603 Leading Transnational Compliance in Europe

Carol M. Seaman
Vice President/Chief Compliance Officer
Cook Group Incorporated

Owen Warnock
Partner
Eversheds LLP

Richard J. Wolf
Former Senior Vice President -Legal, Cendant Corporation
Attorney, Lexakos LLC

Faculty Biographies

Carol M. Seaman

Carol M. Seaman serves as vice president and chief compliance officer of Cook Group Incorporated, an international, privately held medical device manufacturing company with headquarters in Bloomington, Indiana. Ms. Seaman joined Cook Group Incorporated as corporate counsel. She has also held several positions within Cook Group including director of risk management and insurance and vice president of administration. Carol's recent work projects have included the development and implementation of a corporate code of conduct and a global compliance and ethics program.

Prior to joining Cook, she practiced law with Ferguson, Ferguson & Lloyd in Bloomington and taught in the legal research and writing program at the Indiana University School of Law.

Professional organizations include involvement in the Monroe County, Indiana State and American Bar Associations, the ACC, the Indiana medical device manufacturer's council, the Food Drug and Law Institute, the Society for Women's Health Research, and the Risk and Insurance Management Society. She has participated on several panels for the biannual Indiana women in law conference and with the Indiana judges and lawyers assistance project. She currently serves as co-chair of the newly founded lawyers' council of the American Civil Liberties Union of Indiana, as President of the Funeral Consumer's Alliance of Bloomington, and is a member of the Advisory Boards of the Monroe County Historical Society, Harmony School and Pets Alive and previously, the City of Bloomington Safe & Civil City Program. Carol is a "Women in Law Day" team leader for the local Habitat for Humanity "Women's Build" and a member of the Habitat "More than Houses Society", she served as a director and then president of the Monroe County YMCA and she is an active member of the St. Thomas Lutheran Church.

Ms. Seaman attended Wittenberg University and graduated with a B.A. before moving on to receive her M.A. from Indiana University in. Carol received her J.D. from Indiana University School of Law.

Owen Warnock

Owen Warnock is a partner in international law firm Eversheds LLP. He is based in the United Kingdom where he leads a team of lawyers advising on employment law and collective labor law issues. Many of his clients are US corporate seeking advice on employee and union issues throughout Europe, including compliance issues. His special interests are data privacy, union bargaining and age discrimination.

Owen has practiced in this field for many years, rising through the ranks in Eversheds and its predecessor firms.

He is a member of the US-based Society for Human Resource Management, and of the UK-based Employment Lawyers Association and the Industrial Law Society.

Owen graduated with honors in law from Cambridge University.

ARTICLE 29 Data Protection Working Party

Brussels, 3 July 2006
D(2006) MDF/ajv 8459

Mr. Ethiopis TAFARA
Director
Office of International Affairs
Securities and Exchange Commission
Washington, D.C. 20549
United States of America

Dear Mr. Tafara,

Thank you for your letter dated June 8, 2006 providing the Article 29 Working Party with the reaction of SEC staff on its Opinion adopted on February 1st, 2006, relating to the application of EU data protection rules to internal whistleblowing schemes in the fields of accounting, internal accounting controls, auditing matters, and the fight against bribery, banking and financial crime.

The Working Party appreciates your willingness to cooperate with it on this issue. It believes that this cooperation will help solve the concerns of US and EU companies that are bound to comply with SEC Rule 10A-3 and the requirements of Section 301 of the Sarbanes Oxley Act, on the one hand, and European rules on personal data protection, on the other hand.

The present letter is intended to provide clarifications on each of the points which you raised in your own letter dated June 8th. It confirms or completes the interpretation provided by Mr. Christophe Pallez, who met with you and other SEC representatives on March 8, 2006, in his capacity of Secretary General of the Commission Nationale de l'Informatique et des Libertés (CNIL), the French Data Protection Authority.

These comments follow the structure of your letter and should be read in conjunction with it.

1. On the role of audit committees

Paragraph A.1 of your comments requested clarification on how the role of audit committees and the ability of audit committees to provide information to the company's auditors or competent regulatory authorities could be affected by the Opinion.

In Section IV.6 of its Opinion, the Working Party introduced the principle that "groups should deal with reports locally, i.e. in one EU country, rather than automatically share all the information with other companies in the group". It also described two exceptions to this rule

This Working Party was set up under Article 29 of Directive 95/46/EC. It is an independent European advisory body on data protection and privacy. Its tasks are described in Article 30 of Directive 95/46/EC and Article 15 of Directive 2002/58/EC.

The secretariat is provided by Directorate C (Civil Justice, Rights and Citizenship) of the European Commission, Directorate General Justice, Freedom and Security, B-1049 Brussels, Belgium, Office No LX-46 01/43.

Website: http://ec.europa.eu/justice_home/fsj/privacy/index_en.htm

by providing that "the data received through the whistleblowing system may be communicated within the group if such communication is necessary for the investigation, depending on the nature or the seriousness of the reported misconduct, or results from how the group is set up".

This guidance derives from the essential data protection rule that personal data shall only be obtained and further processed for one or more specified and lawful purposes (Article 6.1(b) of Directive 95/46/EC). As a consequence, controllers should only communicate data to other entities, then qualified as "recipients", if the purpose for which the information was originally collected requires and justifies this communication. The exception mentioned in the third paragraph of Section IV.6 (iii) of the Opinion provides that this justification is in principle to be found in the nature of the communicated data. It also provides that this justification may be found, *as an alternative*, in the structure of the group.

The Working Party acknowledges that disclosure of a report to a few employees of another company or of other companies within the group may result from the organisation of the group, although this disclosure might not be strictly necessary for the investigation. This specifically refers to the possibility for groups to set up cross-functional management organisations for such reports, including individuals belonging to the various entities of a group, designated on the basis of their respective skills. Individual reports may be disclosed to those individuals based on their responsibilities. According to this exception, the Working Party believes that audit committees might be in a position to receive such reports, wherever they are located, when this communication is a natural consequence of the committee's tasks and functions. The same logic applies to company's auditors.

Furthermore, data controllers may communicate personal data to regulatory authorities when these authorities have the power to request such communication, by virtue of specific legal provisions. As a rule any access request by such regulatory authorities must be formulated *ad hoc* and should specify on which grounds it is based. This of course does not prevent data controllers from spontaneously informing the competent regulatory authorities in case of suspected improprieties of which these authorities should be informed, in accordance with their specific tasks and missions.

The Working Party therefore believes that EU data protection rules, as specified in the Opinion, do not prevent audit committees from being in a position to face their responsibility for oversight of whistleblower requirements under SEC Rule 10-A.

2. Confidentiality and anonymity

Paragraph A.2 of your comments requested clarification on whether the Opinion would discourage "confidential, anonymous reports" regarding questionable accounting or auditing matters, which would allegedly contradict the express requirement of Rule 10A-3 (ii).

The Opinion indeed deals at length with the question of whether whistleblowing schemes should make it possible to make a report anonymously rather than openly (i.e. in an identified manner, and in any case under conditions of confidentiality).

Article 6(a) of Directive 95/46/EC provides that "personal data must be processed fairly and lawfully". This requirement for fair processing applies in particular to the collection of personal data. In determining for the purposes of this principle whether personal data are

collected and processed fairly, regard is to be had to the method by which they are obtained. A risk exists, in this context, that anonymous collection of data is qualified as unfair collection of data. At any rate, the possibility to file anonymous reports can only increase the risk of frivolous or slanderous reports with the intention of causing the accused damage or distress.

I am personally keen to underline that this assessment must be read in the specific European context. It is certainly useful at this stage to recall that anonymous reporting evokes some of the darkest times of recent history on the European continent, whether during World War II or during more recent dictatorships in Southern and Eastern Europe. This historical specificity makes up for a lot of the reluctance of EU Data Protection Authorities to allow anonymous schemes being advertised as such in companies as a normal mode of reporting concerns.

However, neither data protection rules generally, nor the Opinion specifically, prevent anonymous reports from being filed through whistleblowing schemes. The Working Party further acknowledges, as the Opinion makes clear, that remaining anonymous might sometimes be the only available possibility for a whistleblower to raise a concern, who would otherwise risk being exposed to unacceptable physical or mental retaliation.

In this respect, the Working Party finds that it may take up the analysis made in a decision handed down by the US District Court of Columbia in April 2005 on the respective disadvantages and risks resulting from the possibility of a claimant initiating court proceedings under a pseudonym.[1] While the Court found that filing a request in an open manner "is an indication that the litigant's request is not frivolous and gets the case moving quickly", it also found that "a plaintiff's desire merely to avoid the annoyance and criticism that may attend any litigation is not sufficient to justify pseudonymous proceedings". However the Court also considered that in some cases "the need for anonymity outweighs (...) the risk of unfairness to the opposing party" and that "such critical or unusual cases may include those in which identification creates a risk of retaliatory physical or mental harm, those in which anonymity is necessary to preserve privacy in a matter of a sensitive and highly personal nature, and those in which the anonymous party would be compelled to admit criminal behavior or be subject to punishment by the state".

