

WHISTLEBLOWING SCHEMES IN EUROPE

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An ordinary day in court

CAST:

- Flexco: A Idaho based multinational listed on the stock exchange
- Matt: Assistant General Counsel of Flexco responsible for ethics and compliance
- Martine: Former Central Purchasing Director for the EMEA Region
- John: Shareholder of Xyla, a service company and husband of Martine.
- Jim: CEO of Flexco

An ordinary day in court

Martine was dismissed following the discovery of a major fraud in the purchasing department. For years, Martine arranged to overpay Xyla. The investigation found that Xyla was partly owned by John, husband of Martine. Martine claims that she disclosed to her supervisor that her husband owned the company but that Xyla was still selected. Martine maintains that the accusation is coming from her supervisor as he was bypassed for the position Central Purchasing Director EMEA. Martine was dismissed and Flexco started a procedure against Martine to recover the overpaid amounts.

An ordinary day in court

Judge: How was the fraud discovered?

Matt: For many years, our company has setup an outstanding compliance process. As part of this process, a hotline is available for all employees in order to report on any wrong-doing. An anonymous call was made which uncovered the fraud.

An ordinary day in court

Judge: Do you know who made the call?

Matt: Well..no it was an anonymous caller. Our policy clearly states that callers can make a reporting anonymously. We hope this will encourage reporting on even the smallest wrong-doing without any fear of retaliation.

An ordinary day in court

Judge: I suppose that your whistleblowing scheme was notified?

Matt: Well, it depends on what you mean by notified. The hotline procedures were posted on all the bulletin boards and made known to all employees as part of the annual code of conduct training.

An ordinary day in court

Judge: What type of offences can be reported through the hotline?

Matt: The hotline is available for any type of wrong-doing, even the smallest one. Our employees have an obligation to report any compliance concern. As you can see, our company takes compliance very seriously.

An ordinary day in court

Judge: How was the investigation conducted?

Matt: We have a dedicated compliance investigation team in the US. As soon as the fraud was reported, all the data was transferred to that team and they completed the investigation in less than six weeks. I was very impressed by their work.

An ordinary day in court

Judge: Did you have have a contract in place to ensure the protection of the personal data transferred?

Matt: The data was only sent to our US head office and our IT security systems are outstanding so there was no need to have a contract in place.

An ordinary day in court

Judge: Did the employee have access to the data during the investigation?

Matt: Sir, you will understand that it was essential for the investigation to remain secret. The team managed to do so until the employee was informed of her immediate dismissal and conducted to the door.

An ordinary day in court

Judge: Do you have a translation of the
hotline procedure?

Matt: Not exactly. We are a multinational company and all our employees speak fluent English so translation was not necessary. However in order for the callers to feel more comfortable, multilingual operators are available around the clock to speak in over 75 languages.

An ordinary day in court

Judge:

CASE DISMISSED!

What went wrong?

Jim: Matt, we like what you do for Flexco and understand the challenges you are facing but I do not want this to happen ever again!

I want you to establish a worldwide foolproof whistleblowing scheme which complies with the Sox requirements and which ensures an effective compliance program

Requirements of whistleblowing scheme

- Sarbanes-Oxley Act requires
US companies and their foreign affiliates to establish procedures for the receipt, retention and treatment of complaints received regarding accounting and internal accounting controls; and the confidential, anonymous submission by employees of concerns regarding questionable accounting or auditing matters.
- Effective compliance program:
 - Accounting & internal control
 - Anti-trust
 - FCPA and bribery prevention
 - Export compliance
 - Boy cott
 - Employment practices
 - Environment, Health & Safety

Multilingual International Hotline Available

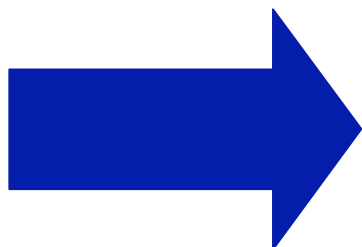
Flexco Ethics & Compliance hotline is available to all employees around the world. Through the engagement of a new service provider, multilingual operators will be available around the clock to speak to employees in over 75 languages. Employees are encouraged to report any compliance concern, including potential unethical conduct or violations of law, regulation, policy, procedures, or the Code of Conduct. The ethics and compliance hotline is open 24 hours a day, seven days a week and provides employees with a mechanism for anonymous reporting.

