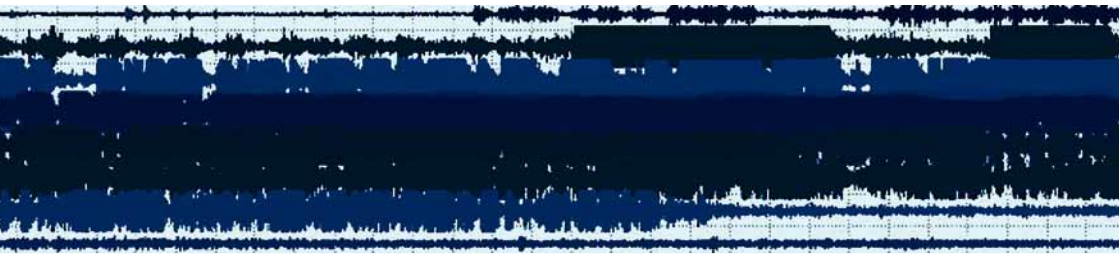
HOUTHOFF BURUMA

NATIONAL COMPLIANCE DEBATE 2011

AUGUST 2011



IN-HOUSE COUNSEL PRACTICAL GUIDE

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INTRODUCTION

The UK Bribery Act, which came into force on 1 July 2011, is arguably the most stringent anti-bribery legislation in the world and has extraterritorial effect applicable to non-UK companies. Similarly, under the rules of the US Dodd-Frank Act adopted by the SEC in May 2011, the SEC's jurisdiction is not restricted to US-listed companies. The Act includes a "whistleblower bounty program", which allows individuals who provide information leading to successful enforcement to receive up to 30% of a resulting multimillion dollar fine. It is not necessary that the whistleblower has reported the misconduct internally first.

This guide will show that compliance can no longer be regarded as a mere domestic concern. Compliance is a broad area, comprising many issues and jurisdictions, which no publication could claim to tackle comprehensively. This guide is intended to serve as supplementary information to the Houthoff Buruma National Compliance Debate 2011, providing a practical introduction to mapping the landscape of certain compliance issues. Above all else, proper preparation appears to be the best way to handle the increasingly global compliance requirements, as well as the changing climate in public opinion. This guide is meant to be a first step in that direction.

Finally, an important aspect of the discourse on compliance is the realisation that compliance means more than just accordance with certain laws and regulations. Self-regulatory standards of integrity and ethical conduct are a vital aspect of good compliance procedures and should receive more than mere lip service. Such standards are increasingly imperative in order to steer clear of material, financial and/or reputational losses.

Lisa Hakanson

11 KEY POINTS ON COMPLIANCE

You may very well be affected by foreign legislation.

Any bribery may be prosecuted by US or UK authorities.

Non-US/UK companies may be caught under the Dodd-Frank Act and the UK Bribery Act.

Authorities will focus on serious fraud cases, not trivial ones.

Whistleblowers are well protected in the US.

Whistleblowers are not well protected in the Netherlands.

Complying with one law may lead to the breach of another.

Under the Dodd-Frank Act whistleblowers are rewarded with up to 30% of the resulting penalty.

In the US whistleblowing is made easy, just go to www.sec.gov/whistleblower.

Under the Dodd-Frank Act whistleblowers do not have to report internally first.

Good compliance does not only rely on a compliance program, the Tone from the Top and company culture are equally important.

SO MANY COUNTRIES, SO MANY CUSTOMS?

By Mirjam Bakker[1]

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The recent financial and economic crisis evidenced the ever increasing interdependence of economies. This development is accompanied by tightened legislation and regulatory supervision with extraterritorial implications for Netherlands based international corporations. The speakers at the National Compliance Debate on June 9, 2011 in Amsterdam illustrated this with the UK Bribery Act and the whistleblower bounty provisions of the US Dodd-Frank Act. A speech on the limited protection of whistleblowers in the Netherlands clearly evidenced that Dutch legislation has not in all instances followed this trend for more tightened legislation. Furthermore, not only foreign legislation, but also the Dutch regulatory developments fuelled the debate surrounding Dutch publicly listed corporations as clearly manifested by the speech on publication of price sensitive information and directors liability.[2] In this article I will discuss two central themes that seemingly triggered the most concern and discussion among the participants of the debate: the extent of the extraterritorial reach of in particular the UK Bribery Act and its practical implications for international corporations, and the role of the company's compliance officer in preventing and mitigating financial crime[3] at international corporations.

Introduction

At the National Compliance Debate I referred to two conclusions of the Ernst & Young European fraud survey:[4]

- Not only is ethical behaviour desirable, it is also good for business – according to 75% of the respondents of the survey.
- New anti bribery legislation will have little impact on economic growth – according to 70% of the respondents of the survey.

From the perspective of upholding lofty principles, it is very difficult to disagree with the above conclusions. I do not think the audience of the debate would have responded very differently if given the same survey. It is however far more challenging to combat financial crime in practice and establish and maintain good controls and procedures to avoid and mitigate financial crime. This is likely why at the 2011 National Compliance Debate two central themes continuously returned in the discussions: first the extent of the extraterritorial reach of in particular the UK Bribery Act and its practical implications for international corporations; and secondly the role of the company's compliance officer in preventing and mitigating financial crime[5] at international corporations.

UK Bribery Act and its practical implications for international corporations

Why are international corporations so nervous about the UK Bribery Act and the whistleblower bounty provisions of the US Dodd-Frank Act? From my perspective for two reasons. Firstly they touch the company's internal control systems of its global operations and hence the way it runs its business. In other words, it impacts the DNA of the company. The UK Bribery Act demands 'adequate' procedures as a defence against a bribery offence. Similarly, under the US Dodd-Frank Act, having a suitable compliance program serves as a defence in a SEC investigation instigated by a whistleblower.[6] Secondly, these regulations trigger a more fundamental question. To what extent can and should international corporations impose their predominantly Western ethical norms on business partners of nations where bribery and corruption are embedded in local economies in varying shades of grey? The Corruptions Perception Index of Transparency International[7] clearly identifies these nations. According to this Index *'nearly three quarters of the 178 countries in the index score below five, on a scale from 10 (highly clean) to 0 (highly corrupt)'.* China and India, but also Nigeria and Ukraine, are among those nations which are perceived as corrupt to highly corrupt. In many of these countries facilitation payments are considered commonly accepted customs. China even has a name for gifts and hospitality to build relationships: 'guanxi', which means 'networks' or 'connections'. 'Guanxi' is understood to be a network of relationships designed to provide support and cooperation among the parties involved in doing business.[8] The question I have, which we also discussed with the audience and panel members[9] of the debate in June, is whether this nervous, fearful reaction in response to these tightened regulations is justified.