This is precisely the logic behind Section IV.2.iii of the Opinion, which is intended to reduce the cases in which anonymity might be used to convey slanderous or frivolous allegations on a specific person. The Opinion provides that "companies should not advertise the fact that anonymous reports may be made through the scheme". This implies that when first getting in touch with the scheme, a whistleblower should not be instantly offered the possibility to remain anonymous but rather the confidential nature of the scheme and the benefits of confidential reporting should be explained to them first. However, the report should still be taken by the scheme if this person wishes to remain anonymous, even after the advantages of identifying oneself have been explained to them.

Section IV.3 further provides that potential users of a whistleblowing schemes must be informed in a general manner "about the existence, purpose and functioning of that scheme". This general information would include the existence of the possibility to file anonymous reports through the scheme, as well as the fact that anonymous reports will be processed with specific precautions. This information should also make clear that the company prefers whistleblowers to identify themselves rather than remain anonymous.

The Working Party therefore confirms that the Opinion is not intended to direct companies to discourage or negatively characterise anonymous reporting when it is used to convey concerns which, if raised openly, would expose the whistleblower to unacceptable risks of retaliation. It is indeed intended to encourage companies to promote and favour identified confidential reporting over anonymous reporting, in the light of the various benefits to confidential reporting as listed in the Opinion.

3. *Classes of persons who can use the procedures and persons who can be subject of complaints*

Paragraph A.3 of your comments requested clarification on the classes of persons who can use the procedures and persons who can be subject of complaints.

The Opinion expressly provides that the Working Party has no wish to be prescriptive on either aspects of this issue and that "it leaves it to data controllers, with possible verification by the competent authorities, to determine whether such restrictions are appropriate in the specific circumstances in which they operate".

The Working Party believes that the Opinion provides data controllers with a very wide margin of manoeuvre to decide, if applicable, that their whistleblower procedures will cover all employees in all the fields covered in the Opinion.

4. *Data retention periods*

Paragraph A.4 of your comments requested clarification on the periods applicable to the retention of complaints.

The Working Party wishes to provide additional guidance on how long the reports filed through a whistleblowing scheme may be kept. Article 6.1(e) of Directive 95/46/EC provides that personal data must be "kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the data were collected or for which they are further processed."

The Opinion further provides that, as a rule, reports should be deleted promptly, and provides as a guideline the period of two months after the completion of the investigation of the facts alleged in the report.

This period will differ if legal proceedings or disciplinary measures are initiated against the incriminated person or the whistleblower (in cases of false or slanderous allegations). In such cases, personal data should be kept until the conclusion of these proceedings and the period allowed for any appeal. Such retention periods will be determined by the law of each Member State.

On the other hand, personal data relating to reports found to be unsubstantiated should be deleted immediately, without necessarily waiting for the end of the two-month period.

[1] David W. Qualls v. Donald Rumsfeld case (Civil Action No. 04-2113 (RCL)), April 27, 2005, available at the following address:
http://www.dcd.uscourts.gov/opinions/2005/Lamberth/2004-CV-2113-17;32;28-4-27-2005-a.pdf

The Working Party acknowledges that data controllers may decide to archive rather than destroy the personal information mentioned on reports. Such a decision may be made upon an assessment of the risks incurred by the company for failing to keep a trace of the information internally, notably in terms of company liability.

Archiving means keeping the data in a separate information system with restricted access. This implies that once archived, the data is no more readily accessible in the working files of the persons dedicated to the processing of whistleblowing reports. It is accessible only on the basis of specific procedures regulating such access. Companies must implement appropriate technical and organisational measures to protect the archived data, in particular against unauthorised communication of, or unauthorised access to the data from within the company.

Access to the files of a sensitive nature should be limited to those within the company that have a genuine need to know given the reason for which the files were archived. Only the persons in charge of managing the whistleblowing scheme may request access to archives relating to previous cases handled by their internal organisation. Such access might be legitimate when it is required to defend the interests of the company in court, when it is necessary to comply with a request by an authorised third party (e.g. the judicial authorities investigating facts which might have been reported) or in cases when it is requested by the individuals identified in the reports in line with their statutory right to access and rectify data held on them subject to any relevant exemption.

The choice between destroying or archiving the reported data is the company's responsibility.

The Working Party hopes that these clarifications will prove useful. It believes that the current framework offers sufficient flexibility for companies to comply with both EU data protection rules and the requirement of Sarbanes Oxley relating to the "retention of complaints".

5. Additional matters

Finally Section B of your letter draws the Working Party's attention to additional matters which, although they do not directly pertain to the SEC's field of competence, the SEC wished to convey to the Working Party on behalf of multinational companies.

The Working Party shares the SEC's concern to prevent companies finding themselves in a situation where it would be impossible to comply with US and EU law on the one hand, or with different EU national standards, on the other hand, or where the costs of such international compliance would be truly excessive or disproportionate and could be avoided.

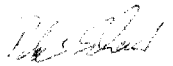
When it started dealing with the application of EU data protection rules to whistleblowing schemes, the Working Party chose to restrict the field of its work to Sarbanes Oxley-related matters as a matter of priority, so as to alleviate the risks that companies operating both in the US and in the EU could face risks of substantial sanctions either in the United States or in Europe.

The Working Party also indicated that it adopted its opinion on the clear understanding that it needs to further reflect on the possible compatibility of EU data protection rules with internal whistleblowing schemes in other fields than the ones just mentioned, such as human resources, workers' health and safety, environmental damage or threats, and commission of offences.

The Working Party will therefore consider during its next plenary meeting whether it is appropriate to provide additional guidance to companies on the application of EU data protection rules to whistleblowing schemes on matters falling outside the scope of its current opinion.

On behalf of the Working Party I wish to thank you and the SEC staff once more for sending us this detailed request for clarification. The members of the Working Party appreciate the quality of the relations between them and the SEC and firmly believe that this joint work, once made public, will be of assistance to companies operating both in Europe and in the United States.

With best regards,



Peter SCHAAR
Chairman

Cc: Mr. Jonathan Faull, Mr. Francisco Fonseca, (Justice, Liberty & Security DG)
Mr. Jurgen Tiedje, Mr. Philippe Pelle, M. P. Delsaux (Internal Market DG)
Mr. Dimitriou Dimitrios, (Employment DG)

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Carol M. Seaman, Esq., Moderator
VP and Chief Compliance Officer
Cook Group Incorporated
Owen Warnock, Esq.
Partner
Eversheds LLP, (United Kingdom)
Richard J. Wolf, Esq.
Managing Partner
Lexakos Consulting LLC

THE LAY OF THE LAND

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Levelling-up

- Some Basics about Europe
- "Europe" – about as many meanings as "America"
- The continent of Europe
- European Union
- European Economic Area
- Council of Europe countries

Council of Europe member countries

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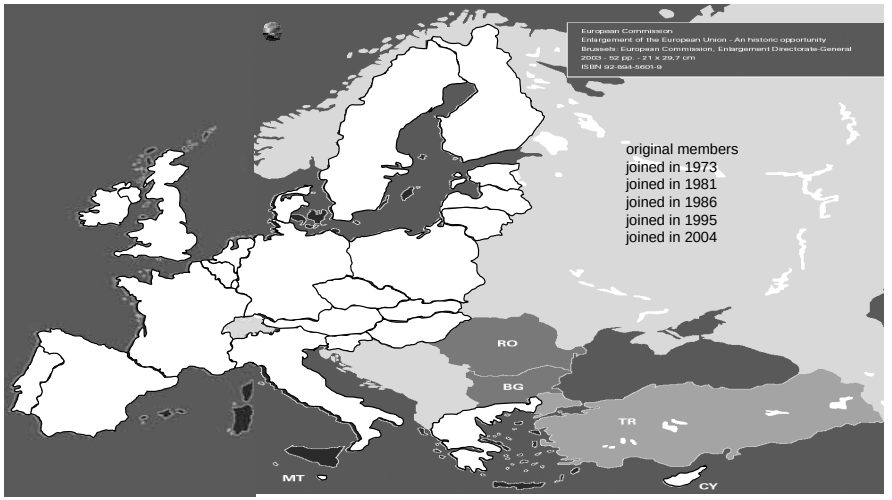
The EU states

Yellow/orange = member

Green = candidate

Europe – How it formed up



Europe/EU as a place to do business

- Not one country split into several states
- Many countries
- As many legal systems
- Many languages
- Huge cultural differences
- USA, Canada, Australia and UK more similar than for example France, Germany, Italy and UK