Opinion 1/2006 of Article 29 Data Protection Working Party

Opinion 1/2006 on the application of the EU data protection rules to internal whistleblowing schemes in the fields of accounting, internal accounting controls, auditing matters, fight against bribery, banking and financial crime

Opinion 1/2006 of Article 29 Data Protection Working Party

- “Provides guidance”
- “It is premature to adopt a final opinion”
- “This working document does not address other legal difficulties in particular in relation to labor law and criminal law”
- “Limited to whistleblowing schemes in the field of accounting and bribery”



Foolproof Whistleblowing Scheme?

Opinion 1/2006 of Article 29 Data Protection Working Party

Condition 1: Legitimacy

- Whistleblowing scheme necessary for compliance with a legal obligation to which controller is subject
NOT SOX since foreign obligation
- Whistleblowing scheme necessary for the purpose of a legitimate interest pursued by controllers
Schemes in the fields of accounting, internal controls and combating against bribery pursue a legitimate interest

Opinion 1/2006 of Article 29 Data Protection Working Party

Condition 2: Proportionality principle

- Only identified reports should be processed
In exceptional cases anonymous reporting possible
but should be discouraged

Opinion 1/2006 of Article 29 Data Protection Working Party

Condition 3: Clear and complete information

- Information to employees on the existence, purpose and functioning of the scheme, the recipients of the reports and the right of access, rectification and erasure

Opinion 1/2006 of Article 29 Data Protection Working Party

Condition 4: Rights of incriminated person

- Right to be informed that data is being recorded
- Right to access the information
- Right to object to information collected

However

If risk that notification will jeopardize
investigation, notification may be delayed

Opinion 1/2006 of Article 29 Data Protection Working Party Condition 5: Management

- Dedicated organisation bound by specific confidentiality obligations
- External provider possible provided appropriate contract in place

Opinion 1/2006 of Article 29 Data Protection Working Party

Condition 6: Transfer to Third Countries

(US):

- Principle: Reports should be dealt with locally except if management is involved
- Transfers:
 1. Safe harbour system
 2. EU Model Contract
 3. Binding corporate rules approved by national authorities

Opinion 1/2006 of Article 29 Data Protection Working Party Condition 7: Security of Processing Operations

- Collection of reports through dedicated system in order to prevent unauthorised disclosures
- All reasonable technical and organisational precautions to preserve security of data & confidentiality of identity of whistleblower

Foolproof whistleblowing Scheme?

Substantial Gaps:

- Condition 1 (legitimacy):
 - Opinion limited to accounting fraud and bribery
- Condition 2 (proportionality)
 - Appears in contradiction with SOX requirement
- Opinion does not address other legal difficulties in particular in relation to labor law
- Opinion = Opinion

Comparative Study

5 Questions:

- Do the national data authorities follow Opinion 1/2006?
- Is it legitimate to operate an anonymous hotline?
- Is a consent of work council required to operate hotline?
- Is any notification/registration required with the national data protection authorities?
- Can whistleblowing scheme cover other areas than accounting & bribery?

Countries: Belgium, France, Spain, Italy, Germany

Comparative Study

- Do the national data authorities follow Opinion 1/2006?

Only Belgian and French regulators stated that “main points” of Opinion 1/2006 were in line with their own views

The other regulators did not publish their views on Opinion 1/2006

Comparative Study

- Is it legitimate to operate an anonymous hotline?

Some regulators (France, Belgium) follow Opinion 1/2006, with the French regulators adding further requirements with respect to precautions for handling anonymous reports.

Some consider them illegal (Germany) while Italy & Spain do not rule them out

Comparative Study

- Is a consent of work council required to operate hotline?

No: Belgium, Spain (but advisable to inform them)

Yes: France, Germany (Wal-Mart case)

Italy: No precedents

Comparative Study

- Is any notification/registration required with the national data protection authorities?

Yes: Belgium (if involves automated processing), France (“autorisation unique”), Germany

No: Italy (unless relates to sensitive data)

Uncertain in Spain

Comparative Study

- Can whistleblowing scheme cover other areas than accounting & bribery?
- Belgium: yes if there is a Belgian legal requirement to establish such a scheme or if there is a legitimate interest for the company but would require authorization
- France: in theory yes but would require specific authorisation (outside of “autorisation unique” system)
- Germany, Spain, Italy: No precedents

Matt's recommendations to FLEXO Management

1. Limit scheme to accounting fraud & bribery preventions
2. No promotion of anonymous reporting
3. Notify scheme in France, Belgium and Germany
4. Fully inform employees of functioning of whistleblowing scheme and their rights
5. Assign responsibilities to dedicated organisation and provide training
6. Obtain consent of works council in France and Germany
7. Register to the Safe Harbour Scheme or have data transfer contract in place
8. Translate policy in local language

Jim:

GOOD WORK MATT !