Dodd-Frank and UK Bribery Law impacts the DNA of the company.

One of the panel members at the debate rightfully underlined that in most jurisdictions around the world, bribery and corruption are strictly forbidden. The question then is: if national and international laws and regulations forbid bribery and corruption, what makes it so difficult to combat financial crime? I identify three main reasons.

First, the comparatively significantly lower enforcement actions of nations that score low on the Transparency International Index.[10] This assertion is supported by the findings of a 2011 survey of Transparency International, which concluded that only seven of the Organization for Economic Cooperation and Development nations had active enforcement measures in place, while twenty-one had little or no enforcement. The remaining nine nations made moderate enforcement efforts.[11] In those countries with limited enforcement actions, facility payments may still today be considered as a good use of a networking opportunity or a well deserved additional source of income. One participant of the debate gave an example of a case in which a local police officer in the Ukraine would only allow you to pass with your rental car – to timely get to the airport – if you would pay the officer an (unjustified) traffic fine. What to do, the participant asked the panel

members? The simplicity of this example identifies the real difficulty of this and similar ethical dilemmas.

Second, in most instances a financial crime usually does not look like one on the surface. Moreover, acts of bribery and corruption often do not consist of a single act committed by one person, but of a complex pattern of seemingly legal transactions conducted by various parties.[12]

Third, the limited global governmental initiatives. The UN Convention against Corruption[13] is, according to Transparency International, the only global initiative that provides a framework against corruption. As discussed during the debate, there lies an opportunity, and maybe even a responsibility, for international corporations to use their public affairs lobbying power to influence governments into better enforcing local laws against bribery and corruption, and to influence the cultural accepted customs of extending disproportional gifts, entertainment and facility payments.[14] This not only helps combat financial crime, but also creates a more level playing field among international corporations. Moreover it supports sustainable business and positively impact sustainability ratings.[15]

A strong compliance officer should be mandatory in all sectors.

Despite the practical difficulties with combating financial crime, I strongly believe that both the UK Bribery Act as well as the whistleblower provisions of the Dodd-Frank Act should not necessarily frighten international corporations, but can be used as prompts to review and strengthen ethics and compliance programs. This brings me to the second main theme discussed at the National Compliance Debate: the role of the company's compliance officer in preventing and mitigating financial crime.

The role of the company's compliance officer

The increased regulatory attention for company controls and procedures, as manifested in the UK Bribery Act, heighten the demand for a strong ethics and compliance function. Due to the increased regulatory supervision of the financial sector, the demand for such a strong compliance function is already recognized and mandatory in this sector.[16] However, it is only rather recent, triggered by serious financial crime incidents and accompanied regulatory fines and infringements of US export control regulations, that the need for such function appears to be gaining weight in the non-financial sector. With examples of serious financial crime incidents and financial settlements with in particular the US regulators over the last years (such as IBM, Alcatel Lucent, Siemens, Daimler) and legislation such as the UK Bribery Act and the US Dodd-Frank Act, such demand concerning non-financials seems to be further increasing. 'Big companies are increasingly turning to ethics officers to repair reputations and improve regulatory compliance', writes Alicia Clegg in the Financial Times of June 6, 2011.

So what is the role of the compliance function in enforcing and embedding the new rules and regulations discussed at the Houthoff Buruma debate in Amsterdam? Should there not also be a role for the compliance/ethics officer in upholding ethical standards? At the debate it emerged that compliance officers of international corporations are still struggling to define their role. Should such officer act as professional advisor on the embedding of laws and regulations or should they have a further reaching, more independent role in challenging management to 'do the right thing'? I strongly believe it should be the latter. This however requires not only technical (legal and business) knowledge and expertise, but also the skill to take lead in challenging business management. It also requires a certain independence and ability to make an impact. This means that I only consider the compliance officer to be effective if he or she has access to the boardroom and is capable of convincing company management when needed. This not only applies to the corporate compliance officer, but I consider it equally valid for the business compliance officer, in relation to his or her corporate management. These views are strongly supported by a paper published already in 2007 by the Ethics Resource Center on the role of the Chief Ethics & Compliance Officer (CECO).[17] The paper provides a very clear definition of the role and argues that *'at a minimum the CECO should be:*

Compliance officers can only be effective if they have access to the board room.

- *Held accountable to the governing authority to carry out the board's delegated fiduciary responsibilities;*
- *Independent to raise matters of concern without fear or reprisal or conflict of interest;*
- *Connected to company operations in order to build an ethical culture that advances the overall objectives of the business; and*
- *Given the authority to have decisions and recommendations taken seriously at all levels of the organization.'*

The ERC Working Group further argues that *'the CECO also must have the financial and human resources necessary to comprehensively promote standards, educate the workforce, and respond to potential violations in a timely manner.'*[18] This same perspective is taken by 'Groep Olivier', a small body of senior compliance professionals of Dutch, publicly listed companies, in their position paper on the role of the compliance officer.[19] I strongly believe that the added value of the compliance function is twofold. One part of the function involves oversight and supervision of internal controls and procedures related to the embedding of rules and regulations. The other part is related to serving as the company's guardian of

Tightened regulations with extraterritorial reach should not be feared.

integrity in order to build an ethical culture that advances the overall business objectives of the company'[20]. This brings us back to the question I raised earlier: should international corporations fear this new legislation of the UK Bribery Act and the whistleblower provisions of the Dodd-Frank Act? As long as a corporation has a well balanced compliance program and a professional compliance function created according to the guidelines as set out above, there is little to fear.[21] From the debate we learned that there is still work to do. The challenge will be to develop the compliance function to the maturity level set out by the ERC Working Group. Only then will a corporation have the countervailing power to address ethical dilemmas in countries where enforcement is not a top priority of the judicial system.