Sources of law in the EU

- Each country's own law
- EU law
- EU law has primacy, but does not cover all fields and topics
- EU Regulations:
  - are automatically law in each member state
  - member states usually just legislate for penalties/remedies to enforce
- EU Directives:
  - direct each member state to introduce law to "implement" the rules in the Directive
  - member states take action within the implementation period – so variety over 2 to 3 years

UNDERSTANDING REGIONAL DIFFERENCES

Enforcement - Sources of difference in the real world

- Enforcement Body
- Method of enforcement
- Cultural factors

Enforcement bodies

- Central Government
- Local Government
- Other public authorities
- Trade and professional bodies

Enforcement Methods

- Criminal law
- Civil law
  - Public claims
  - Private claims
- "Self-regulation"
- Name and shame
- Regulation by punishing breach, by requiring approval in advance
- Reporting up obligations
- Whistleblowing obligations

Some examples

- In France a director can face criminal action, including a possibility of prison for breaches of employment law:
  - Health and safety at work
  - Working time rules
  - Discrimination
  - Employee representation rights
  - Collective bargaining
  - Dismissals

Some examples

- In the UK a director can face criminal action, including a possibility of prison for breaches of employment law:
  - Health and safety at work
  - Working time rules
  - Discrimination
  - Employee representation rights
  - Collective bargaining
  - Dismissals

Some examples

- In France a director can face criminal action, including a possibility of prison for breaches of employment law:
  - Health and safety at work
  - Working time rules
  - Discrimination
  - Employee representation rights
  - Collective bargaining
  - Dismissals
- Solution: director appoints HR manager to act as his delegate!

Prior approval vs. punishment for getting it wrong

- Data privacy regulation: whistleblowing systems:
  - France
    - Originally needed case by case approval
    - Now must notify in advance
  - UK
    - Standard notification already in place will cover
- Food labelling
  - Official binding approval
  - Official "comfort only" approval
  - Approval by trade body

Cultural factors

- Warnings and informal action
- Some issues sensitive in some countries and not a concern in others eg chocolate, vitamins,
- Attitude to foreigners
- Importance of etiquette
- Attitude to profit and business
- Social solidarity
- "Not invented here syndrome"
- Misuse of regulation for economic protection purposes
- Cultural substrate

The real world - Sex and Europe

% women suffered harassment - range of study results

Country	Lowest	Highest
Denmark	1.7	11
Finland	9	34
Norway	8	90
Sweden	2	53

The real world - Sex and Europe

% women suffered harassment - range of study results

Country	Lowest	Highest
Denmark	1.7	11
Finland	9	34
Norway	8	90
Sweden	2	53
Belgium	29	29
Ireland	14	45
Netherlands	13	58

The real world - Sex and Europe

% women suffered harassment - range of study results

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Norway	8	90
Sweden	2	53
Belgium	29	29
Ireland	14	45
Netherlands	13	58
Austria	17	81
Luxembourg	13	78
UK	47	90
Germany	30	80

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The real world - Sex and Europe

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Belgium	29	29
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Austria	17	81
Luxembourg	13	78
UK	47	90
Germany	30	80
France	No Study	
Spain	No Study	
Italy	No Study	

The real world - Sex and Europe

% men suffered harassment - range of study results

Country	Lowest	Highest
Denmark	No Study	
Finland	3	26
Norway	No Study	
Sweden	1	4
Belgium	No Study	
Ireland	1	5
Netherlands	27	27
Austria	No Study	
Luxembourg	No Study	
UK	9	51
Germany	No Study	
France	No Study	
Spain	No Study	
Italy	No Study	

Spotlight on a controversial field

Monitoring and whistleblowing

- Central to ensuring compliance
- In itself an example of variety in law and practice across Europe
- Update on the latest state of play

Monitoring and whistleblowing - Background

- EU Data Protection Directive
  - Orders each EU member to implement the same law, but
  - Room for
    - Differences in the wording of the legislation in each county
    - Difference in interpretation by the Data Protection Authority in each state
    - Impact of culture and history
- Sarbanes-Oxley and mandatory anonymous whistleblowing
  - The French challenge
  - The mess-up in Germany

Whistleblowing
The German mess-up

- Facts
- Legal issues
- Lessons

Whistleblowing
The French Challenge

- The CNIL rulings
- The CNIL "solution" of December 2005
- The Article 29 Working Party
  - To and fro with the SEC
- Working Party letter to SEC July 3, 2006

Whistleblowing
The French Challenge

- Working Party letter to SEC July 3, 2006
  - Whistleblowing date *can* go to other companies in the group
  - Whilst anonymity should not be offered immediately, confidentiality of the scheme should be stressed but if employee requires it anonymity *may* be granted
  - Employer *is permitted to* indicate in the whistleblowing scheme that anonymity is available
  - Unsubstantiated allegations – date to be destroyed after 2 months *or* transferred to restricted-access archive
  - Above only applies to Sarbanes-Oxley matters. Working Party will now turn to whistleblowing in fields of HR, health and safety, environmental issues and commission of offences

Other law on whistleblowing

- Are any employees under an obligation in law to whistleblow or report up?
- Can employer impose an obligation to whistleblow?
- Are whistleblowers protected from retaliation?

Monitoring and searching workplace computers

- The computers belong to us, we can do what we like – USA, UK
- Invasion of privacy to search - eg France
  - Must have good grounds – "exceptional circumstances" eg direct connection to the employee's work
  - Must notify employee
  - Must do it in employees' presence

A European Lawyer's thoughts on strategy for worldwide compliance

- Essentials
  - Knowledge
  - Policy
  - Training
  - Monitoring
- Be aware of different cultural starting points
- Your *standards* may be corporation-wide, but your *ways of getting there* will have to vary – or you will fail
- "Not invented here syndrome" – outposts may have this disease, does HQ have it too?

RATIONALLY ADDRESSING COMPLIANCE IN EUROPE

U.S. Sentencing Guidelines

Elements of an Effective Ethics and Compliance Program

- Compliance Officer(s) *(with adequate authority)*
- Written Policies and Procedures *(that are aligned)*
- Hiring of People of Integrity *(for influential roles)*
- Communication and Training *(brand recognition and help lines)*
- Auditing and Monitoring *(ever improving)*
- Enforcement *(consistency and fairness)*
- Investigation and Response *(remediation)*
- Culture of Compliance *(right "tone" and reward ethical conduct)*
- Risk Assessment *(ongoing process)*

Building and Sustaining Effective Global Compliance & Ethics Programs

Reduced Bureaucracy and Increased Efficiency Through Regional Compliance Councils

Selected Best Practices: Getting Started
Regional Compliance Councils

- Obtain (and maintain) organization charts
- Executive management buy-in and support
- Evaluate and select regions on time zone
- Survey and interview "deputized" managers for high-level legal risk assessment
- Identify gaps and general remediation plan
- Develop escalation and reporting protocols

Selected Best Practices:
Role of Compliance Officers in RCC

- Coordinate regional compliance council (deputized managers) meetings
- Conduit to chief compliance officer
- Schedule periodic meetings
- Translate language and natural law to satisfy corporate policy and procedure
- General oversight for region

Selected Best Practices:
Role of Managers in RCC

- Gain visibility with executive management
- Help normalize global requirements to local understanding and acceptance
- Serve as point of contact for guidance and leadership for employees
- Accountable for ensuring completion of cascaded training and awareness initiatives

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Selected Best Practices:
Communication and Awareness

- US program communicated to Europe RCC
- Understanding reporting responsibilities of US-based parent corporation
- Branding and program themes for EU
- Global intranet to push and pull materials
- Whistleblower and reporting obligations

CLASSIC PITFALLS

1025 Connecticut Avenue, NW, Suite 200
Washington, DC 20036-5425

Tel 202.293.4103
Fax 202.293.4701

www.ACCA.COM

April 4, 2006

VIA EMAIL AND OVERNIGHT DELIVERY
The Honorable Ethiopis Tafara
Director of International Affairs
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Re: Anonymous Reporting Channels and European Data Protection Requirements

Dear Mr. Tafara:

On behalf of the Association of Corporate Counsel (ACC), thank you for the opportunity to present our perspectives regarding the differences in requirements promulgated by regulatory agencies such as the SEC in the United States and lawmakers in other countries. As you know better than anyone, regulatory agencies have a tremendous impact on the legal compliance initiatives that multinational companies strive to implement to stay in accord with local expectations of corporate responsibility and to establish and maintain internal systems that help protect the integrity of global markets.

