzhou Intermediate People's Court.

By the end of 2007, Danone and Wahaha had several battle fronts, other than the arbitral processes, with 10 lawsuits in several countries. It had all become highly personal and involved several Danone executives and Zong's wife and daughter as well. Then, under political pressure from the respective governments (the leaders of France and China had addressed the dispute at a presidential summit in China), both parties agreed to temporarily suspend all lawsuits and arbitrations to start negotiations. As *Chinastakes* put it in its headline, "Politicians may have to resolve Danone-Wahaha Brouhaha" (5 March 2008).

Between December 2007 and April 2008, all attempts at reconciliation failed and the two parties again turned to legal procedures. In July 2008 the Hangzhou Intermediate Court ruled that the original arbitral award issued by the Hangzhou Arbitration Commission was valid.

In January 2009, the Swedish tribunal began the closed-door hearing in Stockholm.

On 30 September, Danone and Wahaha agreed to end their joint venture relationship. Danone announced that it would sell its 51 per cent stake in the Danone-Wahaha joint ventures to

its Chinese partners. No financial terms were announced then, but the settlement amount was considered in the media as below the figure Danone had cited in previously published financial accounts as the value of its Wahaha holdings.

Four hours later to this settlement the Swedish Arbitration Court ruled in favour of Danone. The ruling said Wahaha had breached confidentiality and non-competition agreements, resulting in heavy losses to Danone. It added that their joint venture held the right to use the "Wahaha" brand and that Wahaha and its chairman Zong should cease their unauthorised use of the brand.

This recital of facts and events is cited in Corona (2011).

More information can be found at the company websites and other sources, for instance:

Abrams, Stan (2007) Danone v. Wahaha: No Sympathy. 12 December. Retrieved 15 July 2010 from http://www. chinahearsay.com/danone-wahaha-no-sympathy/.

Brown, Alexis C. (2001) Presumption meets reality: an exploration of the confidentiality obligation in international commercial arbitration. *American Uniform International Law Review 16*, 969–1025.

Chan, Isabella, Lu, Jiangyong, Tao, Zhigang, and Wei, Shangjin (2008) Danone v. Wahaha (A): Who is Having the Last Laugh? CASE/ Harvard Business School. Retrieved 15 July 2010 from http://hbr.org/product/danone-v-wahahaa- who-is-having-the-last-laugh/an/HKU766-PDF-ENG.

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Groupe Danone (2007) News and Events. 12 June. Retrieved 13 August 2010 from http://phx.corporateir. net/phoenix.zhtml?c=95168&p=irol-news&nyo=0.

Assess on the basis of what was said in class and in the course reader of the Danone v. Wahaha case or the Anheuser-Bush (facts below). The articles and materials in Moodle are for background reading. These are well-known and famous cases you should search for more information by yourselves.

In your report:

- Describe the companies involved and their relation.

- Describe the problem/dispute.

- Discuss, weigh and assess what the companies should and could have done, if you look at the problem from the points of view discussed in class: Proactive law and alternative dispute resolution.

- What could the companies have done in terms of causes, effects, and consequences.

- You can also compare the cases with cases or examples you may already know and have been discussed in your own country.

Prepare a presentation that takes about 10–15 minutes and you should share tasks so that both or all members of the team will have a chance to speak. The length of the paper should be 5–6 pages.

Do not only repeat what has been said but give also your own views in relation to what is presented in the course reader and other materials and what has been said in class.

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3.2.4 Case studies based on CSR cases available on internet

Kaisa Sorsa

A number of CSR case studies can be found on the internet and they can be used for further analysis of the contents, standard-setting and monitoring processes of these schemes. Depending on the students' interests they can select cases from different industry sectors.

A list of suggestions for case study topics and case studies:

1) IKEA Cases:
   a) IKEA Family Old enough to work?
      Available at: www.ib-sm.org/CaseIKEA.pdf
   b) Codes of Conduct and international framework agreements: New forms of governance at the company level – Case Study: IKEA
      Available at: http://www.eurofound.europa.eu/publications/htmlfiles/ef07927.htm
   c) Weaving for IKEA in South India: *Subcontracting, Labor Markets and Gender Relations in a Global Value Chain*, Geert De Neve, In J. Assayag & C.J. Fuller (eds.), Globalizing India: perspectives from below.

2) Social and Environmental Responsibility in Metals Supply to the Electronic Industry.
   Available at: http://eicc.info/news_center03.shtml

3) FairTrade standards; http://www.fairtrade.net/

4) SA 8000 – Social Accountability 8000; http://www.sa-intl.org/

5) Sustainability standards in the coffee sector: UTZ certified, Rainforest Alliance and Fair Trade.

6) Corporate Social Responsibility in textile industry.
   Available at: http://www.oesorichtlijnen.nl/wp-content/uploads Kenniscentrum/Sector%20informatie/Textiel%20International%20 Overview%20CSR.pdf

7) Sustainability standards in the fishing industry – Marine Stewardship Council (MSC).
   http://www.msc.org/documents and
   http://assets.panda.org/downloads/full_report_wwf_ecolabel_study_lowres.pdf

8) GLOBALG.A.P. and food safety (e.g. vegetable and fruit sector);
   http://www.globalgap.org/cms/front_content.php?idcat=9
   http://www.globalgap.org/cms/front_content.php

9) Forest industry – PEFC (Program for the Endorsement of Forest Certification Schemes) and FSC (Forest Stewardship Council) certification schemes – comparison.
   http://www.pefc.org/
   http://www.fsc.org/

10) Chemical industry and Responsible Care programme.
    http://www.responsiblecare.org/page.asp?p=6341&l=1

11) Business Social Compliance Initiative and retail business
    http://www.bsci-eu.org/index.php?id=2011
    http://www.bsci-eu.org/index.php?id=2035

Detailed instructions to the students

Students work in pairs or a small group and write a report on the cases. A hard copy of this report is returned to the supervisor within two weeks (no later than DD.MM). The case reports will be presented orally in the team work sessions.

Instructions for the case reports:

In the team work sessions, write a brief report summarising your findings on the cases given.

Pay attention to issues such as:

- Motivation of the company for implementing the CSR standards?
- Is the motivation arising from the company's own willingness or through pressure from some value chain actors?
- Can you identify any obstacles companies face in their proactive operations towards other actors in the value chain?
- Describe the role of NGOs in monitoring the compliance with the standards in the cases?
- Can you identify company's own compliance mechanisms used in the cases?

Case studies can be also used as assignments for the seminars. According to the curriculum, proactive law and the prevention and resolution of the disputes module is 5 + 3 ECTS. This means that students can deepen their knowledge about proactive law by writing a seminar paper from one aspect of proactive law. Various case studies found at internet are a good source of information and they can be used for the purposes of the seminar as well.

3.3   QUIZ – PROACTIVE APPROACHES TO LAW

Gerlinde Berger-Walliser

The proactive approaches to law part (Handbook, Section II, Part II) can be summarised and tested by using a proactive law quiz (see Assignment 1, below) and the Manager's Legal Plan (Assignment 2, below). The teacher can replicate the quiz for students and ask them to answer the questions before the next class or the quiz can be used as a "surprise formative test" at the beginning of the class.

Assignment 1:

Proactive Law Quiz

1) What are the reasons behind the development of "Proactive Law"?
   a) The move from a vertical, hierarchical society towards a horisontal, networked society.
   b) Globalisation, easy access to information, networking, constant innovation (« everything is possible »).
   c) Loss of traditional values, authority leads to individualism and creation of new authorities, improvisation.
   d) Legalisation of society, increasing liabilities, litigation and regulation.
   e) All of the above.

2) Which statement does not fit in Friedman's analysis of the *Horizontal Society?*

   a) A person who works with his abilities to achieve a position in society.
   b) Social networks are very important.
   c) Life achievements are crucial.
   d) The social class to which you belong is the only essential criterion.

3) A Horizontal Society could also be characterised as:

   a) A nodal order
   b) A hierarchical society
   c) A feudal order
   d) A socialist society

4) Which trend does not refer to the modern Western Society?

   a) McDonaldisation
   b) Glocalisation
   c) Individualisation
   d) Systemisation

5) Juridification, overregulation and legal bureaucracy are developments which eventually contribute to the risk society. Which author thought this through?

   a) Max Weber
   b) Hans Boutellier
   c) Ulrich Beck
   d) Lawrence Friedman

6) Which trend is not associated with the rise of legalism?

   a) The liability explosion
   b) The predominant position of social rights
   c) The sanctity of the adversarial principle
   d) The colonisation of the personal life by law

7) The traditional legal paradigm is, according to professor Barton, generally speaking focused on:

   a) Rules, separation and power
   b) Understanding, accommodation and integration.
   c) Socialisation, punishment and understanding.
   d) Empathy, empowerment and worshipping.

8) The new legal paradigm underlying the proactive legal approach can be best characterised by

   a) Rules, separation and power.
   b) Understanding, accommodation and integration.
   c) Punishment.
   d) Cross legalism, legal pluralism and socialisation.

9) What characterises the proactive approach to law?

   a) Reacting quickly to legal problems.
   b) Acting in anticipation, causing change, taking control and self-initiation.
   c) Preventing legal problems from arising.
   d) All of the above.
   e) A and B only.
   f) B and C only.

10) How does "proactive law" differ from "preventive law"?

   a) Preventive law and proactive law are different terms for the same approach.
   b) Preventive law aims at avoiding litigation, while proactive law aims at achieving desired outcomes.
   c) Preventive law emphasises shared care and a team approach, lawyers supporting client's self care, while proactive law aims at professional legal care.
   d) All of the above.

11) How can a legal audit, as described by Brack, be used as a proactive tool, in the sense of adding value to the company?

a) By using it as a diagnostic assessment of the legal situation of a business enterprise in order to manage legal risk.
b) Using it as an assessment of the legal performance of the organization which can be used to formulate recommendations on how to improve legal performance.
c) By adding a legal SWOT analysis to the business scan, in order to discover new opportunities, innovations, and process improvements for the business organization.
d) B and C only.
e) All of the above.

12) What is legal astuteness? Mark the answer which best reflects Bagley's definition in her article "Winning Legally: The Value of Legal Astuteness".

a) The ability of corporate counsel to advise a company on business and legal concerns.
b) The ability of the Top Management Team (TMT) to communicate effectively with counsel and to work together to solve complex problems.
c) A basic understanding of business law.