A culture that values ethical principles advances the overall business objectives of the company.

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So many countries, so many customs?

The recent financial and economic crisis and the evidence of interdependence of our economies has set the tone for tightened regulations with extraterritorial reach. That is why the expression 'so many countries, so many customs' no longer seems appropriate to uphold for international corporations, despite the practical ethical dilemmas involved in pursuing business in nations where facility payments and a 'guanxi' mentality are embedded in the local culture. While this may impact business opportunities on the short term, it will save corporations from potential significant financial and reputational implications in the long run. The reputational and financial damage of enforcement actions against the corporations set out earlier in this article support this conclusion. Several factors can contribute to establishing and maintaining a company-wide culture where financial crime has no chance to proliferate. An important key factor being a strong compliance function that takes the lead in ensuring that 'adequate' controls and procedures are in place and functioning effectively. Another factor would be to focus on the overall culture of the company as such; is doing the right thing embedded in the DNA and is it supported by the right tone from the top? Finally I see an opportunity for international corporations to join forces with their local governments and parties like Transparency International in order to influence enforcement actions in those jurisdictions where bribery and corruption are more commonly accepted.

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[2] Speakers at the Houthoff Buruma National Compliance Debate 2011: Edward de Bock, partner with Houthoff Buruma; Gary DiBianco, partner in the London office of Skadden, Arps, Slate, Meagher & Flom LLP; Willem de Nijs Bik, partner with Houthoff Buruma; Angela Pearson, partner with the law firm Ashurst LLP in London and Joost Wiebenga, Deputy General Counsel and Chief Compliance Officer Europe, Middle East & Africa for Tyco International.

[3] Financial crime means any wrongful act, omission, breach of duty or trust, intentionally performed by an employee or external party, which potentially could or results in a disadvantage to the company or another. It includes fraud, bribery, corruption & anti money laundering.

[4] European fraud survey 2011, recovery regulation and integrity, Ernst & Young 2011.

[5] Financial crime means any wrongful act, omission, breach of duty or trust, intentionally performed by an employee or external party, which potentially could or results in a disadvantage to the company or another. It includes fraud, bribery, corruption & anti money laundering.

[6] See also the article by Gary Dibianco, The Whistleblower Bounty Programme, The US Dodd-Frank Wall Street Reform and Consumer Protection Act, as included in this In-house Counsel Practical Guide.

[7] www.transparency.org.

[8] According to the definition of 'guanxi' on www.investopedia.com

[9] Panel members of the Houthoff Buruma National Compliance Debate 2011: All speakers of the National Compliance Debate 2011 (see foot note 2) and Matthew Cowie, counsel in the London office of Skadden, Arps, Slate, Meagher & Flom LLP.

[10] See footnote 7.

[11] 2011 survey of Transparency International as quoted in the Financial Times of July 18, 2011 in an article by Henny Sender, 'Lines less blurred'.

[12] "Who is the typical fraudster?", Research and report by KPMG forensic June 2011.

[13] United Nations Convention Against Corruption, www.unodc.org.

[14] See also the article by Angela Pearson and Lianne Sneddon, UK Bribery Act 2011, Putting in Place Adequate Anti-Bribery Procedures, as also included in this In-House Counsel Practical Guide.

[15] Company programs against bribery and corruption are considered important elements of a good sustainability program according to e.g. the Dow Jones Sustainability index.

[16] E.g. Articles 3:10, 3:17 and 4:11 and 4:14 of the Dutch Act on Financial Supervision (Wft), Article 31 c of the Regulations on the Supervision of the Conduct of Financial Enterprises pursuant to the Act on Financial Supervision (Besluit Gedragstoezicht financiele ondernemingen Wft). But e.g. also 'Compliance and the compliance function in banks', Accounting Task Force of the Basel Committee on Banking Supervision, April 2005.

[17] Leading Corporate Integrity: Defining the Role of the Chief Ethics & Compliance Officer (CECO), by the Chief Ethics & Compliance officer (CECO) Definition Working Group, Ethics Resource Center, 2007, USA.

[18] See footnote 17.

[19] This peer group published a positioning paper on the role of the Compliance function at publicly listed companies in the Netherlands: 'Compliance Position Paper, Bijdragen aan verandering, een nieuwe visie op compliance', September 2009, www.groepolivier.nl. The author of this article is a member of this peer group.

[20] Leading Corporate Integrity: Defining the Role of the Chief Ethics & Compliance Officer (CECO), by the Chief Ethics & Compliance officer (CECO) Definition Working Group, Ethics Resource Center, 2007, USA.

[21] See also Angela Pierson and Lianne Sneddon, UK Bribery Act 2011, Putting in Place Adequate Anti-Bribery Procedures, as also included in this In-house Counsel Practical Guide.

THE WHISTLEBLOWER BOUNTY PROGRAM OF THE US DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT

By Gary DiBianco[1]

On May 25, 2011, the US Securities and Exchange Commission ("SEC") adopted Regulation 21F,[2] implementing rules under the sections of the Dodd-Frank Wall Street Reform and Consumer Protection Act that established a securities whistleblower bounty program.[3] Under the program, subject to certain limitations and conditions, an individual who voluntarily provides the SEC with "original information" that leads to an SEC enforcement action that results in monetary sanctions totalling more than $1,000,000, is entitled to an award of between 10% and 30% of the sanctions. These provisions also create strong, new anti-retaliation protections for individuals who provide information to the SEC.

Mechanics of the Final SEC Whistleblower Rules

Regulation 21F, as promulgated, describes the SEC's whistleblower program, which is administered by the SEC's Office of the Whistleblower, and establishes procedures that whistleblowers must follow.[4]

Almost anyone in the world can be a whistleblower under the Dodd-Frank Act.