ACC is the in-house bar association[SM], serving the professional needs of attorneys who practice in the legal departments of corporations and other private sector organizations worldwide. The association promotes the common interests of its members, contributes to their continuing education, seeks to improve understanding of the role of in-house attorneys and encourages advancements in standards of corporate legal practice. Since its founding in 1982, the association has grown to 18,500 members in more than 55 countries who represent over 8,000 corporations. Its members represent 47 of the Fortune 50 companies and 96 of the Fortune 100 companies. Internationally, its members represent 42 of the Global 50 and 75 of the Global 100 companies. In-house counsel play a critical role in providing leadership and guidance to organizations on compliance and ethics program development and implementation: ACC's members often have primary responsibility for helping their company and board of directors interpret regulatory requirements and support organizational efforts to comply with law and behave in a responsible fashion.

The specific topic we wish to raise involves recent concerns over the differences in provisions requiring anonymous and confidential reporting systems under the Sarbanes-Oxley Act (SOX) and interpretations and guidelines issued by EU data protection authorities. ACC applauds the Commission's openness to input on this important matter and understands you have discussed with in-house counsel, including some ACC leaders, some of the practical considerations global companies face when forced to choose between compliance with one country's regulations over that of another.

But while our comments today arise in the context of this current situation, we respectfully suggest the Commission consider a broader leadership role in the spirit of international comity. Laws affecting the behavior of corporations that operate in global markets need to be principle-based and take into account regional differences in law and policy. Open dialogue among regulators will allow officials to recognize and address cultural differences and local

1025 Connecticut Avenue, NW, Suite 200
Washington, DC 20036-5425

Tel 202.293.4103
Fax 202.293.4701

www.ACCA.COM

needs, such as here, where compliance systems established to comply with SEC rules risk putting companies between a rock and a hard place: either (1) follow U.S. legal requirements and potentially violate EU data protection and privacy rules, or (2) follow EU data protection and privacy rules and potentially violate U.S. legal requirements.

Perspectives on Provisions Presenting Challenges to Companies Needing to Comply with SOX and CNIL guidelines and WP-29 opinion

The perspectives offered herein address challenges relating to program scope and highlight some difficulties in application. We hope these perspectives provide some additional insights on the practical challenges involved in implementing global compliance programs and help illuminate a path by which the SEC and other regulators in other countries might appreciate the extraterritorial implications of certain laws and examine how well-intentioned and reasoned rules can negatively impact an otherwise effective global corporate compliance program. These examples do not represent the entirety of the concerns presented by these collective requirements but instead are provided to illustrate some corporate concerns.

- **Scope of Reporting Programs and Control Mechanisms:** Many companies seek to adopt a single and flexible set of governing principles or company-wide codes of conduct as a means to promote and operate meaningful compliance and ethics programs. When different jurisdictional requirements and restrictions necessitate program segmentation and fragmentation, a company's ability to set and enforce clearly defined standards is frustrated, execution of procedures can be confused and measurement of program effectiveness is significantly impaired. Put most simply, it's hard for a company to send the right message to employees when sending multiple, different messages.

  Sections 301 and 302 of SOX require internal reporting channels for detecting and disclosing financial and accounting irregularities and other types of employee fraud.[1] SOX requires companies to "retain and treat" information on financial and accounting irregularities and to provide confidential, anonymous reporting channels that enable employees to report in good faith any perceived concerns. The provisions of SOX also require information on financial and accounting irregularities and other frauds to be communicated to a corporation's audit committee or other independent committee of the board of directors for oversight and to discharge their duty of care.

  The rules promulgated through SOX 301 allow companies flexibility to implement internal reporting mechanisms through a variety of channels and modeled on any number of corporate best practices, including employee helplines, email drop boxes, web-based submission tools, in-person reporting and a variety of other means. To the extent the laws of other jurisdictions impact these reporting processes, board oversight and overall compliance program effectiveness will be directly affected, including information gathering, retention, escalation and investigation procedures. Having a patchwork of jurisdiction-based reporting processes can invite a myriad of inefficiencies and unwanted results,

[1] Section 301 requires Audit Committees to establish "procedures for the receipt, retention and treatment of complaints received by the issuer regarding accounting, internal accounting controls or auditing matters; and the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters." In addition, Section 302 requires Chief Executive Officers and Chief Financial Officers to certify to the Commission in connection with defined financial filings that they have "disclosed to the issuer's auditors and the Audit Committee of the Board of Directors… any fraud, whether or not material, that involves management or other employees who have a significant role in the issuer's internal controls."

1025 Connecticut Avenue, NW, Suite 200
Washington, DC 20036-5425

Tel 202.293.4103
Fax 202.293.4701

www.ACCA.COM

including employee decisions not to report in the first place or failures of corporate management to effectively follow-up on situations that might require immediate attention. We believe that these results are not in the best interests of organizations or regulators (and the public interests they wish to protect).

As noted above, SOX and its progeny require companies to implement and maintain entity level controls that include systems that detect, remediate and disclose financial reporting improprieties and fraud. Many companies use ethics helplines to field calls or reports involving financial matters and do not have separate systems for different types of calls.[2]

Companies that implement single reporting systems do so for a variety of reasons. As a practical matter, the vast majority of reports are not financial related, so having a mechanism for reporting matters only financial in nature may not be practical to implement or an efficient allocation of resources. Moreover, complaints about other workplace issues, such as hostile work environment, might be symptomatic of other business problems where a pattern of behavior can be discerned over time. Most companies periodically inform their audit committees on the aggregate statistical data from these reporting systems as a means to allow proper oversight and review of conduct or operations within an organization that might require closer review.

The November 2005 Guidelines issued by the Le Commission nationale de l'informatique et des libertes (CNIL), and the February 1, 2006 opinion issued by the European Union's Article 29 Working Party (WP-29) appear to carve out for consideration the use of reporting programs to detect financial reporting improprieties and may not address other types of employee frauds and workplace matters. For the reasons indicated above, a fragmented approach for intake and handling reports impairs the ability to detect improprieties early and creates an undue burden on organizations that need reporting systems to handle reports that are not financial in nature on their face.[3]

- **Discouraging Anonymous Complaints:** The CNIL guidelines and WP-29 opinion suggest that a company's reporting program should not encourage anonymous complaints and should not advertise to employees the right to remain anonymous. This is contrary to the SOX requirement that companies establish mechanisms for anonymous complaints to Audit Committees.
- **Deleting Data on Unsubstantiated Complaints:** The WP-29 guidance that data regarding unsubstantiated complaints should be deleted is not consistent with SOX provisions that require companies to implement procedures that detect and prevent fraud. Deleting such data makes it more difficult for companies to investigate and track the disposition of complaints by detecting patterns from data points in the aggregate that may be symptomatic of fraudulent behavior or weaknesses in controls or otherwise would lead to discovery of fraud. Of course, we're not suggesting that data may never be deleted; rather, we're suggesting that a flat requirement to delete unsubstantiated data may not support some corporate efforts to assess larger patterns, weaknesses, and troubling trends.
- **Transfer of Data to Other Countries:** The EU Data Privacy Directive and Member State laws place limits on the ability of companies to transfer personally identifiable information from an EU country to other countries, such as the U.S., which do not have national privacy laws parallel to those in the EU. The CNIL guidelines issued in December 2005 indicate the availability of an expedited single authorization process to facilitate the transfer of personally identifiable information for companies with reporting programs of a certain defined scope. However, this process appears to be available only to the extent that the company's reporting system is narrowly confined to gathering reports of financial reporting, accounting, bribery or banking concerns. For companies with reporting programs that include intake and processing of matters outside such scope (such as companies with programs designed to ensure compliance with legal provisions, company policies, internal professional conduct rules and/or those that include employee fraud or workplace matters), the single authorization approach does not appear to be available and an individual authorization request to CNIL for case-by-case program consideration would appear necessary since such inclusive programs are described as raising a 'difficulty in principle.'[4]

Conclusion

ACC appreciates the opportunity to offer our perspectives on the need for additional clarification of regulatory requirements and guidelines on corporate reporting programs or whistleblower programs. We commend the Commission and the CNIL and WP-29 in taking initiatives to help address differences and hope that with additional dialogue further clarification on the challenges addressed herein may be obtained. We further hope that this issue will offer us all a platform from which we can discuss the larger issues of the preventive need for better coordination between regulators around the world whose work is so integral to the ongoing compliance and governance efforts to multinational organizations.

Please feel free to contact us if you would like more information or if we can be of service.

Respectfully submitted,

Susan Hackett
Senior Vice President & General Counsel
Association of Corporate Counsel

cc: Chris Crowder, The Scotts Miracle-Gro Company, ACC European Chapter Liaison

[2] See *Everything You Wanted to Know About Helpline Best Practices, Results of 2004 Survey of Ethics Officer Association Sponsoring Partner Members* (Ethical Leadership Group – October 2004).