13) How does Bagley, in her article "Winning Legally: The Value of Legal Astuteness", integrate legal astuteness and management theory?

a) Legal astuteness is regarded as a company's capability which can create a competitive advantage for the legally astute company.
b) Legal astuteness is regarded as a personal competence of the CEO.
c) Legal astuteness is regarded as a valuable competence of the company's legal department.
d) Legal astuteness is a competence required for corporate counsel to effectively advise a company.

14) Why, according to Bagley, should managers be able to second guess (judge) a lawyer's advice?

  a) Lawyers might, for different reasons, overstate legal risks or be over optimistic about winning a case.
  b) Legally astute TMTs understand that every legal dispute is a business problem requiring a business solution and that therefore they need to take responsibility for managing their disputes and not hand them off to their lawyers with a "you-take-care-of-it" approach.
  c) Because legally astute TMTs make strategic choices about when and how to use litigation as a competitive tool.
  d) Because this will enable them to reduce the cost of the lawyer's advice
  e) All of the above.
  f) A,B,C only

15) Which of the following are measures that may reflect a company's strategic approach to law?

  a) Appointing a lawyer as CEO of the company.
  b) Appointing a non-lawyer as head of the legal department.
  c) Engaging in lobbying.
  d) All of the above.
  e) A and B only.
  f) A and C only.

16) What is the most appropriate dispute resolution form for companies who want to avoid a negative impact of the dispute on their relationship?

  a) Litigation
  b) Arbitration
  c) Mediation

17) Which of the following is <u>not</u> part of step 4 of Seidel's Manager's Legal Plan ™? Or, in other words, wouldn't help a company to reframe legal concerns as business concerns and opportunities?

a) Developing strategies going beyond the legal requirements for business reasons, for example setting up an ethical charter, code of conduct to remediate image or costumer loss.
b) Searching for foreseeable legal problems and using them as business opportunities (e.g. searching for possible misuse of a product, that could give rise to product liability, in order to develop products costumers need)
c) Using actual or potential legal problems for purposes of developing costumer service.
d) Limiting liability (for example creating a legally separate subsidiary for activities that may result in similar claims, develop disclaimers, contract clauses that limit liability where legally possible).
e) Creating collaborative contracts that serve both contract partners better, improve the contractual relationship, create long-term partnerships and save costs.

Correct answers: 1 E, 2 D, 3 A, 4 D, 5 C, 6 B, 7 A, 8 B, 9 F, 10 B, 11 D, 12 B, 13 A, 14 F, 15 D, 16 C, 17 D.

Other assignments can be used in order to develop the student's capability to apply the Manager's Legal PlanTM which is explained in the handbook.

Assignment 2:

To each of the following cases apply the different steps of the Managers' Legal PlanTM developed by G. Siedel (Siedel/Haapio, *Proactive Law for Competitive Advantage*, Gower, 2011, 13 ff.), and described in the PAM PAL handbook.

In each of the following cases examine,

a) how disputes should be handled by the companies involved;
b) how the companies could prevent legal problems from arising in the future;
c) identify new business opportunities based on the legal issues raised in each case.

1. Your company produces electronic appliances. Your CEO calls you because a customer just filed a product liability lawsuit against your company. The customer had used a hairdryer designed and commercialised by your company, manufactured by a South Korean sub-contractor, and bought from a local supermarket, in order to unfreeze a door lock during a heavy snowstorm. The customer suffered serious injuries from flames that came out of the hairdryer during the customer's attempt to unfreeze the door lock. Apply the Manager's Legal PlanTM to this scenario.

2. A pizza delivery service guarantees pizza delivery within 30 minutes or customers would receive a discount. After several traffic accidents involving the company's drivers the pizza delivery company faces public criticism and law suits. How could the company react?

3. Printer, a small U.S. printing company with a solid reputation and a large customer base, has leased computer hardware from a large, financially powerful U.S. firm, Lessor. After delivery, Printer realises that the hardware does not meet its composition needs because there is no application programme. As a result, Printer stops payments on the lease and sues Lessor for lost profits. In the complaint, Printer alleges that Lessor breached the contract because its sales representative promised to provide Printer with the application programme at no extra charge. Neither the contract nor Printer's request for a proposal mentioned the application programme and the sales representative was not authorised to offer the application programme for free. Apply the Manager's Legal PlanTM.

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3.4   SUMMARY

Kaisa Sorsa

Chapter 3 has its focus on developing students' capabilities to understand and handle complex issues. The aim was to expose students to use authoritative sources, informal sources and their own experiences as an invaluable learning opportunity. Critical thinking has been developed in order to acquire and develop competences to be a real private lawmaker and also in order to develop the students' capabilities to use law proactively.

We have proposed variety of assignments to be used during the lectures for the stimulation of discussion or for practising the essay writing as well as for writing the seminar papers. Case studies are very flexible both for the light and for the profound analysis purposes. The groups of students and the teaching environments in which we have used these assignments have been different every time. As there are no 'one fits for all' type exercises we want to propose a variety of them.

PROACTIVE CONTRACTING AND RISK MANAGEMENT COMPETENCES

❚ INTRODUCTION – ABOUT THE KNOWLEDGE BASE OF PROACTIVE CONTRACTING

Kaisa Sorsa

The world economy has shifted from being driven predominantly by single enterprises to being driven by networks of enterprises exchanging goods and services on a large or global scale. Contracts are used as a governance tool in the network economy. The focus of contracting may be either on risk or opportunity management or on communicating with stakeholders. Both of these aspects require new approaches to contractual issues from the legal perspective: first, the contextual factors are critical (compare bilateral versus contractual networks; service business contracting and contracting in the value chain) and secondly, understanding the basic culture of contracting: from juxtaposition to co-operation and finally, the role of contract management for success in business.

This novel approach to contracts as value-adding components in the networked economy is called *proactive contracting*. This approach sees the contract and the processes related to it as parallels to the internal processes of a company, which also require leadership, strategies, planning, communication, and teamwork. Contracts as tools need to be flexible and proactive because they are subject to changing circumstances especially in long-term and life-cycle contracts. Contracting is a way of seeing contractual relationships as a particular form of the organization of a firm and contracting as a governance form for optimising business results in the same way as management theory sees the ways and means for optimising companies' goals and resources.

The basis of proactive contracting is in setting contracting into a real life business context. In order to do so, it requires every application to be connected with real companies and their relationships. This prerequisite assumes an interdisciplinary approach as a critical element of studying proactive contracting – it can not be studied from the legal perspective alone. The combination of contracting companies' business goals, the legal context

(national versus international) and the business culture (e.g. corporate social responsibility; competition atmosphere) always need to be in the focus of learning in order to understand how contracts can contribute to success in business.

The aim of this section is to learn how to use contracts as a risk and opportunity management tool both in a bilateral contracting situation as well as in a value chain context. In the latter case, the role of standards and self and private regulation tools are in the focus of learning. In both cases it is important to learn how to measure whether the goals set for contracting and business in general are met.

The third area of proactive contracting is contract management. As the role of contracting has arisen dramatically it is important to see contract management as an elementary part of management. The managerial point of view links contracting to human resource management, product management, marketing, accounting, research and development and corporate social responsibility management. In the company level, it is important to have an integrated perspective to managerial issues. In many cases, contract management is left aside.

Proactive Contracting and Risk Management

Course description

After completing this course the student:

- understands the contracting skills to be an essential part of one's professional ability in business;
- is able to employ contracts as instruments for resource planning, risk and opportunity management, strategic communication, avoiding disagreements;
- can use contract management for supporting the company's operations;
- is able to see risks as opportunities – not only threats.

Course Material

- ProActive Management and ProActive Business Law Handbook material
- A selection of case studies

2 CONTENTS AND TOOLS FOR THE TEACHING OF PROACTIVE CONTRACTING AND RISK MANAGEMENT MODULE

2.1 INNOVATIVE TRAINING

Krista Finstad-Milion

Proactive management and proactive business law (PAM PAL), as an innovative training approach, is not aimed at innovating for the sake of innovation. Innovative training is rooted in a philosophy of learning which has gained ground in recent years in response to the limitations of more traditional approaches to training. The PAM PAL group encourages instructors and students alike to embrace the frame-breaking nature of proactive law, a collaborative interactive approach to accompany the shift in the way lawyers service their clients, the way in which both lawyer and client perceive the role of the lawyer, and the way companies use the law as a strategic instrument.

Innovative training serves to develop new competences better aligned with the occupational shift and professional demands of lawyers today. The term "competences" refers to "the work-related personal attributes, knowledge, experience, skills and values that a person draws on to perform their work well" (Roberts, 1997, 7). Proactive management competency development for lawyers, as well as developing proactive legal skills in managers, involves the identification of emerging competences that are seen as important to the occupation. Such competences include greater emphasis on planning and accompanying, and managing client relationships in order to avoid conflicts and to create value. Each competence can be divided into a number of different levels, which can be matched to the new requirements of the occupation.

Innovative training in proactive management and law aims at equipping the undergraduate business law or management student with new skills as well

as accompanying the established lawyer or experienced manager in adopting new perspectives. Changing professional challenges are the driving incentive to embracing this new discipline at the crossroads of business law and management.

What is innovative teaching? Innovative training implies a new approach to views traditionally held on learning and reproduced in traditional classroom environments. The following table summarises key characteristics of each approach and allude to the challenge of moving from a more traditional teaching approach to a more innovative approach. According to the more traditional teaching approach, if applied to proactive law and management, any expert can teach. However, the innovative approach is more complex, requiring greater anticipation and design of the learning experience. For example, for traditional teaching, assessment may be equated to a mathematic exercise with respect to curve grading. Innovative teaching assessment requires, prior to the learning experience, the formalisation of different targeted learning objectives and the corresponding levels of learning achieved. For authors such as Campbell and Smith (1997), the new paradigm for teaching is opposed to the old paradigm. For Blanchard and Thackard (2007) the cognitive approach ("innovative" in Table 1) is opposed to the behaviourist approach ("traditional" in Table 1). For the cognitive approach, learning is synonymous to how information is processed, organised and stored. For the behaviourist approach, learning can be confirmed by an adequate response to a given stimulus. Adoption of one approach or the other leads to implications for how training is conducted and the climate of the training. However, it should be noted that for some learning situations, a behaviourist approach is better, and for others a cognitive approach works better.

