

The conflict between U.S. confidential whistle blowing requirements and EU/Belgian privacy and data protection legislation: A cultural and legal clash



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After the Enron and Worldcom accounting scandals, the U.S. Congress adopted in 2002 the “Sarbanes-Oxley” Act, or “SOX”. SOX requires that every company listed on a U.S. stock exchange implement a confidential mechanism for reporting questionable accounting or auditing matters. Since SOX requirements apply to foreign subsidiaries of listed U.S. companies and to non-U.S. companies listed in the U.S., the obligation to institutionalize a procedure for confidential whistle blowing has an extraterritorial effect. Therefore, in order to comply with SOX, many multinationals have set up whistle blowing schemes on a world wide basis, some of which are not limited to accounting and auditing issues, but target their entire ethics code.

By focusing on catching the wrongdoers while ignoring foreign legislation and sensibilities, SOX does not take into account the strong European aversion to anonymous informants. Furthermore, almost every whistle blowing scheme requires that personal data be processed. However, all EU Member States, including Belgium, already have severe privacy and personal data protection (“DP”) legislation required by EU Directive 95/46/EC. More specifically, in Belgium the DP law of 8 December 1992, published in the Belgian State Gazette of 18 March 1992, as modified several times, is applicable.

Protest in the EU against the implementation of alert lines was strong, especially in France and Germany. In France, the French DP authority refused to authorize alert lines of McDonald’s France and of La Compagnie Européenne d’Accumulateurs. French courts also judged some policies and alert lines to be illegal because they violated fundamental rights of employees and also did not comply with the DP legislation. In Germany, Wal-Mart encountered opposition regarding the labor law aspects of the implementation of its ethics program because it did not involve consulting the works council.

Conflict with DP legislation is a potential issue in each EU Member State. The anonymity of SOX whistle blowing schemes in particular poses significant legal problems for companies to which both SOX and European DP legislation apply. This situation places such companies between a rock and a hard place and a workable solution requires careful planning.

In February 2006, the EU DP Working Party (a meeting of representatives of the EU Member States’ DP authorities and of the EU Commission, also called Group 29) issued an opinion providing guidance on how whistle blowing schemes may be implemented in compliance with EU DP rules in the context of financial and accounting irregularities.

On 29 November 2006 the Belgian DP authority (inspired by the DP Working Party opinion) issued a recommendation regarding the compatibility of whistle blowing schemes with the Belgian DP law in all contexts, not only financial and accounting. The recommendation determines a number of basic principles that are minimal requirements to comply with Belgian DP law. The basic principles refer to admissibility, honesty, legitimacy and purposefulness, to proportionality, to accuracy of the personal data, to transparency, to security, to the rights of the persons involved (for example, possibilities of access, correction and erasing), and to registration of the database with the DP authority.

A few specific topics should be mentioned. The Belgian DP authority clearly expressed its strong dislike of anonymous reporting, but admitted that in very restricted cases anonymous complaints may be processed, it being understood that whistle blowing schemes should never be organized in such a way that anonymous reporting is encouraged. Once a complaint is filed and during the investigation, the whistle blower’s identity must be protected. Reporting of irregularities through the alert line must remain an option for the employees and may never be imposed as an obligation. The alert line must be an extra way to report irregularities, in addition to the normal hierarchic structures, and must be reserved for substantial infractions, for which no other legally organized reporting systems exist (such as exists in the case of sexual harassment). The person incriminated by an alert must be informed about the processing of his personal data and his correlative rights. The personal data processed may only be kept for the period of time necessary for handling the complaint. The scheme must mention the consequences of any complaints, whether justified or not.

A specific organization must be set up for handling the complaints and for conducting the related investigations. The handlers of the complaints must be sufficiently independent. They must be protected against pressure from the management of the firm and from the unions. The handlers must work confidentially with respect to the management (except if urgent measures would be required) and to other employees, unions or third parties. The handlers must take care that the processed personal data are sufficient, relevant, not excessive, limited to facts (excluding subjective observations) and that any unproven facts are clearly indicated as such. The handlers must be held personally liable for the fulfillment of their task. The handlers of the complaint may inform management if the complaint is justified, but if they think the complaint is not correct, they may inform management only when the complaint is manifestly incorrect (for example if they suspect the complainant’s motives).

It should be mentioned that any transfer of data outside the EU is subject to specific provisions of the DP legislation. This presents a separate problem for U.S. subsidiaries of EU companies and for EU subsidiaries of U.S. companies.

It remains an open question whether companies that comply with the DP opinions/recommendations also comply with their obligations under SOX. Implementing a SOX whistle blowing scheme for a company with a connection to the EU has become a delicate exercise of balancing the interests and rights of all parties involved. ■

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