[3] For companies with operations within the U.S., the U.S. Sentencing Commission's Federal Sentencing Guidelines for Organizations provide really the only 'government definition' of the elements of an effective corporate compliance and ethics program, and include criteria suggesting a need for having and publicizing "a system which may include mechanisms that allow for anonymity or confidentiality where employees and agents may report or seek guidance regarding potential or actual criminal activity without fear of retaliation." With the passage of SOX, corporate compliance and ethics programs are receiving heightened scrutiny. Companies subject to SOX, including Sections 301, 302 and 404, have additional layers of program processes for internal and oversight controls and to support certifications to regulators.

[4] Some matters assessed on a case-by-case basis may qualify for processing due to "their particular seriousness." See CNIL's *FAQs on whistleblowing systems* at http://www.cnil.fr/index.php?id=1982.

1025 Connecticut Avenue, NW, Suite 200
Washington, DC 20036-5425

Tel 202.293.4103
Fax 202.293.4701

www.ACCA.COM

Keith Cheresko, Ford Motor Company
Renee Dankner, Association of Corporate Counsel
Muzette Hill, Ford Motor Credit, ACC Advocacy Committee Chairman
Fred Krebs, Association of Corporate Counsel
Luise Welby, FreddieMac, ACC Corporate & Securities Law Committee
Richard J. Wolf, Cendant Corporation, ACC Greater New York Chapter President

ACC Resources

Conducting Effective Risk Assessments.
A competent risk assessment is a basic building block of a successful compliance program. This infoPAK provides valuable information on prioritizing and conducting a useful risk assessment.
Available for free download to ACC members at: http://www.acca.com/resource/v7151

Records Retention – Critical Considerations Surrounding Records Management.
This infoPAK is a general guide on record retention for corporations with a section devoted to European and global record retention beginning on page 19.
Available for free download to ACC members at: http://www.acca.com/resource/v5206

Clash of the Titans: Complying with US Whistleblowing Requirements While Respecting EU Privacy Rights.
To comply with the Sarbanes-Oxley Act many companies require employees to report suspicious behavior anonymously on company hotlines. Unfortunately, this practice in Europe (especially in Germany and France) is viewed with anathema due to similar requirements in the Nazi and Soviet eras. This ACC Docket Article provides guidance on balancing the conflicting requirements.
Available for free download to ACC members at: http://www.acca.com/resource/v7105

"Whistleblower" Anonymous Hotlines and SOX - Dealing with the French and German Decisions (Webcast).
This webcast provides guidance on how to address SOX anonymity requirements in the wake of recent decisions against the operation of anonymous reporting hotlines from the German Courts and the French CNIL.
Available at: http://phx.corporate-ir.net/phoenix.zhtml?c=129735&p=irol-EventDetails&EventId=1161893

European/International General Resources

Europa.
As the portal of the European Union (EU), Europa provides information on legislation currently in force or under discussion, access to the websites of each of the EU institutions, and information on the policies administered by the EU under the powers devolved to it by the Treaties.
Available at: http://europa.eu

Organisation for Economic Co-operation and Development (OECD).
The OECD comprises thirty member countries and is the economic counterpart of the North Atlantic Treaty Organization (NATO). Its members work together to address the economic, social and governance challenges of globalization and exploit its opportunities. The OECD is one of the world's largest and most reliable sources of comparable statistical, economic and social data, and it is an invaluable resource.
Available at: http://www.oecd.org/home/0,2987,en_2649_201185_1_1_1_1_1,00.html

International Organization for Standardization (ISO).
The ISO is currently working on a new guidance standard (ISO 26000) for social responsibility that will be published in 2008. This website provides information on the status of the project and the reasons for it.
Available at: www.iso.org/sr

The European Anti-Fraud Office (OLAF).
The European Commission established OLAF to protect the financial and economic interests of the Communities and to fight against transnational organized crime, fraud and any other illegal activity prejudicial to the Community budget. It is responsible for conducting administrative anti-fraud investigations by having been conferred a special independent status.
Available at: http://ec.europa.eu/comm/anti_fraud/index_en.html

Corporate Governance

European Corporate Governance Institute (ECGI).
The ECGI is an international scientific non-profit association which provides a forum for debate and dialogue focusing on major corporate governance issues and promoting best practice. Their primary role is to undertake, commission and disseminate research on corporate governance. The website includes an index of codes that provides links to many countries' codes of corporate governance.
Available at: http://www.ecgi.org/index.htm

Global Corporate Governance Forum (CGF).
The CGF was co-founded by the World Bank Group and the Organisation for Economic Co-operation and Development (OECD) to promote global, regional, and local initiatives to improve the practices of corporate governance. The Forum's main concern is improving the economic efforts of developing countries.
Available at: http://www.gcgf.org/ifcext/cgf.nsf/Content/Home

International Corporate Governance Network (ICGN).
The ICGN is a non-profit, unincorporated association whose stated goals are to provide an investor-led network for the exchange of corporate governance views internationally, to examine corporate governance principles and practices, to develop and encourage adherence to standards and guidelines, and to generally promote good corporate governance.
Available at: http://www.icgn.org/index.php

Corporate Governance
This page from the Euractiv website provides current information on the status of corporate governance in European policy positions. It provides links to EU official documents, governments, international organizations, industry federations, non-government organizations and think-tanks.
Available at: http://www.euractiv.com/en/financial-services/corporate-governance/article-137147

The Global Corporate Governance Academic Network.
This website is provided by the Yale School of Management as part of its International Institute of Corporate Governance. It provides extensive links to corporate governance information including corporate governance centers worldwide, libraries and information, networks, investor associations, professional associations, social responsibility, as well as many other resources.
Available at: http://gcgan.som.yale.edu/Corpgov/links.shtml

Corporate Social Responsibility (CSR)

http://europa.eu.int/rapid/pressReleasesAction.do?reference=SPEECH/06/401&format=HTML&aged=0&language=EN&guiLanguage=en This link is to a speech recently given to the European Market Place on Corporate Social Responsibility Conference (Brussels, 22 June 2006) by Vladimir Špidla, one of the members of the EU commission responsible for Employment, Social Affairs and Equal Opportunities. In it he discusses the importance of CSR, the concept of 'Decent Work', and the status of diversity, equal opportunities, and the fight against discrimination in Europe.

CSR Europe.
CSR Europe is a non-profit organization consisting of over sixty leading multinational companies whose goal is to help companies achieve profitability, sustainable growth and human progress by placing corporate social responsibility in the mainstream of business practice.
Available at: http://www.csreurope.org/

Global Policy Forum Europe (GPF Europe).
An offshoot of the New York based Global Policy Forum, GPF Europe is based in Germany and has been monitoring and analyzing UN politics since 1993. Its primary aim is to critically analyze and monitor German and European policy-making relating to and within the United Nations. Corporate accountability is one of their current focuses and the site provides a rundown of corporate scandals of the last decade.
Available at: http://www.globalpolicy.org/socecon/crisis/indexcorp.htm

Data Protection

The Article 29 Data Protection of Working Party

This is a working party consisting of delegates from the data protection authorities of EU Member States. It has been heavily involved in issues such as the tension between European data privacy rules and the Sarbanes-Oxley requirements for US corporations, and the question of transfer of data from Europe to other countries.
Available at: http://ec.europa.eu/justice_home/fsj/privacy/workinggroup/index_en.htm

Commission Nationale De L'Informatique et Des Liberte

This is the French data protection authority which has been one of the most active in relation to the question of anonymous headlines. Some of its materials are available in English.
Available at: http://www.cnil.fr

Information Commissioner's Office

This is the United Kingdom data protection authority. It is a useful source for those seeking an overview of EU data protection principles written in English. Caution is needed because the Information Commissioner's Office also deals with some matters that are solely British law topics - for example rights of access to the papers of government and other public authorities. In addition, it must be borne in mind that when it comes to areas of data protection law where judgments have to be made and a balance has to be drawn between the interests of data subjects and others, the UK's ICO gives guidance which is generally accepted as representing the appropriate balance in the UK. Those views might not be accepted in other European countries, who may be more "purist" or more pro-privacy.
Available at: http://www.ico.gov.uk/

Comparing European and American Business Practices

A Theory of Corporate Scandals: Why U.S. and Europe Differ. John C. Coffee Jr.

This paper proposes that different kinds of scandals characterize different systems of corporate governance and, therefore, different deterrence methods are necessary to prevent fraud and scandals.
Available for free download at:
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=694581

Corporate Ethics, Governance and Social Responsibility: Comparing European Business Practices to those in the United States. Nathan Hurst.

A research paper that tests the proposition that the ethics, governance and corporate social responsibility (CSR) practices of corporations based in the United States differ dramatically from corporations based in Europe. The analysis is meant to provide companies with a better understanding of the similarities and differences between the U.S. and European business environments.
Available at:
http://www.scu.edu/ethics/publications/submitted/hurst/comparitive_study.pdf

COMPLIANCE - VARIETY IN THE APPROACH TO ENFORCEMENT IN THE EUROPEAN UNION

The approach of a multinational corporation to issues of compliance must of course take account of the different laws, rules and business norms in different countries. However, it is crucial also for the business to take account of differences in inspection, monitoring and enforcement. The methods of control of business standards varies enormously from country to county, and cultural issues are also of great significance.