TABLE 1. *Innovative teaching vs. Traditional Teaching. Adapted from Campbell and Smith, 1997, 275–276 and Blanchard and Thackard, 2007, 77.*

Issue	Innovative teaching	Traditional teaching
Dominant epistemology	constructivist; inquiry and invention	reductionist, facts, rote and repetition
Ways of knowing	narrative	logical-scientific
Mode of learning	relating	memorising
Learner's role	active constructor, discoverer, transformer of knowledge, self-directed, self-evaluating	passive vessel to be filled by instructor's knowledge, dependent
Instructor's role	facilitator, coordinator, coach, source of stimulation, source of inspiration	director, monitor
Training content	problem or task-oriented	subject-oriented
Learner motivation	more internally motivated	more externally motivated
Training climate	trust-based, relaxed, collaborative	judgemental, formal, competitive
Instructional goals	developed through collaboration	developed by instructor
Instructional activities	interactive group, experimental, project-oriented	directed group, individual, subject-oriented
Assessment	criterion-referenced (grading to predefined standards); typically use performances and portfolios, continual assessment of instruction.	norm referenced (grading on the curve); student rating of instruction at end of course

In the old paradigm of teaching, the learner is considered to be externally motivated, stimulated by achieving high ranking or better results than fellow classmates. In the new paradigm, the learner is motivated internally, seeking personal development and the acquisition of key skills needed to face future professional challenges. Such teaching philosophies bear implications for how a subject matter is addressed in training. Advocates of a new paradigm for teaching, such as Weimer (2002), claim that "when teaching is learner-centred, content is used, not covered". Content is thus used to develop a knowledge foundation, and to not only develop professional skills but to develop learning skills, which Weimer qualifies as sophisticated skills necessary to sustain learning.

Creating sustainable or significant learning experiences places emphasis on the process through which the learner learns and the outcome of the learning experience (Fink, 2002). In a powerful learning experience students will be engaged in their own learning, there will be a high energy level associated with it and the whole process will contribute to important outcomes. Students will not only be learning throughout the course; by the end of the course they will clearly have changed in some important way and/or they will have learned something important. Creating significant learning experiences can come about only when the motivation of individual learners and the needs of the target group have been addressed.

Innovative training attributes great importance to the intrinsic motivation of the learner to learn. Differences in personality and individual characteristics are related to the learner's motivation to learn and ability to learn and thus are also factors in resistance to learning. A key factor to succeeding in creating a favourable learning climate is the anticipation of fears of the members of the target public. For the case of proactive contract management, what different fears may exist in the different target publics? For adult publics, typical fears include fear of the unknown (a new additional domain of knowledge to integrate), fear of incompetence (necessity to master new skills in new domains outside one's own field of competence), additional demands (thus requiring intellectual disposition and time to assimilate new knowledge), potential loss of rewards (occupational shift would lead to loss of investment, profit and/or influence). Anticipated negative reactions of adult lawyer publics to such a training offer could be retrenchment into a tunnel vision of the business lawyer's role and occupation. For both lawyer and manager publics, a possible negative reaction could be that proactive law is simply not either one's job: it could be seen as occupying a no man's land halfway between business law and management.

For a management student public, the stereotyped image of a dull, dry lawyer could make the proactive law option less attractive than other available options. Challenges then arise for advocates of this new field of training and practice. Typical images and issues those images raise require identifying, communicating in innovative ways, and challenging. An undergraduate may ask can one make a living through such an activity. An established lawyer may question what is the added value for my practise? For the lawyer, an anticipated question may be: does such a shift in occupational priorities challenge the reputation of lawyers as a professional group? Established lawyers may fear being different or

"sticking out" from colleagues. Lawyers, managers, and engineers may fear to be incompetent in a field of knowledge and practice on the periphery of their own professions. Occupational change creates anxiety. Table 2 presents typical fears associated with training on occupational change.

TABLE 2. *Trainee fears as to training on occupational change. (Blanchard and Thackard, 2007, 89).*

Fear of the unknown	"Right now I know how things work, but I do not know how this training will affect things."
Fear of incompetence	"I do not know whether I will learn this stuff"
Fear of losing rewards	"What will happen to my pay, status, and parks, among other things?"
Fear of lost influence	"Will this training make me more or less valuable?"
Fear of lost investments	"I've spent a lot of time and energy learning to do it this way. Why change?"

Innovative training, compared to traditional training, has a greater potential to transform the learner by way of significant learning experiences. By critically addressing such key issues as the relationship between the lawyer and the client, adult students can call to question the dominant versus desired nature of business relationships. If proactive law and management promote a more collaborative approach to legal matters, for example greater emphasis placed on drafting and following up on contracts, they address an even deeper issue inherent to all relationships: that of the nature and distribution of power. How do lawyers perceive how they service their clients? They take information from the client's analysis. They give information back to the client. They identify the legal problems and they give solutions. If knowledge is commonly accepted as being a resource and source of power, in the new paradigm of proactive law, knowledge becomes a shared resource and power is evenly distributed between partners. One of the desired outcomes of such an approach is achieving mutual understanding between the lawyer and the client. Innovative training seems to be the obvious choice in accompanying such an occupational shift.

Training activities

The following are two collaborative task-oriented training activities to raise awareness on the benefits of proactive law and management for established lawyers and managers, and law and management students.

Objective of the activities:

• to create ownership of proactive management and law by practitioners and students versus imposing the occupational shift

Activity A: Traditional vs. Proactive approaches to contract management

Material: flipchart and markers

Divide students into groups of 5 to 6.

Ask each group to:

1) formalise the traditional way lawyers perceive the way they service their clients with respect to contracts vs. the proactive law way. (15 minutes)

2) define the occupational competences needed for the traditional way vs. the occupational competences needed for the proactive way. (15 minutes)

Share and discuss group results in a plenary session. (15 minutes)

Activity B: Picturing a proactive approach to management and/or law and the consequences of such an approach

Material: flipchart and markers

Divide students into groups of 5 to 6. Ask each group to graphically illustrate why proactive management makes sense today and even more so tomorrow. (30 minutes)

Proposed grid:

Social argument
Economic argument
Political argument
Cognitive argument
Share and discuss group results in a plenary session. (20 minutes)

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2.2 ASSIGNMENTS – THE LEGAL ENVIRONMENT AND FREEDOM OF CONTRACT

Kaisa Sorsa

Proactive contracting focuses on the use of contract as a risk prevention tool or as a tool for opportunity management.

The starting point of studying proactive contracting is the contracting space. In order to familiarise students with the legal environment and the scope of freedom of contract students are asked to find out at least two contracting situations which have different levels of contractual freedom.

Assignment 1: Describe at least two contracting situations in which the freedom of contract is broad, partly limited or there is hardly any space for defining contract clauses by the contracting parties.

If there are students from different disciplines, this exercise will raise further questions about the rationale of restricting the freedom of contract.

Assignment 2: Discuss in a small group why in certain areas the freedom of contract is limited, in which respect it is limited and in which ways it is replaced with mandatory rules.

In the very beginning of the proactive contracting course students should also learn about the use of standardised contractual terms (general terms and conditions) which is a very important area for saving the transaction costs. Because very often it is really difficult to get real contracts for analysing purposes, the teacher can also use the general terms and conditions in order to concretise the issues of contract contents.

Assignment 3: Analyse some of your own contracts e.g. with your tele-operator. Pay attention into the individually negotiated contract terms and into general terms and conditions which are part of the contract.

2.3 ASSIGNMENTS – THE VALUE CHAIN MANAGEMENT AND PROACTIVE CONTRACTING

Kaisa Sorsa

The value chain management chapter of the Handbook focuses (Sorsa 2011b, Section III, chapter 4) on the value chain relationships. It is very important that the student will learn to see the role of each company in a wider value chain context. This is necessary as many small and medium size companies supply their products or services for retail businesses which have a chain concept (e.g. in Finland the two powerful retail chains are S-group and K-group.)

In order to concretise the variety of different value chains students are asked to explore one or two industry sectors and some product value chains. The aim of this exercise is also to pinpoint that the power relationships in the value chain impacts the contractual relationships.

Assignment 4: Formulate two examples of two different value chains: demonstrate who the main players in the value chain are, point out whether the value chain is retail driven, supplier driven or modular.

Some companies show openly their procurement conditions and general terms and conditions at their website. Ask students to find out what kind of procurement requirements companies impose to their suppliers. Discuss the role of small companies in those value chains and how do the procurement requirements seem from SME company perspective?

Because the CSR plays a pivotal role in many sectors, some companies may build their competitive advantage on corporate social responsibility. Students are asked to explore at least one well known company and its contractual relationships and procurement policies. In the company's annual report you can find a source of information e.g. on the different private regulation schemes in which the company is committed to.

Students should understand the difference between collectively drafted standards and company specific standards. Many transnational global companies have company specific standards which have been develop by only one company. A good example is IKEA and their IWAY standards. The second important issue is how companies implement the schemes they are committed to. The third critical issue is that the new CSR standards set requirements also to the production process and not only to the product itself. The next three assignments aim at developing student's capability to analyse different schemes based on these issues.

Assignment 5: Select one company that has a good reputation concerning CSR and that builds its competitive advantage on CSR. Find out what kind of collective standards it implements and how the company succeeds in persuading the whole value chain to commit to them. The sources of information are internet websites, company reports, social media and interviews.

Assignment 6: Search from the internet the IKEA IWAY Standard Minimum requirements for Environment and Social and Working Conditions when Purchasing Products, Materials and Services 2008.06.04 4th edition. Study the content of the standard and describe in how the standard impacts the production process of the company in a developing country.

Assignment 7: Based on the assignments, lectures and discussions, write a summarising report where you explain why these different private regulation tools and contractual arrangements are proactive law? If you are not convinced about their proactive nature, please, justify your counterarguments.

Assignment 8:

Prepare a 20 minute presentation on your case study.

Questions:

a) What is the content (the scope) of standards? What is the main focus?
b) Who in the value chain requires the use of these standards? What kinds of contracts or contractual clauses are used?
c) What is the monitoring system like?
d) What kind of benefits does this system generate for the different actors in the value chain? What is the impact of the standards worldwide? (statistics)

List of the case study topics:

1) FairTrade standards; http://www.fairtrade.net/

2) SA 8000 – Social Accountability 8000; http://www.sa-intl.org/

3) Sustainability standards in the coffee sector: UTZ certified, Rainforest Alliance and Fair Trade.