Award Eligibility

A whistleblower is eligible for an award upon voluntarily providing the SEC with original information that leads to successful enforcement of an action by the SEC resulting in monetary sanctions exceeding $1,000,000.[5]

- Information is submitted "voluntarily" if it is provided before a related request, inquiry, or demand is directed to the whistleblower by the SEC, the Public Company Accounting Oversight Board, or any self-regulatory organization, Congress, any other federal government authority, or any state Attorney General or securities regulatory authority.[6] A submission is not voluntary if the individual must make it pursuant to a pre-existing legal or contractual duty that is owed to the Commission or to any of the aforementioned authorities.[7]

- Information is considered "original" if it is: (a) derived from the whistleblower's "independent knowledge" or "independent analysis"; (b) not already known to the Commission from another source, unless the whistleblower is the original source; (c) not exclusively derived from an allegation made in a judicial or administrative hearing, government report, hearing, audit, or investigation, or from the news media, unless the whistleblower is the original source; and (d) provided to the Commission after July 21, 2010.[8]

The definition of original information contains several exclusions intended to prevent certain individuals from profiting by betraying confidences obtained in positions as trusted advisors or "front-running" internal investigations for their own benefit. For example, subject to certain exceptions, information is generally not "original" if it is obtained:

A compliance officer cannot be a whistleblower.

- in connection with the legal representation of a client; by an employee whose "principal duties involve compliance or internal audit responsibilities," or an employee of a firm retained to perform compliance, internal audit, or internal investigation functions;
- by an employee of a public accounting firm, if the information is obtained through the performance of an engagement required under the federal securities laws that relates to a possible violation by the audited entity or its directors, officers, or employees; or
- in a manner that is determined by a federal court to violate applicable federal or state criminal law.[9]

Restrictions on Eligibility – Regulation 21F expressly excludes certain types of individuals from eligibility, including, among others:

- persons associated with certain regulatory and law enforcement authorities, including the SEC;
- foreign government officials;
- persons convicted of criminal violations that are related to the SEC action or a related action;
- persons who obtain original information through the performance of an audit of a company's financial statements, if a whistleblower submission would be contrary to the requirements of Section 10A of the Exchange Act (which requires auditors to notify the SEC with respect to illegal acts by audit clients if the client fails to take appropriate remedial action); and
- persons who knowingly and wilfully make false, fictitious, or fraudulent statements or representations in their whistleblower submission to the SEC.[10]

Finally, to be eligible for a bounty, a whistleblower must submit information to the SEC in the form and manner that that the SEC requires.[11]

Awarding Bounties

In exercising its discretion, under the final rules, the SEC will consider four factors that can increase the amount of a bounty:

(i) The significance of the information provided by the whistleblower;

(ii) The degree of assistance provided by the whistleblower;

(iii) The programmatic interest of the SEC in deterring violations of the securities laws by providing a whistleblower bounty in the particular case; and

(iv) The whistleblower's participation in internal compliance systems.[12]

The SEC will also consider three factors that can reduce the amount of a bounty:

(i) A whistleblower's culpability in the matters associated with the SEC's action;

(ii) Unreasonable delay in reporting the violation; and

(iii) Interference with internal compliance and reporting systems, including by preventing or delaying detection of a violation, or hindering an entity's effort to detect, investigate, or remediate violations.[13]

Awards to Culpable Individuals

Regulation 21F expressly states that culpable individuals cannot achieve "amnesty" from prosecution by providing information to the SEC.[14] Rather, leniency for culpable whistleblowers will be assessed in accordance with the SEC's stated policy regarding cooperation by individuals.[15] In order to prevent culpable individuals from profiting as a direct result of their own misconduct, the rules provide that sanctions assessed against the whistleblower or any entity whose liability is based substantially on conduct that the whistleblower directed, planned, or initiated will not count for purposes of determining whether the statutory threshold of $1,000,000 has been met, or for purposes of calculating the amount of any bounty.[16] On the other hand, in the absence of a related criminal conviction, culpability is not a total bar to recovery.

A whistleblowers may have been part of the misconduct, but this is not a hindrance to receive a reward.

Protection from Retaliation

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For purposes of protection from retaliation, status as a "whistleblower" does not depend on an individual's eligibility to receive a bounty. Rather, the rules state that a whistleblower is any individual who, alone or jointly with others, and in accordance with certain procedures, provides the SEC with information about a possible violation of the federal securities laws that has occurred, is ongoing, or is about to occur.[17] The rules further state that, in order to enjoy protection from retaliation, a whistleblower must possess a reasonable belief that the information being provided relates to a possible violation.[18]

Potential for Undermining Internal Reporting Systems

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The Concern. A serious and persistent concern regarding the bounty program is that it creates significant incentives for employees to ignore internal reporting systems and communicate information about potential violations directly to the SEC. The SEC rejected a requirement that whistleblowers first exhaust internal reporting mechanisms before reporting to the SEC.[19] However, the final rules contain three provisions that are intended to encourage whistleblowers to report possible violations to internal compliance personnel prior to or at the same time that they report the information to the SEC:

A whistleblower need not use the employer's internal compliance system first.

- *First,* under the definition of "original information," the final rules provide a 120 day look-back period, meaning that whistleblowers can report issues internally and still receive credit from the SEC for blowing the whistle as of the date of the internal report, as long as the whistleblower provides the information to the SEC within 120 days.[20]

- *Second,* the final rules provide that whistleblowers will be credited with information that results from a company's internal investigation resulting in whole or in part from information that was reported internally by the whistleblower, even if the information that was originally reported internally would not have satisfied the requirement of sufficient specificity and credibility.[21] In this way, the SEC aims to incentivize internal reporting by increasing the likelihood that a whistleblower will obtain an award in cases where the whistleblower reports information internally that is then supplemented by an internal investigation.[22]

- *Third,* the final rules provide that the SEC will consider internal reporting as a positive factor in setting the amount of a whistleblower bounty, and that the SEC will consider interference with internal compliance and reporting systems as a negative factor.[23]

In addition, the SEC has stated that, in "appropriate cases," it will inform companies of whistleblower allegations and evaluate the company's response for purpose of crediting companies' cooperation.[24] In determining whether to provide a company with this opportunity, the SEC has stated that it will consider a number of factors, including, but not limited to, the nature of the alleged conduct, the level at which the alleged conduct occurred, the company's culture in relation to corporate governance, and information about the company's internal compliance programs, including the role of internal compliance in bringing the issue to the attention of management or the Commission.[25]

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Actions to Take. In the wake of the final rules, companies should evaluate their internal reporting systems. The best way to avoid learning about a possible violation after the issue has already been reported to the government by a whistleblower is to have an internal reporting and compliance system in place that is widely known within the company and regarded by employees credible, responsive, and non-retaliatory.