The note seeks to illustrate these points by looking at inspection, monitoring and enforcement in some sample major European countries. The examples look also at cultural difference in so far as they affect the regulatory approach, but not at all cultural implications. In particular, cultural factors also affect the "starting point" in terms of the standards of behaviour likely to be seen as normal by employees in a particular country and therefore the level of policy and training input that will be needed to bring them up to the corporation's compliance standards.

THE UNITED KINGDOM APPROACH TO THE REGULATION OF BUSINESS

Method of regulation

Legal

Most legal standards imposed on those doing business in the UK are governed by **criminal law**. In other words the sanction for breach is prosecution leading to a fine on the company and less frequently a fine or the imprisonment of directors and managers. It is rare for directors to be prosecuted, and such prosecutions often fail. Managers with direct responsibility for a particular breach, such as a manager who permitted an employee to continue working when a safety guard was broken, do face prosecution from time to time. Imprisonment is very rare, except in cases of deliberate defrauding of creditors by directors of businesses.

Some areas of compliance are covered by **civil law** either instead of, or in addition to, criminal law. Examples are:

- Individual and collective employment law regulations, which are exclusively enforced by complaints to the Employment Tribunal. In most cases such a compliant must be made by the employee affected. Where duties are owed by employers to unions or other employee representatives, then they can bring complaints. The sanctions imposed by an Employment Tribunal are primarily compensation of the injured employee for losses and, occasionally, the paying of a private penalty, for example a payment ordered to be made by an employer to each of a group of workers who have not been properly consulted about a proposed factory closure.

- Consumers also have extensive civil law rights to seek compensation from businesses for defective goods either through contract law or tort law. However, except in cases of major injury, consumers will normally report defective goods to the authorities and leave it to the authorities to pursue criminal sanctions.

Eversheds LLP
Holland Court
The Close
Norwich NR1 4DX

T +44 (0) 1603 272727
F +44 (0) 1603 610535
DX 5206 Norwich
www.eversheds.com

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Finally, there are some aspects of regulation on business which are governed by **self-regulation**. Examples are:

- Good corporate governance in listed companies. Whilst there are many specific *legal* requirements regulating the management of listed companies and dealings in their shares, a great deal of the maintenance of high standards is observed through the Combined Code. Companies are required either to comply with the Combined Code or to set out in their annual report those instances where they have not complied and why. This gives a listed company an ability to depart from the Code in appropriate circumstances but if the reason given for departing from the Code is not persuasive then the company is likely to suffer in the market with adverse decisions being made by investors and lenders.

- Another example of self-regulation concerns advertising in the press. The standards of honesty, decency and truthfulness which must be complied with were devised by those involved in advertising, and the industry funds the Advertising Standards Authority which adjudicates on complaints about advertisements made by consumers, action groups and rival businesses. The sanction is essentially a practical one - the media will not carry advertisements in relation to which there has been an adverse ruling from the ASA.

Enforcement bodies

Enforcement of standards which carry criminal sanctions is undertaken by a variety of nationwide and local bodies. It is largely a matter of historical accident whether the enforcement is carried out by a centralised agency or by a local authority. To give a few examples, the financial services industry is regulated by a single national regulator, the Financial Services Authority, and all taxes and duties are administered and regulated by Her Majesty's Revenue and Customs. At the other extreme, breaches of trading standards, such as defective products and misleading product labels are dealt with by the Trading Standards departments of local government authorities.

Many fields are regulated by a combination of national and local bodies, for example health and safety is covered by the Health & Safety Executive and local environmental health officers, and food manufacturing and retailing is governed by the national Food Standards Agency and local environmental health officers.

In the vast majority of cases any centralised enforcement authorities are independent authorities with their own governing bodies funded by Parliament rather than departments of the civil service.

There are trade and professional bodies with regulatory functions such as the Financial Services Authority for financial services business and, for solicitors, the Law Society. Whilst self-regulation is common in relation to the professions, outside the professions it is rare in the United Kingdom. Local chambers of commerce have no legal powers at all to regulate business and have very little impact on the standards of conduct of business - indeed they do not even seek to influence their members in this area.

Zealousness in enforcement and other cultural issues

Criminal law

The general perception in the UK is that enforcement is generally light with the exception of issues which relate to the health and safety of human beings. Most public authorities take a risk-related approach to inspection and enforcement: the most potentially dangerous industries and the worst-organised businesses within those industries, receive the most attention. There is for example specific guidance to local authorities to take this approach in relation to food manufacturing and retailing.

Inevitably the zealousness of enforcement does vary from place to place, influenced particularly by the personalities of the senior managers in charge. The variety is greatest in relation to those matters where inspection and enforcement is carried out by local authorities since the lower degree of central direction in such fields means there is more scope for a variety in approach. For example, there was a period during which the Shropshire County Council Trading Standards Department was renowned for challenging manufacturers' practice in controversial areas of the manufacturing and labelling of food.

In most fields, where a breach of standards has been identified, criminal prosecution will not necessarily follow - very often an acceptance on the part of the business that a change is required is all that is necessary.

Corruption is virtually unheard of amongst enforcement officials and, whilst such individuals do expect to be treated politely, they do not expect obsequiousness, and they regard themselves by and large as public servants. Most officials see the need of business to make a profit and to balance cost against perfection as legitimate and appropriate. Whilst there may be some racism amongst officialdom, it is highly unlikely that any business would suffer from a different approach to enforcement simply because it was foreign-owned or seen as a foreign business. Britain is very open to trade and the misuse of regulations for national economic protection purposes is virtually unknown.

A major perceived problem area in the United Kingdom is not that *enforcement itself* is too rigorous but that European requirements are translated into over-prescriptive and excessive legal requirements in the United Kingdom. This process is known as "gold plating", and the view of British business is that public authorities seek to use European Directives to exert additional control and impose additional restrictions on businesses, and that they take approaches to implementing European Directives which are unwieldy and over-complicated, and thus put British businesses at a disadvantage as compared with others elsewhere in Europe. Those making such complaints also normally complain that in some other countries not only are the legal requirements imposed to implement directives less burdensome, but they are not policed so thoroughly.

Civil remedies

Use of the civil law to control the behaviour of businesses is relatively rare in the UK. Apart from infringement of intellectual property rights, it is extremely rare for one business to take civil proceedings against another for an alleged breach of standards by the other. Consumers do take legal proceedings to obtain compensation for losses suffered as a result of defective products or services. The courts award compensation for such losses which, whilst often reasonably generous, are not permitted to be penal. Individual complaints by consumers and members of the public only have a major impact on business if there is a significant adverse effect on health to a large number of people - examples would be asbestosis claims for those employed by or living near asbestos factories and claims for injury caused by defective medical devices.

Owen Warnock
Eversheds LLP
Norwich, UK
owenwarnock@eversheds.com

THE GERMAN APPROACH
TO THE REGULATION OF BUSINESS

Measures of regulation

Criminal law

The most severe sanctions for non-compliance under German law are provided by criminal law (Criminal Code and additional provisions, codified alongside the special topics, e.g. tax law). The regulations only create consequences for *individuals* who might be convicted. Prosecution is taken very seriously and punishment may include imprisonment as well as financial penalties (which are different from a fine). In any case of conviction under criminal law this is considered as a punishable act and not just as a regulatory offence which may result in the imposition of a fine.

Besides the criminal law, the law on regulatory offences is an important measure of regulation. Fines may be imposed for all kinds of non-compliance. The regulatory offence is like a step below criminal law and covers *companies* as well as *individuals*.

For businesses, the prosecution of individuals (by criminal law) and of the company itself (by regulatory offence law) has been enforced during the last ten to twenty years. Typical offences are fraud, money-laundering or falsification of documents. Tax evasion is one of the main offences directors or managers of businesses are prosecuted for.

Nevertheless, the impression still exists that simple thieves and other petty criminals have to face - relatively - more severe consequences than criminals in high positions of businesses.

Civil law

Under civil law a number of methods of regulation are provided for.

For example, under employment law the protection against dismissal results in a right of the employee for continuation of employment if the dismissal is invalid. In practice, it is only in a few cases that continuation of employment is the outcome. Most of the time, the employer will increase his offer for severance payment once the court indicates that the dismissal is invalid. Under collective labour law, in relation to the negotiation of collective agreements with trade unions the legal means to exert pressure on the opposing party are strikes on the part of the employees and lockout on the part of the employer. Within a company the Works Council - if one exists - has various means to enforce its rights under the Works Constitutions Act. For example in social matters, the works council is provided with a right of co-determination: no measures are possible without the consent of the Works Council. Either the employer or the Works Council may file a lawsuit to enforce their rights. Also, if the rights of the Works Council are not taken into account in the context of a dismissal, the dismissal is invalid.