4) Corporate Social Responsibility in textile industry. http://www.oesorichtlijnen.nl/wp-content/uploads/Kenniscentrum/Sector%20informatie/Textiel%20International%20Overview%20CSR.pdf

5) Sustainability standards in the fishing industry – Marine Stewardship Council (MSC).
http://www.msc.org/documents and
http://assets.panda.org/downloads/full_report_wwf_ecolabel_study_lowres.pdf

6) GLOBALGAP and food safety (e.g. vegetable and fruit sector);
   http://www.globalgap.org/cms/front_content.php?idcat=9
   http://www.globalgap.org/cms/front_content.php

7) Forest industry – PEFC (Program for the Endorsement of Forest Certification Schemes) and FSC (Forest Stewardship Council) certification schemes – comparison.
   http://www.pefc.org/
   http://www.fsc.org/

8) Chemical industry and Responsible Care programme.
   http://www.responsiblecare.org/page.asp?p=6341&l=1

9) Business Social Compliance Initiative and retail business
   http://www.bsci-eu.org/index.php?id=2011
   http://www.bsci-eu.org/index.php?id=2035

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2.4 ASSIGNMENTS – THE USE OF CONTRACTS AS A RISK AND OPPORTUNITY MANAGEMENT TOOL

Tarja Salmi-Tolonen, Gerlinde Berger-Walliser & Kaisa Sorsa

2.4.1 Contract clauses and their functions

Tarja Salmi-Tolonen

It is generally agreed that the main functions of commercial contracts are: contracting and managing business and commitments; creating allocating and protecting value; communication, motivation and control; sharing, minimising and managing risk and preventing problems and controlling and resolving disputes. The use of the contracts and how they fulfil their purposes can be

analysed concentrating on the contract text and by specifying the different contractual functions of the instrument in inter-firm contracts. The above listed functions can be summarised into three critical categories as Eckhard and Mellewigt (2008) have done: *Safeguarding* of the parties' investments against opportunism; *Coordination* of the exchange process to ease the performance risk (incompetence, market and technological uncertainties) clear definition on roles and responsibilities, aligning expectations; *Contingency adaptability* guidelines to cope with future disturbances caused by market or technological environment.

Assignment 9: the role of contracts as *safeguarding*, *coordination* and *contingency adaptability* devices can be empirically confirmed. All three functions deal with the management of special types of concerns in inter-firm relationships, stemming from determinants such as asset specificity, task interdependence or transaction instability that require distinct contractual provisions. Find different types of contracts and indicate which of the contract clauses serve safeguarding (either seller or buyer or both), coordination or contingency adaptability purposes.

Assignment 10: Standard terms and risk management and care of commercially justifiable allocation of risks.

Standard terms are usually either:

Seller-friendly standard terms:
- Early payment terms
- Late ownership transfer
- Early transfer of the liability of risk to the buyer
- Set off prohibition
- Consequences that exclude consequences imposed by law

or

Buyer-friendly standard terms:
- Late payment terms
- Early ownership transfer
- Later transfer of liability of risk
- Right to deduct paid compensation for damages, price reduction and paid liquidated damages
- Consequences in addition to those imposed by applicable law

Find two kinds of well known internationally used standard terms and compare them in respect of the liquidated damages clauses with the CISG and your domestic Sale of Goods Act.

These assignments will help students understand how securing success through incentives for good performance and arrangements where rights, responsibilities, risks and remedies are effectively identified and realistically assessed, shared and managed can analysed at the text level. A contract document is often the only tangible part of the contractual relationship especially in the service business therefore it is important to train students to close reading of the texts and understand their effects on the contracting parties.

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Eckhard, B. and Mellewight, T. (2005) Contractual Functions and Contractual Dynamics in Inter-firm Relationships: What we know and how to proceed. Paper accepted for presentation at the Academy of Management, August 11–16, 2005, Atlanta, Georgia, USA.

2.4.2 Assignment – Unilateral change of contract terms

Gerlinde Berger-Walliser

Case Description: Anheuser-Bush: extension of payment terms

On July, 2008 the Belgium brewer InBev and US brewer Anheuser-Bush proudly announced the merger of the two companies, creating the combined company Anheuser-Bush InBev with the headquarters of the combined company in Leuven, Belgium, and headquarters for the North American region and the global home of the flagship Budweiser brand in St Louis, Missouri, former Anheuser-Bush headquarters.[8]

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8   Anheuser Bush InBev Press Release, *available at* http://www.anheuserbusch. om/press/PressImages/FINAL%20PRESS%20RELEASE.pdf http://www.anheuserbusch. com/press/PressImages/FINAL%20PRESS%20RELEASE.pdf (last visited September 16, 2010).

InBev was a publicly traded company (Euronext: INB) based in Leuven, Belgium. The company's origins date back to 1366, and at the time of the merger, it was the leading global brewer. As a true consumer-centric, sales driven company, InBev managed a carefully segmented portfolio of more than 200 brands. This included true beer icons with global reach like Stella Artois® and Beck's®, fast growing multicountry brands like Leffe® and Hoegaarden®, and many consumer loved "local champions" like Skol®, Quilmes®, Sibirskaya Korona®, Chernigivske®, Sedrin®, Cass® and Jupiler®. InBev employed close to 89,000 people, running operations in over 30 countries across the Americas, Europe and Asia Pacific. In 2007, InBev realised 14.4 billion euro of revenue.[9]

Based in St. Louis, USA, Anheuser-Busch was the leading American brewer, holding a 48.5 percent share of U.S. beer sales, and deeply rooted in and committed to the St. Louis community.[10] The company brewed the world's largest-selling beers, Budweiser and Bud Light. Anheuser-Busch also owned a 50 percent share in Grupo Modelo, Mexico's leading brewer, and a 27 percent share in China brewer Tsingtao, whose namesake beer brand is the country's best-selling premium beer. Anheuser-Busch ranked No. 1 among beverage companies in FORTUNE Magazine's Most Admired U.S. and Global Companies lists in 2008. Anheuser-Busch was one of the largest theme park operators in the United States, was a major manufacturer of aluminium cans and one of the world's largest recyclers of aluminium cans.[11]

According to the press release that announced the merger, "the combination of Anheuser-Busch and InBev will create the global leader in the beer industry and one of the world's top five consumer products companies. On a proforma basis for 2007, the combined company would have generated global volumes of 460 million hectolitres, revenues of $36.4 billion (€26.6 billion) and EBITDA of $10.7 billion (€7.8 billion). Anheuser-Busch and InBev together believe that this transaction is in the best interests of both companies' shareholders, consumers, employees, wholesalers, business partners and the communities they serve."[12]

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9   Id..
10   Emerson boycotts Anheuser-Busch beer, St. Louis Business Journal, at
        http://www.bizjournals.com/stlouis/stories/2009/04/13/daily65.html (last visited November 19, 2010)
11   Id. N. 1.
12   Id. N. 1.

The merger was structured as a share deal. InBev bought Anheuser-Bush shares from Anheuser-Bush shareholders at $70 per share in cash, for an aggregate equity value of $52 billion and committed to financing for the purchase of all of Anheuser-Busch's outstanding shares.[13] Anheuser-Bush became a wholly owned InBev subsidiary with Carlos Broto, former InBev, CEO, as CEO of the combined company.[14]

At the time of the merger the companies expressed that "the transaction creates significant profitability potential both in terms of revenue enhancement and cost savings. The combination will yield cost synergies of at least $1.5 billion annually by 2011, phased in equally over three years. Given the highly complementary footprint of the two businesses, such synergies will largely be driven by sharing best practices, economies of scale and rationalisation of overlapping corporate functions. InBev has a strong track record of delivering synergies in past transactions and is confident in its ability to achieve these synergies. In addition, there are meaningful revenue opportunities through expansion of Budweiser on a global scale: InBev is the number one brewer in 10 markets where Budweiser has a very limited presence, and has a superior footprint in nine markets where Budweiser is already present. The transaction is expected to be neutral to normalised earnings per share in 2009 and accretive beginning in 2010, and return on invested capital will exceed weighted average cost of capital during the second year after close."[15]

In the aftermath of the Anheuser-Bush InBev merger, and following the financial crisis, Anheuser-Bush InBev in early 2009 changed its payment terms with its suppliers to 120 days – take it or leave it. Before being taken over by InBev, Anheuser-Bush typically settled its accounts in 30 days.[16]

As a reaction to the new payment policy Emerson, a St. Louis based A-B InBev supplier, and one of America's largest appliance manufacturer for the food industry boycotted Anheuser-Bush products to protest against A-B InBev's new payment terms. In an internal memo, that became public,

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13   Id. N. 1.
14   Anheuser-Bush Management Structure, *available at*
        http://www.abinbev.com/go/about_abinbev/management_structure/organization_chart.cfm (last visited September 16, 2010).
15   Anheuser Bush InBev Press Release, *available at*
        http://www.anheuserbusch. com/press/PressImages/FINAL%20PRESS%20RELEASE.pdf
        http://www.anheuserbusch. com/press/PressImages/FINAL%20PRESS%20RELEASE.pdf
        (last visited September 16, 2010).
16   http://www.stltoday.com/news/article_93c6c109-a58e-57e1-9f7a-e4765e225b5b.html.

Emerson Chairman, CEO and President instructed all its division heads to stop buying A-B InBev products, but instead to use A-B InBev's competitors products, and accused A-B InBev of having stopped supporting activities in the St. Louis community.[17] Anheuser-Bush demented and justified its new payment policy with the overall company strategy.[18] In addition to the boycott, the extension of payment terms at A-B InBev caused negative reactions by professional organizations. The International Association for Commercial and Contract Management (IACCM) called A-B InBev payment terms "contrary to the principles contained in IACCM's guide to ethical contracting – and to good risk management."[19] A-B InBev was entered into the Forum of Private Business's Hall of Shame.[20] The Forum of Private Business is a UK based non-for-profit organization providing information and assistance to its members – small enterprises – in all fields of management.

Tasks:

Comment on the Anheuser-Bush InBev case as reflected in the materials by answering the following questions. For complementary information read René Franz Henschel, Managing Crisis through Contracts, In: The leadership Handbook (Boersens Ledelseshaandboger, 2009), chapter 11.