A good compliance system may reduce the SEC penalty.

Additional areas to consider include:

- Verifying that current hotline protocols ensure that complaints are quickly and appropriately escalated internally;
- Ensuring that employee conduct manuals clearly provide for reporting of potential misconduct to appropriate company personnel;

- Verifying that proactive monitoring and tracking controls are in place to identify potential issues so that the company can identify and respond to these before a whistleblower does; and
- Including a requirement in third-party contracts that the third party provide notice of any compliance issues.

Internal Compliance Programs and Investigations.

The Concern. The final rules create potentially powerful incentives for individuals to attempt to position themselves as whistleblowers even in the midst of an internal investigation. Indeed, there is the possibility that a company's efforts to address potential compliance issues through responsible internal investigation of potential misconduct may itself release financially motivated whistleblowers as personnel learn of the company's efforts. Moreover, the provision permitting the SEC staff to have continuous, undisclosed contact with corporate personnel, including members of a corporate control group, so long as those individuals initiate contact with the SEC, has the potential to chill communication and erode the protections of the attorney client privilege. These considerations also render even more challenging a company's decision whether and when to self-report information to the SEC.

Having a protocol for quick and effective response to potential compliance issues is key.

Actions to Take. Companies should assess their protocols for responding to indications of potential compliance issues. In situations where there is the possibility that misconduct may be of sufficient gravity to implicate a whistleblower award, companies should design their response in a way that will maximize the possibility of protection, including by eschewing internal audit and compliance in favour of reviews by counsel, and by strictly limiting the availability of information, including among the control group, until a review is concluded and appropriate decisions have been reached by the entity.

What to Expect Going Forward

According to the SEC, the whistleblower bounty program is already having a significant impact in that the quality of tips received by the SEC has improved, and the SEC has already saved weeks of investigation time as a result of "specific, credible and timely information" provided by whistleblowers.[26] Now that the SEC has promulgated final rules, the flood of tips and referrals will likely begin in earnest. To the extent that companies identify possible compliance issues or learn that an employee has reported such an issue internally or to the government, they should act quickly to investigate and respond to the issue in close consultation with experienced counsel.

The whistleblower bounty programme is already working successfully.

[1] Gary DiBianco is a partner in the London office of Skadden, Arps, Slate, Meagher & Flom LLP and heads the Firm's London-based Corporate Investigations practice. This article is adapted from a 14 June 2011 Skadden, Arps client mailing on the same topic, a copy of which is available at www.skadden.com. Special appreciation and acknowledgment are made to Erich T. Schwartz in Skadden's Washington DC office as a primary author of that mailing.

[2] Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, Exchange Act Release No. 64,545 (May 25, 2011).

[3] Pub. L. No. 111-203, § 922(a), 124 Stat. 1376, 1841-1849 (2010) (codified as 15 U.S.C. § 78u-6).

[4] 17 C.F.R. § 240.21F-1.

[5] *Id.* § 240.21F-3(a)(1).

[6] *Id.* § 240.21F-4(a)(1)-(2).

[7] *Id.* § 240.21F-4(a)(3).

[8] *Id.* § 240.21F-4(b)(1).

[9] *Id.* § 240.21F-4(b)(i)-(iv).

[10] 17 C.F.R. § 240.21F-8(c)(1)-(7).

[11] *Id.* § 240.21F-8.

[12] 17 C.F.R. § 240.21F-6(a).

[13] *Id.* § 240.21F-6(b).

[14] *Id.* § 240.21F-15.

[15] *Id.* (citing 17 C.F.R. § 202.12).

[16] *Id.* § 240.21F-16.

[17] *Id.* § 240.21F-2(a).

[18] *Id.* § 240.21F-2(b)(i).

[19] See Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, Exchange Act Release No. 64,545, at 95-97 (May 25, 2011).

[20] 17 C.F.R. § 240.21F-4(b)(7). The proposed rules had a similar provision but with only a 90 day look-back period.

[21] *See id.* § 240.21F-4(c)(3).

[22] *See* Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, Exchange Act Release No. 64,545, at 101-107 (May 25, 2011).

[23] 17 C.F.R. § 240.21F-6(a)-(b).

[24] Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, Exchange Act Release No. 64,545, at 92 (May 25, 2011).

[25] *Id.* at 92 n.197.

[26] Mary L. Schapiro, Chairman, U.S. Sec. & Exch. Comm'n, Opening Statement at SEC Open Meeting: Item 2 – Whistleblower Program (May 25, 2011).

FOR WHOM THE BELL TOLLS – WHISTLEBLOWERS IN THE NETHERLANDS

By Edward de Bock

Introduction

Whistleblowers in the Netherlands show some similarity to the main character in Ernest Hemingway's famous novel "For whom the bell tolls". Like Robert Jordan, whistleblowers who are ready to "do good as all men should", must (almost) be willing to make the ultimate sacrifice. In view of the relatively relaxed (or should one say lax) position the Netherlands have chosen with respect to whistleblowers, they hardly ever "feel the earth move". Although the Netherlands are well known for their high degree of protection of employees in general and especially as far as the very strict rules with regard to termination of employment agreements are concerned, the Netherlands do not form a social paradise for whistleblowers. Unlike many other countries and other than for civil servants[1], the Netherlands have failed to introduce an act on whistle blowing or specific regulations with regard to the protection of whistleblowers. Furthermore, the Netherlands lack so called "qui tam" procedures.