In general, under civil law, damages may be granted under contract law or law of tort. Consumers, for example, are protected quite strongly under the Civil Code.

Public/Administrative law

As there is no self-regulation or any similar means method in Germany, public law is quite "strong". Some examples to illustrate how public law works are as follows:-

- The Industrial Law, by means of the Business Inspectorate, exerts strong control of businesses. Apart from fines, a breach of the industrial law regulations may result in a withdrawal of the industrial admission.
- Banks are supervised and have to account for the maintenance of certain standards, regulated under the German Banking Act (Kreditwesengesetz).
- The same can be said for insurance. The Insurance Contracts Act (Versicherungsvertragsgesetz) regulates this branch.
- (The question of whether these provisions for banks and insurance should be regarded as public or civil law is open to debate, but the content of the regulation clearly is constructed in a public law manner.)
- Emission control is the subject of both federal and state emission protection acts. An example of state control and regulation is the protection of health and security for employees.

Tax law

Tax law can be named as a further separate branch of regulation of businesses which in the field of law is a comprehensive branch – distinct from the other fields of law.

Enforcement bodies

Criminal law/regulatory offence law

Criminal offences are prosecuted by the office of public prosecutor with the aid of the police. For regulatory offences the police and administrative bodies are responsible.

Civil Law

The individuals whose rights have been infringed (and companies if they are legal persons) have to enforce their rights themselves.

Damages for individuals granted by the Courts in general are much lower than for example in the US. This is caused by the fact that under German law only the actual damage is restored and there is a well-established level of damages for pain and suffering. No penal damages are provided for under civil law. Nevertheless, the social insurance in Germany covers most of the possible damages, for example in the case of an accident (not at work), the employer is obliged to continue remuneration for the first six weeks of inability to work. After this time the health insurance has to pay sick benefit to the employee for a maximum of 78 weeks. Invalidity pensions are then granted under statutory pension insurance if at least a partial invalidity has to be asserted.

Administrative Law

The administrative authorities are also responsible for regulations on fines under administrative law. The administrative authorities are organized in a hierarchy: local authorities, state and federal authorities. For applications for licences, and objections to such licences, in general the local authorities have to be consulted.

Very rarely associations are allowed to claim before a court the rights of individuals under public law (if the individual wishes that to happen). This is for example the case for environmental protection associations under certain conditions.

Cultural Issues

Germany is in general perceived as high in bureaucracy which is regarded as a disadvantage in international competition. There might be slight differences between the different states in how strictly regulations are enforced but these are only marginal differences. Complying with a general perception of bureaucracy, Germany is known for high standards in environmental and consumer protection, which is ensured mainly through the administrative authorities and public law.

Corruption is not too much of a problem in Germany, though it certainly exists and cannot be regarded as a negligible issue. Especially in the fields of construction and environmental protection corruption is common as well as in public procurement. If it is detected though, those responsible have to face severe consequences.

With regard to the attitude towards profit and business, it has to be taken into account that the constitutional concept in Germany is one of a social market economy. There is a strong influence of the State on the social system. Because of this strong state system social solidarity in an individual sense is less distinctive than in other countries.

The attitude towards business and profit seems to be ambivalent. On the one hand profit and good business are well accepted if they are a result of good effort and hard work. On the other hand a lot of people feel dominated by the profit interests of the companies whereas companies complain about the disadvantages they consider they suffer in international competition because of the strong social system.

Regarding foreign businesses and "not invented here syndrome" Germany has always been regarded as strong in innovation and in the quality of products. There might be a critical attitude towards foreign businesses but this is not too much of an issue.

Chambers of Commerce are irrelevant with respect to the enforcement.

Melanie Hoeveler and Frank Achilles
Heisse Kursawe Eversheds
Munich, Germany
m.hoeveler@heisse-kursawe.com
f.achilles@heisse-kursawe.com

THE ITALIAN APPROACH TO THE REGULATION OF BUSINESS

A quick summary of Italian rules

What is apparent at first glance when reviewing the Italian regulation to business, is how quickly and, at the same time, how deeply the legal scenario has changed and is changing in the most recent years. Since 1998, when a new regulation of financial markets was implemented, we can count at least three major legislative intervention in company law (in the years 2001, 2003 and 2005) both under a civil and criminal perspective, a number of regulatory provisions set forth by independent authorities, governmental and local bodies, and a few other intervention in different areas such as for example environmental law and consumers protection against defective goods,.

It is also quite clear that the reform process has not yet come to an end, and some minor corrective intervention is likely to occur in the future.

Background

The most recent financial scandals (like Cirio and Parmalat cracks) have led to an increase of attention on companies' conduct, as a result of non-institutional investors having been seriously damaged by an inappropriate management of information processes on the bond issued by the company and on the situation of the companies themselves. In order to protect such non-institutional investors, new regulations have been approved at the end of 2005, aiming at seriously punishing corporate crimes. Accordingly, such regulations are particularly focused on:

- The truthfulness and completeness of the corporate information;
- The reality and wholeness of the corporate capital;
- The preservation of the corporate capital, especially in respect of acts pursuing non-company interests;
- The right and fair functioning of the corporate bodies;
- The regularity and reliability of the financial markets.

Several actions are sanctioned such as, the provision of any kind of false information or omission of information aimed at misleading the shareholders, the creditors, the investors the supervision authorities and the other subjects interested in such information, in relation to the financial and economic situation of the company, creating any obstacle to the execution of the control and supervising activity and any the undertaking of any fake capital formation or any unlawful operation prejudicing the creditors.

The individuals who can be deemed liable are the company's directors, general managers, manager in charge for the draft of the accounting documents, auditors, receivers, or the non-qualified individuals who carry out the same activity. In the event the crimes were committed for the benefit of the company, the same individual can be also liable and punished with money penalties.

However, apart from those criminal issues deriving from those major damages to the investors, it shall be highlighted that the various competent authorities seem to have a prudent application of all the new rules at least in relation to minor defaults: in this respect usually the stock market authorities have a cooperative attitude, aiming to collaborate with listed companies managers to avoid and correct formal and minor defaults, rather than prosecuting them.

The self-regulation issue in corporate governance

The most revolutionary principle which is being implemented through the different above reforms, is that of leaving many aspects of the business organisation to self-regulation. If on one side companies may adopt different and more flexible corporate governance structures, on the other side, law rules require companies to:

- adopt compliance programs,
- appoint internal bodies empowered with control on business conducts,
- in the event of listed companies, register a number of items of information relevant to the business and the details of those persons who becomes aware of that information before it is publicised,

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- adopt effective risk assessment models.

In particular, the need to adopt compliance programs (which covers various parts of the business such as for example privacy, money laundering, insider trading, prevention of crimes) is putting some burden on Italian companies in so-called back office activity and is increasing the possible responsibility of managers who are at the top of those programs.

The adoption of the above self-regulatory programs is generally left to the discretion of the companies: however, in the event that some crimes have been committed, and in the event that no effective programs or control procedures had been adopted, such default may cause some liability of the company itself, and thus of those managers who can be considered in default for not having adopted such programs or procedures. As consequence, not only will the manager be held liable for such misconduct, but the company itself can incur in a so called "criminal – administrative liability", which consists of a sum related to the financial wealth of the company and, moreover, the company can be banned from contracting with Public administration.

Further to this, it is becoming ever more common for companies to adhere and implement certain rules set forth in good practice codes which are applied on voluntary basis. The most important example is the "Self-discipline Code for Listed Companies": the code gives some recommendations on the corporate governance structure and on the way the companies may comply to sound business conduct rules. Even though companies adhere to the code on a voluntary basis, and a default in this is not legally sanctioned, listed companies are required to communicate to the market a yearly report on their corporate governance structure, in which they are required to specify to what extent they adhere to the code, and the reasons why they depart from the code. As a result, companies tend to adhere to the code to the maximum possible extent, since a departure from it would probably have a detrimental impact on the evaluation of the company in the market.

Employment and health and safety in work places

The above mentioned tendency of expanding the area of self-regulation seems to apply on corporate matters, whilst in some other important fields a different approach seems to be excluded. Important examples are employment and health and safety regulations. Health and safety obligations and the connected responsibility for their fulfilment are related to the activities actually performed by the Company within its business organisation and, therefore, operate in different levels. Thus, both the company and its managers are responsible for the implementation of the health and safety measures provided for by the law. The non-fulfilment of the health and safety obligations by the company or the managers, within the limits of their functions, constitutes contravention punished with imprisonment or fines.