1) Give a short summary of the events at Anheuser-Bush.

2) How did Anheuser-Bush suppliers and professional organizations react to the new Anheuser-Bush InBev policy regarding payment terms?

3) Anheuser-Bush InBev changed the payment terms of its supply conditions to delivery+120 days. Does this raise any legal or other concerns? How was it possible for Anheuser-Bush to change its payment terms without its suppliers agreeing with the new terms?

4) What were the "official" and "real" reasons for Anheuser-Bush InBev to extend its payment terms?

5) The Anheuser-Bush case is not the only case of extended payment terms. What are the economic consequences of such a general purchasing policy? By which means would it be possible to reinstall a balanced relationship between buyers and suppliers regarding payment terms?

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17   Id N. 3.
18   Id.
19   https://www.iaccm.com/news/?id=1079.
20   http://www.fpb.org/page/781/Late_payment__Hall_of_Shame__entries_2009.htm.

6) What are the immediate and future consequences of Anheuser-Bush contract strategy for the suppliers and the company itself? Do you think Anheuser-Bush will benefit or suffer from its policy?

7) Who at Anheuser-Bush decided about the extension of payment terms? How can companies avoid the negative consequences mentioned above by this kind of decision?

8) Can you think of other terms companies might unilaterally extend? Do you think that for the purchasing company it is always best to achieve the lowest level of legal risk in contracts?

9) How did the Belgian government and the European Union react to these and other cases of unbalanced payment terms? What is the current status of a proposal by the European Commission for a directive on combating late payment in commercial transactions (see http://www.europarl.europa. eu/oeil/file.jsp?id=5769082)?

10) Did Anheuser-Bush InBev manage its contracts proactively?

2.4.3 Different risks during the contract life-cycle

Kaisa Sorsa

Contractual relationships seem to become longer as the companies conclude, for example, strategic alliances. Students should become aware of the different contractual risks during the different phases of a contract life-cycle. Especially in the construction business or in the project business it is normal that the contractual relationships are built on strategic alliances. The following exercise aims at developing students' capabilities to analyse contractual relationships using the life-cycle concept as an analysis tool and it aims at discovering the different sources of risks.

Assignment 11: Imagine that you are a project manager in a construction business. You are starting a new project where the life-cycle is five years. Put together a team of experts and list all the different risks which might jeopardise the outcome of the project. In a team, you can also consider how to prevent these risks emerging and what kind of risk assessment tools you could use, if the risks nevertheless emerge.

After this exercise you can discuss the risks listed in the Better Practice Guide for developing and managing contracts. (See appendix 2).

> *Source:* Developing and Managing Contracts. Getting the right outcome, paying the right price. Better Practice Guide. February 2007. Australian Government. Department of Finance and Administration. http://www.anao.gov.au/uploads/documents/Developing_and_Managing_Contracts.pdf

The public sector is also an important player in contracting with the private sector. They have also developed tools in order to ease the contracting processes especially in the field of public procurement. The public sector also wants to be a frontrunner in promoting sustainable development and it can promote it by using CSR standards as a selection criteria. The European Commission has developed a very practical teaching tool for universities and public sector. This tool can be recommended when teaching proactive contracting as it specifies how risks can be avoided in the tendering phase and how CSR criteria can be used in the procurement and contract award phase. The teaching material and instructions can be found at the Commission of the European Union website Green Public Procurement (23 language versions): http://ec.europa.eu/environment/gpp/toolkit_en.htm.

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2.5 QUESTIONNAIRE – A TOOL FOR CONTRACT MANAGERS

Casper Wissink

The contract management chapter focuses on the management side of contracting and it should be highlighted in teaching proactive contracting.

A good contract administration and being in control of the contracting process can be a solution to many of the shortcomings in business, and improve efficiency and profit margins. Contract management can be useful from a number of perspectives: legal compliance and risk management, professionalisation of the purchase of goods (procurement), account management, information management and cost control.

The process of contract formation consists of three stages. The first is the determination of the contract requirements, fact finding and gathering information (Determination stage). The second is the decision making stage, concluding the contract and documentation (Contracting stage). The third stage is the stage of post-project assistance (After care stage). At this stage, the rights and obligations agreed on in the contract are monitored.

An important precondition for the establishment of a good contract administration is creating support within the organization. Support from the business is an absolute requirement for the success of a contract administration.

A tool that can be used in order to obtain enough support is to make a quick scan of the contracts in the business with a questionnaire.

Questionnaire

Question 1:

Are contracts concluded in your branch of industry with third parties or are there currently negotiations with third parties that could result to contracts?

Question 2:
Who are these third parties?

☐ Private individuals
☐ Companies
☐ Public authorities
☐ Semi-public undertakings
☐ Other, namely ...

Question 3:
What types of contracts are being concluded within your branch of industry?

☐ Purchase contracts   number:
☐ Sales contracts   number:
☐ Lease contracts   number:
☐ Hire-purchasing finance contracts   number:
☐ Employment contracts   number:
☐ Rental contracts   number:
☐ Maintenance contracts   number:
☐ Service contracts   number:
☐ Collaboration contracts   number:

Question 4:
Are the above-mentioned contracts:

☐ once only
☐ ending (termination period)
☐ ending with tacit extension
☐ ongoing
☐ on call
☐ ……

Question 5:
Where are the contracts archived and how are your contracts administered?
Do you use files (hard copies), electronic files (soft copies), etc?

Question 6:
Who are authorised to conclude contracts on behalf of your company?

Question 7:
Who checks the contracts on completeness, intelligibility and accuracy?

Question 8:
Do you make use of standard contracts?

If so, what kind of format do you use (e.g. engagement letter)?

If not, for what reason standard contracts are not applied? How is a contract established? Who or which department will in such case review the contract from a legal perspective?

Question 9:
Which data is documented in the Determination stage?

☐ Name of the candidates
☐ Contract aim (e.g. purchase, collaboration, services)
☐ Renumeration for proposals
☐ Other data, e.g. ...

Question 10:

Which data is documented in the Contracting stage?

☐ Name of counterparty
☐ Names of rejected parties
☐ Terms of payment
☐ Terms of delivery
☐ Notice period
☐ Contract period
☐ Warranty period
☐ Liabilities
☐ Other rights and obligations

Question 11:
Which data is documented at the After care stage?

☐ Names of contracting parties
☐ Rights and obligations
☐ Contract modifications
☐ Experiences with contracting party regarding compliance with the contracts
☐ Other, ...

Question 12:
Who (which officials within your company) or which department are involved in the respective stages of contract management?

☐ Determination stage:
☐ Contracting stage:
☐ After care stage:

Question 13:
How are the concerned officials being kept up to date in respect of the latest developments in the respective stages of contract management?

☐ Determination stage:
☐ Contracting stage:
☐ After care stage:

Question 14:
Do you have insight into the status of contracts (e.g. terms, rights and obligations and warranties)? If so, how?

Question 15:
Are you at all times informed about the status of contracts or do you check the status of contracts on a regular basis? If so, how?

Question 16:

Is there an authority and if yes, which authority within your branch of industry makes sure that all parties comply with their contracts and that these contracts are executed in a correct manner?

Question 17:

What are the ways and means the authority referred to in question 16 has to make sure that all parties comply with their contracts and that these contracts are executed in a correct manner?

Question 18:

How much time do you spend on the administration related to contracts?

Question 19:

What are your ideas concerning the organization of contract management and what information would you like to be able to obtain from a contract management system?

This questionnaire will provide insight into the types of contracts, the approximate size of these types of contracts and how the business deals with the above-mentioned stages of contract formation. Furthermore, this scan will provide insight into the where, how and by whom contracts within a certain business department are being registered, how contracts are being established and how they are filed.

2.6 MATURITY MODEL – AN ASSESSMENT TOOL

Kaisa Sorsa

Maturity concerns development and growth, from an initial stage to an advanced stage, steps which one needs to take in order to reach the advanced level. In the context of business improvement, the first step would be the implementation of the improvement programme, and the advanced level one where the strategies of the programme have been fully adopted and integrated into the organization on a continuous and substantial way. (Moore 2010)

Proactive contracting capabilities are a growing necessity in every company because the business has moved towards the service business and is very often conducted in networks. Maturity models are normally used in the company but the idea of applying a maturity model for measuring the progress of students' proactive contracting capabilities during the course has improved to be a workable method. During the piloting phase of the EU project we have used the tool both in the University of Applied Sciences twice in the Master's degree programme and once at the University of Turku with law students. A group of 35 Master's degree students attending the Proactive Contracting and Risk management course in the autumn term 2010 and a group of 30 in the autumn term 2011 have completed the test at the very beginning of the course and after three months of education. The Master's degree students at the University of Applied Sciences are adults who are working in local companies in other words they are individuals already employed in real business. The measurement tool seemed to function even though it is primarily intended to be used for intracompany purposes.

Every "box" of the model (see table 3) was translated into opinion polls (see attachment 1). Altogether 60 statements were developed and students answered them using a scale of "I totally agree – I totally disagree". Each level of the maturity model had at least two opinion polls. At TUAS the measurement was carried out using a webropol tool (developed by Kaisa Sorsa). The opinion polls were then mixed into a random order. After the first round the mean values were calculated (see figure 1, blue curve) and after the second round once again (red curve). The development process can be seen in figure 1 as a difference between the blue and the red curves.