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Whistleblowers are not well protected in the Netherlands.

The Netherlands obviously do not want to become a "nation of snitches", although it seems there is significant support for the introduction of schemes similar to the Dodd-Frank Act in our country under the majority of employees.[2] Last but not least, there is relatively little case law in the Netherlands with respect to whistleblowers and most (published) cases regarding whistleblowers did not end that well for the employees concerned.

The STAR-code

Especially in view of the lack of extensive regulations in the Netherlands, the statement concerning methods for dealing with malpractices in companies of June 2003 (the Statement) and the draft example procedure published by Stichting van de Arbeid ("STAR")[3] remain the most important basis for any discussion with regard to whistleblowers. The Statement lists the basic components of whistleblowers procedures. The first basic component deals with the notion that only "real" whistleblowers should be qualified as such and deserve the protection of their employers. Whistleblower regulations do not pertain to the reporting of personal grievances about the work performed. The second element in the Statement deals with the procedural infrastructure which should be in place. A whistleblower should act with due care, both in procedural as in substantive sense. This means that a whistleblower should first report any suspected malpractice internally, unless this cannot be reasonably expected of him or is contrary to the public interest. Furthermore if facts are made known externally this should be done in an appropriate manner commensurate with the situation. The whistleblower should also make certain (at least to reasonable extent) that the relevant facts are correct, should ascertain that

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the reporting of malpractices is or could be in the public interest and should ascertain that the public interest served by reporting the suspected malpractices externally takes precedence over the employer's interest in maintaining confidentiality. According to STAR a suitable procedure for reporting suspected malpractices should therefore consist of the following:

a. a clearly worded definition of malpractices in which the public interest is potentially at stake;
b. the appointment of corporate officers to whom malpractices should be reported;
c. clear guidelines for follow up action;
d. a facility for providing feedback to the whistleblower;
e. the assurance of confidentiality if requested;
f. the possibility of consulting an adviser in confidence if so requested by the employee;
g. an explanation of the situations in which the employee can report malpractices externally and the preferable methods to be used; and
h. the assurance of legal protection for actual and potential whistleblowers who act with due care.

Although various attempts have been made to introduce formal legislation, so far the efforts in this respect have fallen on deaf ears despite the SER committee's positive advice and recommendation to implement the Statement. Efforts to introduce a committee for the protection of whistleblowers with important authorities in the private sector have also failed. Recently, however the Dutch government has announced that an office for whistleblowers will be introduced for the private sector (Advies en Verwijspunt Klokkenluider). This committee for whistleblowers will not have any real powers, but will act as a source of support and advice for whistleblowers.[4]

The Corporate Governance Code

The other foundation for whistleblower regulations is the Dutch Corporate Governance Code (Code Tabaksblatt). Although the code has a legal foundation in Dutch Corporate Law, the code is based on the principle "comply or explain". This means that it is permissible to deviate from the Corporate Governance Code as long as the company has a solid explanation for doing so. The code only (formally) applies to companies listed on the Dutch Stock Exchange. Last but not least the corporate governance code has a limited scope. Best practice provision II.1.7 states that *"the management board shall ensure that employees have the possibility of reporting alleged irregularities of a general, operational and financial nature within the company to the chairman of the management board or to an official designated by him, without jeopardising his legal position. Alleged irregularities concerning the functioning of management board members shall be reported to the chairman of the supervisory board. The arrangements for whistleblowers shall be posted on the company's website".* The Dutch Corporate Government Code therefore does not meet most of the criteria set forth by the STAR. The code does not provide clear guidance on the protection

of whistleblowers acting in good faith and with due care. The code does not provide for any mechanism of reporting malpractices externally. The code does not set forth any clear procedural guidelines. It does not amaze therefore that most Dutch (listed) companies have chosen to implement only a bare skeleton of a whistleblowers procedure. Only some of the listed companies have put in place a mechanism for the external reporting of malpractices, often forced for instance by foreign legislation such as the Sarbanes Oxley Act for companies with a listing in the United States.[5]

Being a good employee

The picture of the legal framework painted above is not pretty. Also from a more practical point of view, the Netherlands are very far away from the situation in the U.S. In the U.S. there are hundreds of lawyers who make a living in the field of advising whistleblowers, there is an enormous amount of websites dedicated to whistleblowers and there are even practical "do it yourself" guides. There is for example The Whistleblowers Handbook by Stephen Martin Cohn, director of the National Whistleblowers Centre, which mentions rules such as: follow the money, find the best federal law, do not forget states laws, use the first amendment, be aware of hotlines, delay is deadly, get to the jury, get every penny deserved, make the boss pay attorney's fees, do not take hush money, *"never forget whistle blowing works".*

The Dutch, on the other hand, try to solve issues such as these on the basis of the principle of "good employment". Article 7:611 Dutch Civil Code states that an employer and employee are obligated to act as good employer and good employee. This is a rather vague and general concept which does not give whistleblowers any real guidance. Of course employers and employees should act as good employers and employees, but what does this effectively mean? Some authors are quite satisfied with the present situation where the evaluation of the acts of a whistleblower is left to the court.[6] Others have become champions of the introduction of a formal act on whistle blowing similar to the protection in place for civil servants.[7]

A duty of secrecy is a substantial hurdle to Dutch whistleblowers.

Although there is not a lot of Dutch case law, the general picture looks rather grim. Article 7:678 Dutch Civil Code mentions that amongst others an urgent cause justifying summary dismissal with immediate effect may exist when the employee makes confidential details regarding the employer public. From Dutch (published) case law it becomes apparent that an explicit or implied duty of secrecy constitutes a substantial hurdle for whistleblowers. In the only whistleblowers case that made it to the Supreme Court (Meijer / De Schelde),[8] the Supreme Court ruled that the notion that the freedom of expression is only limited by duties of secrecy is incorrect.