Conclusion

While it may be that the impact of the above-mentioned reforms and the recent requirements for adoption of compliance programs and internal procedures and rules for the prevention of crimes, create quite a confusing picture, which may cause some worries for a company which intends to invest and operate in Italy, it should be noted that all the above reforms tend to the goal of modernising the Italian economic system. The intent is to facilitate business on one side and to create a sound business management on the other side.

Federico Strada
Piergrossi Bianchini Eversheds
Milan

**THE FRENCH APPROACH
TO THE REGULATION OF BUSINESS**

Method of regulation

Legal

Most legal standards imposed on those doing business in France are governed by **criminal law**. In other words the sanction for breach is prosecution leading to a fine on the company and less frequently a fine or the imprisonment of directors and managers. It is rare for directors to be prosecuted, and such prosecutions often fail. Managers with direct responsibility for a particular breach, such as a manager who permitted an employee to continue working when a safety guard was broken, do face prosecution from time to time. Imprisonment is very rare, except in cases of deliberate defrauding of creditors by directors of businesses.

Some areas of compliance are covered by **civil law** either instead of, or in addition to, criminal law. Examples are:

- Individual and collective employment law regulations, which are exclusively enforced by the ability of employees or trade unions to complain to the Employment Tribunal (*tribunal des prud'hommes*). Where duties are owed by employers to unions or other employee representatives, they can bring complaints. The sanctions imposed by an Employment Tribunal are primarily compensation of the injured employee for losses and, occasionally, the paying of a private penalty.

- Consumers have extensive civil law rights to seek compensation from businesses for defective goods either through contract law or tort law. However, except in cases of major injury, consumers will normally report defective goods to the authorities and leave it to the authorities to pursue criminal sanctions.

In France, the culture of **self-regulation** is much less developed than in anglo-saxon jurisdictions (where there are multiple sources of regulation and regulation is thought of in a more complex and innovative fashion thereby encouraging self-regulation). Indeed, in France, regulation ultimately flows from the State. Consequently, even though principles of good corporate governance are making headway, self-regulation is not yet as developed as elsewhere.

Enforcement bodies

Enforcement is usually carried out by the court system but can sometimes be carried out by "independent administrative authorities" or "independent professional authorities" such as, for example, the Financial Markets Council (*Conseil des marchés financiers*) which enforces the regulations applicable to financial markets. However, these bodies are themselves regulated and controlled by the state through the court system. Indeed, control ultimately stems from the respect of the law as enforced by the courts since the decisions and sanctions handed down by the above-mentioned regulatory/enforcement bodies can be contested before the courts.

In France, the number and the variety of the regulatory bodies, most of them qualified as "independent administrative authorities" makes it difficult to draw a general trend of zealousness in enforcement. Some examples follow:

- However, it is interesting to note that, for instance, the French Competition Council (*Conseil de la Concurrence*) set out in its yearly report the detailed statistics of its activity, and of its most notable decisions and sanctions. By way

of example, the 2005 report mentions that the Council imposed a 534 million euro fine on three French mobile telephone operators. The Council held that the operators' practice constituted a prohibited understanding between them. The operators had exchanged, on a monthly basis between 1997-2003, confidential and precise information concerning their new subscribers and the number of the clients having their subscription terminated.

- The French Data Protection Authority (*Commission Nationale de l'Informatique et des Libertés* or *CNIL*) publishes also a yearly report of its activities. According to its 2005 report, the Authority's activity increased, and it was allowed new human resources in order to complete its mission.

- The *Autorité des marchés financiers* (*AMF*), mentions in its 2005 report that its Commission of Sanctions had sustained activity throughout the 2005 year.

However, these examples do not mean that the French regulatory authorities are more zealous in enforcement than their European colleagues. The sustained activity of different authorities, and sometimes the creation of new authorities such as *Commission de regulation de l'énergie*, may be the consequence of the introduction of open trade in sectors which were previously protected (for example national monopolies).

Civil remedies

As a general remark concerning the civil remedies in France, it should be borne in mind that the regulatory authorities' primary task is the protection of the public interest as opposed to individuals' (or specific companies') self-interest. For instance, the Competition Council's mission is to protect the fair competition in the French market, not the interest of a particular company or the interest of an individual. Also, the AMF's mission is to protect the saving and investment as a whole. Consequently, it is relatively rare in France that civil remedies are used to control the business in regulatory matters.

However, the civil courts may take into account the illegal practice, previously sanctioned by a regulatory authority, when determining the possibly indemnity of a particular victim of such practice.

Valerie Blandeau
Eversheds Frere Chomeley
Paris
valerieblandeau@eversheds.com

THE BELGIAN APPROACH TO THE REGULATION OF BUSINESS

Method of regulation

Many legal standards imposed on business in Belgium are governed by **criminal law**. For example, breaches of environmental regulations are sanctioned by fine or imprisonment. Breaches to social security obligations as well as some provisions of labour law (for example in relation to discrimination) are also sanctioned by very large fines or imprisonment penalties. The same is also applicable in case of tax fraud.

Some provisions of the Company Code are accompanied with criminal or administrative sanctions, principally consisting in the payment of fines. For example, the board of directors of each company must draw up each year the annual accounts and an annual report in which it must account for its management of the company during the past financial year. Subject to administrative fines, in the event of default, the annual accounts must be filed within thirty days of their approval by the shareholder's meeting at the National Bank of Belgium and at the latest within 7 months following the end of the financial year.

As a general rule, the law of May 4, 1999 in relation to the criminal liability of corporate entities provides for the rule of the "decumul". This means that the corporate entity and a physical person (such as a director of the company) will normally not be held criminally liable together. Only in the circumstances that the physical person has acted "knowingly and willingly", can both be held criminally liable. This law is in particular important for the various environmental infractions committed by the companies and which cannot be ascribed to one responsible physical person.

Some legal standards imposed on people doing business in Belgium are governed by **Civil law**. In addition liability under the principles of tort law may also be invoked towards companies. Consumers have for example very extensive rights to seek compensation from a company for defective goods either through contract or tort law.

A company director's liability under Belgian Law is also mainly of a civil nature (for example for breaches of company law and statutory breaches).

The tort principle (provided by article 1382 of the Belgian Civil Code) applies to all directors whatever the type of company. It has as consequence that anyone whose conduct is wrongful shall indemnify the damage resulting there from.

Finally, some aspects of regulation of business are governed by **Corporate Governance**. The rules of Belgian Corporate Governance are currently summarized by the so-called Code Lippens which is not an official code in the sense that it has not been enacted by the legislature and is consequently not legally binding.

This Code summarises all specific requirements regulating the management of listed companies and dealings in their shares. Although this Code is not a legal one, it is generally followed by the main Belgian companies. It has been recently reported that the most important Belgian companies, the so-called Bel-20 group, adhered to most of the provisions of this informal Code.

The Code Lippens will probably become binding in the future for all Belgian Companies and will thus impose on companies legal requirements regulating their management.

Enforcement bodies

The above-mentioned liability rules, both criminal and civil, can be enforced by the ability of third parties to complain to the Belgian Courts and Tribunals.

The criminal and commercial courts can act upon the request of a public prosecutor in case of non-compliance with the criminal law or specific company obligations (related for example to tax or social security matters).

Enforcement of standards is also undertaken by a variety of nationwide and local bodies.

For example, the financial services sector is regulated by the CBFA ("*Commission bancaire, financière et des assurances- Commissie voor het bank - financië en assurantiewezen"*).

The food manufacturing and retailing is governed by the standards imposed by the "AFSCA" ("*Agence Fédérale pour la sécurité de la chaîne alimentaire - Federale Agentschap voor de Veiligheid en de Voedselketel"*). Furthermore, the public food authorities throughout Belgium have adopted a restructuring project with the focus on the chain approach, where the various inspection services are integrated into one single

control body. It carries out thorough monitoring of contaminants, works on the development and traceability and optimal quality control throughout the whole agricultural food chain while promoting Belgian food products by means of labels and chain guarantee systems.

Compliance with social security law is monitored by the "Social Inspection" which has the power to inspect companies and can exercise this inspection power on its own initiative.

Tax authorities also have very wide powers in order to inspect companies and can impose on their own initiative very large fines.

The department DG Environment within the federal government has responsibility at the federal level for checking the conformity with legislation of shipments or the release on the market of dangerous products. However a very strict control is also exercised on the compliance to environmental regulations by Regional inspection services.

Zealousness in enforcement and other cultural issues

The regulation of business by national bodies is quite efficient in Belgium.
Generally speaking, enforcement of all legal standards towards companies is perceived to be more focussed in Flanders than in Brussels or in Wallonia.

Furthermore, enforcement is sometimes exercised by Regional entities. For example, environmental matters are the concern of the Regions, so that there are three different inspection authorities.

Consequently, zealousness in enforcement in these matters varies widely from place to place.

Sylvie Cousin
Eversheds
Brussels

Eversheds International
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