TABLE 3. *Maturity model for proactive contracting and risk management. (Sorsa & Salmi-Tolonen 2009)*

KPA	Ad hoc	Repeatable	Functional	Integrated	Optimized
CON-TENTS	All contracts drafted ad hoc	Offer - acceptance and standardized templates for repeated transactions	Standardized, modular templates; modules selected according to project type	Contract structure sensitive to project flexibility	Contract contents are developed proactively and tailored according to customer needs
	Sporadic use of guidelines or GTCs	Guidelines for drafting complex or high visibility contracts	Some GTCs in use	Contract templates, models and GTCs in use for all contracts	Contracts designed with full understanding of their contribution to mutual business needs
	Reactive approach to legal risks	Observes legal norms and self-regulation rules	Requirements of corporate social responsibility are recognized and reflected in contract contents	CSR goals are explicitly expressed	Advance proactive measures of CSR
PRO-CESS	No alignment between productizing, sales, business and contracting	While a proactive approach may be evolving, most of the activity still reactive	Process plan in use	CM processes fully integrated with other organizational processes e.g. cost mgt, schedule mgt.	CM processes streamline initiatives as part of its continuous process improvement program
	Focus on result metrics only	Some level of tracking and reporting initiated	Processes are measured, metrics in use for proactive monitoring	Both results and process metrics are in place to track performance	Systematic use of performance metrics to measure the quality and evaluate the efficiency of the process
RELA-TIONAL	Transaction based	Based on operative cooperation	Based on tactical cooperation	Based on strategic cooperation	Based on shared value generation
	Aims according to own specs	Aims at cost effectiveness	Aims at new value generation via sharing knowledge and modus operandi in some sections	Aims at strategic advantage for all parties	Aims at value generation for all parties throughout the business
	Written contracts rare. Parties unaware of existing commitments or whether execution is in line with them	Roles and products well-documented in contract. Parties aware of roles and commitments and try to comply with them	Interaction in addition to well-documented roles. Parties understand commitments and comply in collaboration	Beginnings of a collaborative relationship. Consequences of noncompliance well operationalized	Contract viewed as manuscript for creating value for all parties; exchange of info on processes and practices open and free. An in-built incentive system for performance excellence
	Conflicts are resolved ad hoc	Need for conflict mgt is acknowledged but not in use	Documentation on contingency handling	Proactive approach to contingency management	Contingency management an integral part of the management
ORGANIZATIONAL	No company specific contract tools	Dedicated team formed to develop conract models, processes, procedures, tools systems and metrics	Contracting is fully established, institutionalized, and mandated throughout the organization	View to rationalize and align policies, procedures and processes across the business	Policies, procedures and processes are optimized and comparable to ISO or other standards
	Managers and contract personnel not held accountable for adhering to any contracting processes or standards	Contract managers hired or assigned to lead contracting and business organization to drive change	Senior management provides guidance direction and approval of key contracting strategy, decisions and tools	In addition to representatives from other organizational offices, other contracting parties are integral members of contract teams	Established lessons learned and best practices programs to improve contracting contents and process standards

FIGURE 1. *Assessment results from one master's group in 2010.*
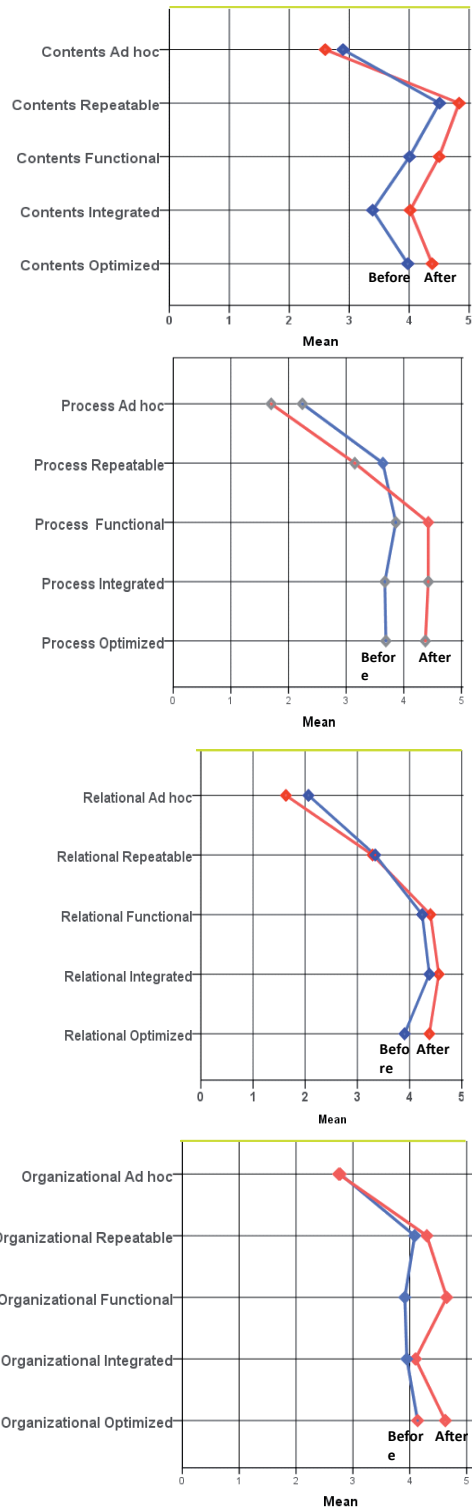
The maturity model can be used as a development tool for teaching the proactive contracting and risk management course. It helps teachers to see at the beginning of the course what the student's weak areas are. If the teacher takes this measurement into account, he/she can develop the content of the course according to the needs of the group.

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APPENDIX 1

Indicator for assessing proactive contracting and proactive law capabilities

Answer by circling an option which corresponds with your opinion.

1 = Totally disagree; 2 = Almost totally disagree; 3 = Cannot say;
4 = Almost totally agree; 5 = Totally agree.

CONTENT RELATED CAPABILITY (1):
1) It is good from a business point of view, if contracts are drafted from a scratch when they are needed.
2) It is good from a business point of view, if there are standardised document models for ordinary business cases.
3) Contract models should be standardised according to the customer type and be modular.
4) Contract models should be modular to a certain extent but flexible according to project specific customer needs.
5) Contract contents should be drafted and tailored to the client's needs

CONTENT RELATED CAPABILITY (2):
1) When entering into a routine contract one needs only sporadically general terms and conditions or other guidelines.
2) When entering into a complicated or economically important contract one should have guidelines and guidance.
3) It is important to be able to use the general terms and conditions applicable in the field you are working.
4) I think that one should have customer group specific contract models for all customer groups.
5) Contract contents should entirely reflect the business goals of the contracting parties.

CONTENT RELATED CAPABILITY (3):
1) It is not a problem, if one deals with contractual issues only after problems have arisen.
2) When drafting a contract contents one should also take into account compliance with legal rules and rules developed by companies themselves.

3) It is good, if contracts communicate and enhance the company's corporate social responsibility.
4) It is essential that contracts explicitly elicit company's attitude to corporate social responsibility.
5) It is important to proactively develop contract contents so that they promote and develop responsible business.

CONTRACT PROCESS RELATED CAPABILITY (1)
1) It is not a problem, if the contract process is not aligned with other processes like productising, sales or marketing.
2) There is no need to engage in drafting a contract before one has agreed on the contents of the deal.
3) One should have a process plan for contracting in order to manage contract processes.
4) Contract processes should be fully integrated with other organizational processes.
5) Contract management process should be streamlined and developed with other organizational processes.

CONTRACT PROCESS RELATED CAPABILITY (2):
1) The performance of the contract needs to be measured only when necessary by using the indicators measuring the results.
2) During the life cycle of the contract, it might be good to track and report the performance every now and then.
3) One should proactively measure contract performance with several indicators.
4) It is important that both result and process parameters are available to track performance.
5) It is important that there is systemic use of performance metrics to measure the quality and evaluation of contract process efficiency.

RELATIONAL CAPABILITY (1):
1) We need to take care of contractual relations only when we enter into contracts.
2) We should focus on relational issues according to the operative importance of our clients.
3) We should focus on relational issues according to their tactical importance.
4) We have to take good care of our strategic partners all the time.

5) Contractual relationship should be taken care of using a "win-win" principle.

RELATIONAL CAPABILITY (2):
1) Taking care of relational issues is based on our own interests.
2) Taking care of relational issues aims only at cost effectiveness.
3) Taking care of operational issues aims at new value generation via sharing knowledge and modus operandi in some sections.
4) Taking care of relational issues aims at strategic advantage for all parties.
5) Taking care of relational issues aims at value generation for all parties throughout the business.

RELATIONAL CAPABILITY (3):
1) Contractual relationships can be taken care of without written contracts.
2) It is important that roles and products are well-documented in a contract.
3) It is important that there is interaction between contracting parties in addition to well-documented roles in formal contracts.
4) I think that the contractual relationship should be seen as a beginning of a collaborative relationship.
5) I think that contract should be viewed as a manuscript for creating value for all parties.

RELATIONAL CAPABILITY (4):
1) It does not matter whether contracting parties are unaware of existing commitments of the formal contract or whether the execution is in line with it.
2) It is important that parties are aware of roles and commitments and try to comply with them.
3) It is important that parties understand commitments and comply in collaboration.
4) It is important that consequences of noncompliance are well operationalised.
5) It is important that there is an in-built incentive system for performance excellence.

RELATIONAL CAPABILITY (5):
1) It is important that conflicts are resolved only *ad hoc*.
2) It is not enough that the need for conflict management is acknowledged, if it is not in use.

3) It is important to document all contingencies during the contract process.
4) It is important to have made a conflict management plan proactively.
5) It is important that a contingency management is an integral part of the management.

ORGANIZATIONAL CAPABILITY (1):
1) It does not matter even if a company does not have specific contract management tools.
2) It is good, if a company has a dedicated team to develop contract models, processes, procedures, tools, systems and metrics.
3) It is important that contracting is fully established, institutionalised, and mandated throughout the organization.
4) It is important that the company has a view to rationalise and align policies, procedures and processes across the business.
5) It is necessary that policies, procedures and processes are optimised and comparable to ISO or other standards.

ORGANIZATIONAL CAPABILITY (2):
1) It does not matter even if managers and contract personnel are not held accountable for adhering to any contracting processes or standards.
2) It is important that contract managers are hired or assigned to lead contracting and business organization in order to drive change.
3) It is important that senior management provides guidance, direction and approval of the key contracting strategy, decisions and tools.
4) It is necessary that in addition to representatives from other organizational offices and other contracting parties there are integral members to contract teams within a company.
5) It is necessary that established lessons learned and best practice programmes to improve contracting contents and process standards are recorded in one place.