The Advocaat-Generaal even went so far as to state that a whistleblower may endanger the continuity of the company. The Amsterdam court ruled that an obligation of secrecy does not limit the freedom of expression but only enforces limitations of such freedom of expression accepted by the employee.[9] In the well known case of Organon / Stiekema,[10] the Amsterdam court ruled in first instance that Stiekema (who blew the whistle on (alleged) malpractices within Organon pertaining to a new drug for heart diseases by informing third parties) had breached his duty of secrecy and was therefore not entitled to any protection.[11] It should be noted that in the subsequent appeal, the Amsterdam Court of Appeal ruled that the breach of secrecy was allowed because the method of reporting the malpractices was proportional and Stiekema had first attempted to raise the issues internally.

From Dutch case law it also clearly follows that the courts find it very important that alleged abuses are first reported internally. In the case of NRG / Schaap[12] the whistle was blown with regard to safety problems in the nuclear reactor in Petten. Mr. Schaap lost his job for blowing the whistle externally without awaiting the results of possible internal measures. In the case of NDDO Diemeer the employee who reported on possible issues pertaining to a new drug was saved by the bell because he had first raised the issues internally and only after that reported the wrong doings externally in a proportional manner while observing certain restraints whereby the resulting breach of secrecy was considered justified in view of the possibly huge public interests involved.[13] The Amsterdam court upheld the dismissal for urgent cause of an employee of ABN AMRO Bank who had informed third parties with regard to certain attachments. The fact that the employee had not followed the internal procedural guidelines was sufficient to justify summary dismissal regardless of whether a huge social interest might have been at stake.[14] In the case of Lenssen/Vijverdal, the employment court also ruled that the dismissal of an employee who criticised communications within the management board was justified as the employee had decided to report the alleged malpractices externally immediately instead of following internal procedures. In this respect it should be noted that the Amsterdam court also ruled that if a whistle blower reports alleged wrongdoings in accordance with the internal guidelines and his accusations turn out not to be correct, this does not constitute a legal tort towards the colleagues who have wrongfully been accused.[15] However, even if employees follow the internal procedures things can still go wrong. The employment court of Bergen op Zoom rescinded the employment agreement of a whistleblower who had failed to prove his allegations with regard to faults by the management board simply because the allegations had irreparably damaged the basis of trust between employer and employee.[16]

As opposed to the US, in the Netherlands it is important that the whistleblower reports internally first.

Even if following internal procedures first, a whistleblower is not protected from being fired.

If the public interest is not really at stake a whistleblower is not protected even if he or she follows internal procedures.[17] Things have not gone well for the most famous whistleblowers in the Netherlands. Mr. Bos, who informed the general public concerning the bouwfraude (widespread fraud in the building industry) lost his job, ended up in a caravan on social welfare and facing criminal prosecution. Mr. Spijkers, who blew the whistle on the Dutch military incorrectly claiming that someone had died in an accident with a landmine lost his job and had to battle the Dutch government for many years, which ultimately resulted in a compensation for damages of 1.6 million Euros. In a very recent ruling, Mr. Quirijns was denied damages from his former employer private bank Theodoor Gilissen because he had not been clear enough while brining the matter up internally before he raised the matter externally. Furthermore, the court found that Mr. Quirijns did not deserve the protection of a whistleblower because the issue on which he was blowing the whistle concerned only one client, and hence did not serve any public interest. Perhaps the most famous whistle blower of all is the writer Douwes Dekker who blew the whistle on serious malpractices in the former Dutch colonies. He ultimately resigned and subsequently wrote his famous novel "Max Havelaar" using the pseudonym "Multatuli" (I have suffered much) which seems to be an adequate description of the fate of most Dutch whistleblowers.

Good news

While the above may seem good news for most companies, I remain convinced that it is not. It should not be forgotten that a good system for whistleblowers is in the interest of both companies and the public interest. The following reasons can be mentioned:

a. the limitation of negative consequences of malpractices;
b. a lesser chance of repetition;
c. a lesser chance of more serious malpractices;
d. the prevention of corruption;
e. a chance to enhance the corporate culture and to underline the values within the organisation;
f. a lesser chance of wrongdoing;
g. the opportunity to learn from malpractices to develop preventive policies.[18]

In 2006 the Ministry of Social Affairs published an evaluation of the self regulation for whistleblowers. At that time approximately only ten percent of all Dutch companies had introduces a whistleblowers code. A similarly low percentage of employees was aware of the existence of whistleblowers codes. Even more worrying is that almost 60 percent of the

employees stated that malpractices were not being reported. 88 Percent of the employees interviewed stated they would report malpractices if a whistleblowers code were in place, compared to 65 percent of the employees working in companies that did not have a whistle blowers code. 11 Percent of the employees would report malpractices externally in the case of whistleblowers code. Undoubtedly the number of companies that have introduced whistle-blowers procedures will have increased but it is fair to assume that the majority of the Dutch companies will not have introduced a whistleblowers code at present. The main effect of a whistleblowers code seems to be that there is an implied inclination to report malpractices internally instead of externally. This in itself should be an important reason for all Dutch companies to introduce a whistleblowers code. The evaluation furthermore shows that the existence of whistleblowers procedures does not guarantee the reporting of malpractices. The report states that the corporate culture plays an even bigger role. From the Ernst & Young fraud survey 2011 it follows that employees' perceptions of the ethical standards of management are negative while most employees indicated that the ethical tone of the organisation must be set by senior management and established through frequent employee communication and training. On the other hand, it is not all bad news. Two thirds of the respondents to the Ernst & Young European fraud survey 2011 agreed that a strong reputation for ethical behaviour translates into a commercial advantage. Integrity and compliance can be good for business. The above leads to the following recommendations.

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The majority of Dutch companies have not adopted internal whistleblower procedures.

- The Netherlands should introduce an obligation to implement a whistleblowers procedure in accordance with the example procedure set forth by STAR with a legal foundation similar to the corporate governance code, while at the same time allowing for tailor made measures by adhering to the same principle as used in the corporate governance code: "comply or explain". Deviations from the whistleblowers code should be explained to both the general public and the employees.