APPENDIX 2

Risks in the contract life-cycle

PREAWARD PHASE

Sources of risk   Examples of risks

Resourcing
- Inability to obtain and retain necessary level of resources, including specialist advice
- Failure to obtain senior management support and involvement
- Insufficient time to develop the contract

Contract deliverables
- Contract deliverables described in ambiguous or unclear terms
- Inability to obtain stakeholder and/or end-user input and sign-off of contract deliverables

Contract performance measurement
- Failure to specify performance indicators that can be cost-effectively measured
- Failure to link contract payment to satisfactory performance
- Failure to establish cost-effective performance monitoring and assessment arrangements

Contract payments
- Having a payment regime that is a disincentive to good performance and/or that is inappropriate to the nature of the contract deliverables
- Failure to cap contract expenditure
- Failure to establish payment milestones that are linked to contract performance

Other contract provisions
- Failure to include relevant legislative and policy requirements in thecontract for example, privacy, security, recordkeeping
- Failure to include all relevant contract provisions such as contract variations, disputes, termination, including termination for convenience

Conflicts of interest
- Failure to identify and address actual or potential conflicts of interest

AWARD

Sources of risk   Examples of risks

Actions of the acquiring entity
- Unknowingly entering into a contract
- Work commencing before the contract is signed

Contract negotiations
- Failure to focus negotiations on key outcomes
- Failure of negotiating team to understand the extent of their authority
- Negotiating team not having sufficient skills and experience and/or having required access to specialist advice
- Final negotiated position adversely impacts on the value for money outcome
- Agreeing to unnecessary or undesirable outcomes during negotiations
- Failure to behave fairly and ethically

Final contract drafting
- Agreed outcomes not reflected in the final contract
- Failure to obtain all necessary approvals by those delegated to give them
- Failure to include all necessary contract clauses or including inappropriate clauses
- Failure to establish the legal status of the contractor

POSTAWARD – IMPLEMENTATION

Sources of risk   Examples of risks

Contract management capability
- Failure to have sufficiently skilled and experienced resources to effectively manage the contract(s)
- Lack of recognition of the importance of contract management
- Failure to act on contractor under-performance

Contractor performance
- Failure to provide contract deliverables on time, to agreed quality standards
- Failure to adhere to agreed budget
- Failure to comply with all contract provisions, for e xample, privacy, security, recordkeeping
- Fraud and/or unethical conduct by the contractor

**Changes in circumstances
and/or requirements**
- Contract changes not dealt with as contract variations
- Contractor not prepared to agree to contract variations to accommodate changes in entity requirements
- Changes in circumstances not managed in a timely manner

Stakeholder relationships
- Stakeholders not consulted and/or kept informed about contract performance
- Changes in stakeholder expectations not communicated to contract manager
- Differing and/or conflicting stakeholder expectations

ENDING THE CONTRACT

Sources of risk Examples of risks

Contract materials,
information and records

- Failure to return all required materials, information and records
- within agreed timeframes and/or in the required format

Payment

- Failure to agree final payment details
- Submission by contractor of an invoice for unforeseen additional costs

Transition arrangements

- Failure to appropriately manage the transition out by the contractor
- Not undertaking arrangements for a new procurement early enough in the contracting cycle
- Not managing the process of re-tendering in line with probity requirements, particularly where the existing contractor is re-tendering
- Disruption to the provision of goods and services
- Not addressing performance problems with an existing contractor who is re-engaged
- Not reviewing value for money when contracts are extended

Source: Developing and Managing Contracts. Getting the right outcome, paying the right price. Better Practice Guide. February 2007. Australian Government. Department of Finance and Administration. http://www.anao. gov.au/uploads/documents/Developing_and_Managing_Contracts.pdf.

IV PROACTIVE MANAGEMENT AND BUSINESS ETHICS

▮ BUSINESS ETHICS AND PROACTIVE LAW STRATEGIES

Kaisa Sorsa

The contents of "the proactive management and business ethics" course module are defined by the project group to be the following:

Proactive Management and Business Ethics

Course description
The main aim of the course is to provide students with the necessary background knowledge and skills which enable them to become proactive members of the business community and contribute to value creation.

After completing this course, the student is able to:
- understand the basics of business strategy, the process of strategic management and the business environment;
- analyse the influence that the environment and the sector characteristics can have on the strategic development of a company;
- identify resources and capabilities on which a company can base its long-term competitive advantage;
- consolidate schemes, processes and beliefs that are favourable to innovation and enable critical attitudes;
- identify the different work processes within an organization, in order to analyse the performance of the company and to identify opportunities to increase efficiency;
- use creative thinking in order to provide innovative solutions;
- consider the impact of business operations and integrate the ethical perspectives into the strategic and operational levels.

Course Material
- ProActive Management and Proactive Business Law Handbook
- A selection of case studies

In the handbook the topic is discussed from the strategic management and innovation management perspective. This part of the teacher's guide aims at linking the topic to the wider proactive business law context and system level innovations discussion.

Competition can no longer be based on aspects that have traditionally worked in the past; rather, it should focus on creating value as a source of sustainable competitive advantage which promotes development and, in the worst cases, permits survival. At the same time, business strategy should include ethics as a differentiating element which, apart from differentiation, improves business performance and helps meet the expectations of all those participating in the company's value chain (Camacho & García 2011; Sorsa 2011a).

Companies need to take into account the market trends which will be the cause of their success or failure. Market trends are growing rapidly across many voluntary sustainability initiatives (VSI) in many important global product sectors far beyond the growth of markets for conventional products. According to the 'The State of Sustainability Initiatives Review 2010: Sustainability and Transparency' (Potts et al. 2010, vii), the production of VSI compliant goods is now reaching significant levels of market penetration, accounting for over 10 per cent of global production across several of the consumer goods sectors (e.g. forestry, coffee, tea, cocoa, bananas).

The following assignments and examples will focus on the integration of legal knowledge especially private regulation and ethical issues, which are crucial to the participation and implementation of the VSI, into the business strategies. Companies can have different strategic approaches to legal issues which are illustrated in Figure 1 and further developed in Figure 2. The three proactive business strategies are called the preventive strategy, the advantage strategy and the transformative strategy (see Figure 1). These strategies become visible in different kinds of actions. When the company is willing to change its culture to be more ethical and sustainable, the process encompasses much more than mere compliance with legal requirements (Bertels & Papania & Papania 2010, 10, 12–17).

> Bird (2007b) describes five different strategies how companies approach legal issues. In the PriceWaterHouse research three strategic categories are used instead (2008). Companies that practice *avoidance* see law as a barrier to economic growth. Compliance with the law is an obstruction to be overcome as quickly and as cheaply as possible. Managers in an

avoidance company conclude that lawyers lack the training or the will to understand the company's business or its strategic position. *Compliance* companies view their legal resources as cost centres and consider following applicable laws as a necessary expense of doing business. Legal staff serves as a check against wrongdoing as measured by formal rules. Managers dictate obedience to laws and regulations, which may not be true in avoidance companies. Managers also consider adherence to the law as the goal rather than an intermediary toward a strategic position. The most detectable evidence of a compliance company arises from its company code of conduct normally written by attorneys. *Codes of conduct are legalistic in nature, focusing on rules, hierarchy, and sanctions* (Bird 2007b, 6–7).
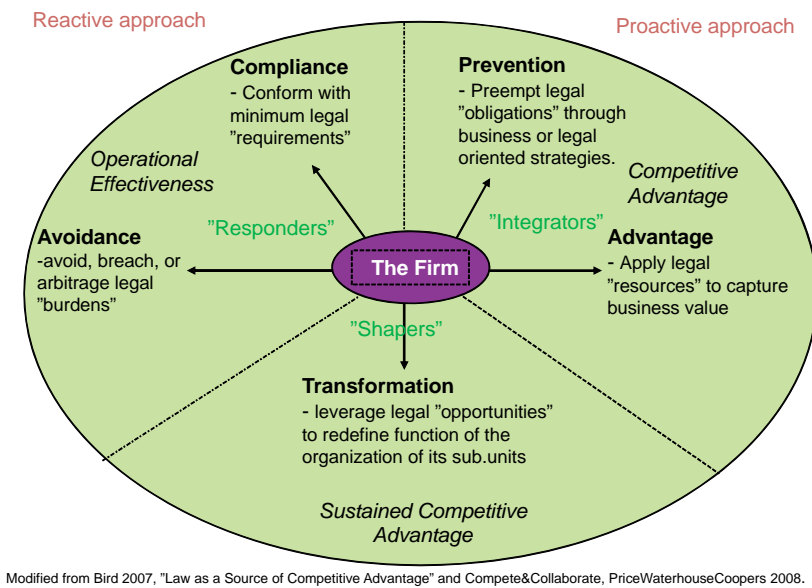
Modified from Bird 2007, "Law as a Source of Competitive Advantage" and Compete&Collaborate, PriceWaterhouseCoopers 2008.

FIGURE 1. *Reactive and proactive business strategies.*

Both avoidance companies and *compliance* oriented companies pursue operational effectiveness as their strategic focus. Operational effectiveness is defined as simply performing similar activities better than one's rivals. Like avoidance companies, practices of compliance

companies can generally be copied by competitors (Bird 2007b, 7–8). The company strategy necessitates that in order to succeed, different activities should fit with and reinforce one another. An avoidance company's legal practices rarely establish a beneficial fit with the rest of the organization. Compliance companies, in contrast, establish a simple level of fit (Bird 2007b, 9). Actions in reactive strategies are focused on problem solving and compliance.

Prevention companies, like many of their stage two counterparts, identify and assess potential legal risks and try to minimise them. One example is how companies in the food value chain use risk management standards (e.g. BRC, GLOBALG.A.P). A legally-based strategy emerges when legal requirements advance business goals. In order to reach these goals, companies need to be linked and supported by information technology, and managerial and human resource practices. Though a preventive legal strategy offers worthwhile business benefits, it rarely results in a long-term competitive advantage over rivals (Sorsa 2009a; 2009b; Bird 2007b, 10–11).

Companies which use the *advantage* approach to law are able to use legal knowledge to capture value. Law is set on an equal standing with other business disciplines as a source of company strategy. Managers act proactively, without the pressure of litigation or regulation, to initiate legal strategies in business plans. Attorneys are valued as counsellors who participate fully to the strategic planning of the company. Capturing value from the legal environment entails an ability to see a legal problem as an opportunity. Bird (op.cit.) describes different ways of using the law to capture value, such as improving brand equity or using intellectual property assets. (Bird 2007b, 10–13) A company which emphasises sustainability in its company culture is also actively engaged in communication with different groups of stakeholders in order to develop rules and practices to better align with the ethical expectations of different stakeholders (Sorsa 2011a; Bowen et al. 2008).

The *transformation* companies use legal resources to create value through sustainable competitive advantage to redefine the goals of a critical product, process or characteristics. Interpretation or implementation of law may augment or change the company's mission. While *advantage* companies capture marketplace value, transformation companies can potentially create value where none was thought to exist. Leveraging law to transform the organization can reap great productivity improvements, cultural rewards, and even protect an organization from impending decline. (Bird 2007b, 13–14)
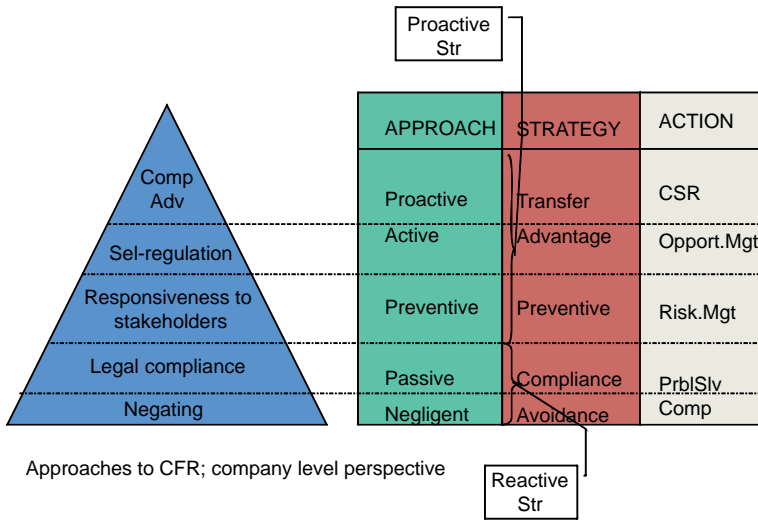
Approaches to CFR; company level perspective

FIGURE 2. *Approaches, Strategies and Actions to CSR and legal issues.*

In order to establish these different strategies, let us consider three giants from the food industry, Nestlé, Kraft Foods and Danone. How do they handle CSR issues and what kind of implementation methods do they use in order to make their strategic approaches function? What is the role of private regulation schemes in implementing their CSR strategies?

Assignment 1: Compare three of the most well-known transnational companies and their CSR strategies. Assess their strategies and actions and try to figure out what makes a difference between prevention strategy and transformation strategy in the company level? Make a list of different activities which according to your understanding foster the implementation of certain strategies.

Proactive management reflects the efforts of the managers to maximise potential benefits (organizational or network), while at the same time reducing uncertainty about the future of those benefits. Managers reduce uncertainty by proactively managing network actors. The future of organizational structures will be networked in order to gain flexibility and speed in their communications.

Consequently managers should share their knowledge with the rest of the staff, but not through command or contractual structures, but *through integration of the individuals and their contribution to the dialogue structure.* Integration implies sharing values and goals, enriching the people themselves through increased knowledge. (Santateresa 2011).

This may be true at the company level but when we move to a supply chain or even a broader value chain level the examples of one good company manager's dialogical methods may not be sufficient. Sustainability is part of a broader societal agenda that extends beyond the organization (Bertels et al. 2010, 10).

2   PROACTIVE MANAGEMENT, PROACTIVE LAW AND SYSTEM LEVEL INNOVATIONS

Kaisa Sorsa

After discussing and analysing the different strategies and activities in these three companies you can discuss the role of proactive companies further concerning the creation of complex, systemic innovations which need to be developed in broader networks than provided by only one company (see Figure 3).

When analysing Figure 2 below, one finds that the scope of actors evolves according to the type of innovation. Furthermore, when one focuses on products and processes the focus is often on the company level innovations. When the focus is on the value chain level it is on new technologies, cost reduction, traceability or different aspects of the CSR. The focus will be on the management of the different processes of the value chain: production processes, trading processes, information processes etc. Finally, when the focus is on the system level innovations the scope of actors will be the broadest and the management of this network needs innovative solutions by the actors.
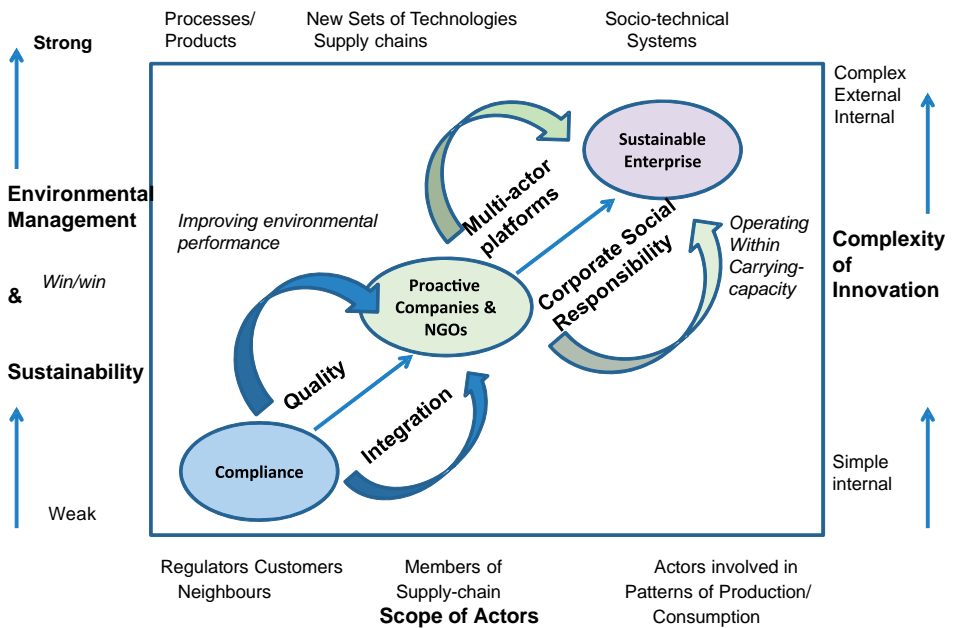
FIGURE 3. *System level innovations and actors. Modified from governance and innovation for sustainability (Roome 2004, 277).*

The next assignment can be used as a source for a more profound discussion with the students concerning systemic innovations. Assignment 2 concentrates on baseline practices at the company level. After discussing their contributions to the questions with the students, the teacher can explain the Framework for Best Practices report and a case study by Unilever.

Assignment 2: In order to innovate solutions for the management of the supply chain level on the CSR issues, 1) write down the sources of pressure imposed on firms to address social and environmental issues in their global supply chains; 2) After finding out the sources, learn more about the Best Practices Framework for Sustainable Supply Chains developed by the Network for Business Sustainability: Managing Sustainable global supply chains. Framework and Best Practices, Executive Summary (Brammer & Hoejmose & Millington 2011, 10–16) which is available at the address: http://nbs.net/knowledge/topic-supply-chains/supply-chain/systematic-review/

In order to understand the system level innovations in socio-technical systems one should widen the perspective further from the company and value chain levels to the whole community. Recommended reading is, for instance, 'Engaging the Community: A Systematic Review' issued by Research Network for Business Sustainability in 2008. The report explains community engagement in different collaborative processes.

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V CLOSURE

CLOSURE

Tarja Salmi-Tolonen

Business and law are inseparably embedded in the global economic environment. Almost every facet of reality in matters of society, such as business or the law, hinges on contextual factors. This relationship is naturally complex and while the context has an impact on business and law they, for their part, have an impact on the context – there is an incessant two-way interaction. Acknowledging this complex relationship, the authors of this accompanying volume to the *ProActive Management and ProActive Business Law Handbook* set out to compile a package of pedagogical background information, teaching methods and proposals for different types of assignments, quizzes and questionnaires to aid educators in their demanding work preparing students to face real-life challenges.

This *Teacher's Guide to ProActive Management and ProActive Business Law* is an accompanying volume to the Handbook and one of its purposes was to provide teachers and instructors the rationale behind the knowledge base offered in the Handbook. The thoughts and ideas presented in the Handbook are based on the outcomes of this curriculum development project but also based on earlier findings on an empirical study on contracting capabilities conducted in a real business environment in 2006–2009.[21] The pedagogical views presented in this book are presumably familiar to a number of educators, but our aim was to compile to this book the current approaches we tested in the pilot courses and which seemed to work best with our aims and topics. We also wanted to share the competence chart and the assessment tools we compiled based on present day requirements, such as the European Quality Framework and real working life demands with colleagues working with the same subjects. In addition, we propose ways to organise the modules as well as suggestions for course plans and schedules, and proposals for assignments, quizzes, and questionnaires which can easily be modified to the teacher's needs. We are convinced that experienced educators will find a number of creative modifications and new solutions to these. It is our wish that since the concepts proactive law and

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21   Corporate Contracting Capabilities research project was funded by the National technology Agency of Finland and the Academy of Finland, see details in the Handbook (Sorsa 2011b).

proactive contracting are relatively new, also others will develop the concepts further and suggest new pedagogical solutions.

We organised the course modules into three topics: 1) The Development of Proactive Law and The Prevention and Resolution of Disputes, 2) Proactive Contracting and Risk Management and 3) Proactive Management and Business Ethics, but innovative teachers can easily mix and match the topics to suit their needs depending on the length of the course and the emphases of their schools or programmes. The materials offered by these two books – the Handbook and the Teacher's Guide – can also be used in a flexible manner to cater for different kinds of pedagogical needs.

It is clear that since concepts and contexts are constantly changing, more research is needed on both in order to provide cutting edge research findings and knowledge and for operationalising them for university education and real life. Ideally, practical experiences in real life, professionals in their work and academic researchers from all the fields involved communicate. This has been the case in developing the concepts of proactive law and proactive contracting. Even if we have touched on a number of topics, the coverage is in some cases sparse and programmatic. Apart from the obvious point that in the present economic situation the globalisation development is accelerated in an unprecedented way and data on present-day business life very quickly becomes outdated, we have been brief on many practical issues in detail. The conundrum of the changing business context is always a challenge but its elasticity on the other hand allowed us to focus on a time-slice of this day and age and the present development of regulation, public and private, responses to corporate social responsibility, and proactive approaches and practices.

Research on proactive law and proactive contracting will go on. Books, nevertheless, have to end. We wish to thank all our readers and colleagues and wish that you do not hesitate to get in touch. You will find the accompanying website with additional information, slides and articles on proactive law and proactive contracting at http://pampal.turkuamk.fi/index.php.

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