- Compliance officers should be protected in the same manner as whistleblowers, because otherwise compliance officers could face the same dilemmas as whistleblowers. Furthermore compliance officers should be granted sufficient budgets to ensure that the necessary (preliminary) research and investigations in the case of actual reports of malpractices can be undertaken.

- As all companies who are confronted with whistleblowers need on the one hand to undertake sufficient investigations as far as the justification of the report of alleged malpractices is concerned and on the other hand need to protect their business, it seems wise that companies draw up a script on how to act beforehand. It is my experience that most companies are seized by panic when actually confronted with an actual whistleblower.

- At the same time a general obligation for secrecy should be introduced either in the Dutch Civil Code or in the whistleblowers procedure itself. This ensures that an employee in good faith will first comply with the internal reporting mechanisms before going externally too quickly and furthermore means that the employee will have to carefully weigh his obligations under the secrecy undertaking with the public interest at stake. It is my conviction that though such a mechanism the interests of the general public are best served and that this would ensure a more harmonious sound compared to the otherwise possibly harsh or shrill sounds sometimes made by whistleblowers.

[1] As of May 1, 2003 the Act on civil servants has been changed to include articles 125 en 125.a. For civil servants a procedure must be in place how to deal with suspicions of abuse and malpractice. Furthermore, the civil servant should not exercise his right of freedom of expression to the extent that this endangers his job or the proper functioning of the public service. The civil servant is obligated to secrecy unless the civil servant – acting in good faith – exposes his notions of abuse in accordance with the whistleblower procedures, in which case the civil servant should be protected against the negative consequences of following such procedures.

[2] Ernst & Young European Fraud Survey 2011, www.ernst&young.com

[3] www.stvda.nl

[4] See F.B.J. Grapperhaus, Bescherming voor klokkenluidende werknemers: een inventarisatie van het wetsvoorstel en het SER-advies, *Ondernemingsrecht* 2005/78, J.P.H. Donner, letter of April 15, 2011 with characteristic 20011/2000 1362229.

[5] F.C. van Uden, De klok en de klepel, Sociaal Recht 2004/3 en I. de Laat en D.J. Rutgers, Corporate governance en de klokkenluider, *Bedrijfsjuridische Berichten* 2004/16.

[6] See J.M. van Slooten, de klokkenluider en de rechter, *Sociaal Recht* 2000, F.B.J. Grapperhaus, de klokkenluider en zijn broodnodige bescherming, *Ondernemingsrecht* 2000 and F.B.J. Grapperhaus, bescherming voor klokkenluidende werknemers een inventarisatie van het wetsvoorstel en het SER-advies, *Ondernemingsrecht* 2005/78).

[7] E. Verhulp, vrijheid van meningsuiting van werknemers en ambtenaren, Den Haag: SDU 1996 and A.F. Verdam, bescherming van klokkenluiders: welke regels en procedures (dienen) te gelden, *Arbeidsrecht* 2001/2003 and R. van de Water, Klokkenluiders eer ge bezint eer ge begint, *Sociaal Recht* 2002, 159-161.

[8] HR 20 April 1990, NJ 1990, 702.

[9] Rechtbank Amsterdam, 16 August 1995, JAR 1995, 208.

[10] Kantonrechter Amsterdam 4 December 2001, JAR 2002/35.

[11] See F.C. van Uden, de Raad van Staten, de vrijheid van meningsuiting en het (ongewijzigde) wetsvoorstel klokkenluider, Sociaal Recht 2005/1 en F.C. van Uden, de klok en de klepel, *Sociaal Recht* 2004/3.

[12] Kantonrechter Alkmaar, 1 July 2002, JAR 2002/157

[13] Kantonrechter Amsterdam, 15 October 2004, JAR 2005/3

[14] Rechtbank Amsterdam, 21 January 2010, JAR 2010/66

[15] Rechtbank Amsterdam, 3 January 2007, LJN AZ5526

[16] Kantonrechter Bergen op Zoom, 14 April 2009, PRG 2009/84

[17] Rechtbank Amsterdam, 11 February 2010, LJN BN5692

[18] See E.D. Karsing uit de boekenkast van de bedrijfsethiek, *Tijdschrift voor Compliance* 2006/6 en N.M. Kaptein en F. Buiter, de integere organisatie II. Handreiking voor een sluitend vangnet voor ongewenst gedrag, stichting beroepsmoraal en misdaadpreventie.

UK BRIBERY ACT 2010: PUTTING IN PLACE ADEQUATE ANTI-BRIBERY PROCEDURES

By Angela Pearson and Lianne Sneddon

Introduction

The UK Bribery Act 2010 comes into force on 1 July 2011 (the Act). It is, arguably, the most stringent anti-bribery legislation in the world. Unlike the US Foreign Corrupt Practices Act (FCPA), the Act applies to bribery in both the private and public sectors. It also has extraterritorial effect and applies to non-UK companies carrying on business in the UK regardless of where in the world the actual bribery takes place.

The stated aim of the Act is to make life difficult for the minority of organisations responsible for corruption. It is not intended to burden the vast majority of law-abiding businesses. However, in order to ensure that unethical businesses are caught, the Act has been broadly drafted. This has caused concern among the business community and, in order to address these concerns, further guidance on the Act has been published by the UK Government (the Guidance)[1]

In this article we look at the Act and the Guidance, focussing on three particular questions:

- What is bribery?
- Why is the Bribery Act relevant to overseas companies?
- What do overseas companies need to do about it?

The Bribery Act at a glance

The Act introduces four categories of offence:

- offering, promising or giving a bribe to another person (section 1);
- requesting, agreeing to receive or accepting a bribe from another person (section 2);
- bribing a foreign public official (FPO) (section 6); and
- failing to prevent bribery (the corporate offence) (section 7).

The Act applies only to bribery offences committed from 1 July 2011. The penalties if convicted of an offence include:

- up to ten years' imprisonment; and
- an unlimited fine.

What is bribery?

The definition in the Act is deliberately broad and refers to the giving or receiving of a financial or other advantage. This captures a wide range of things including payments of cash, the awarding of contracts and political and charitable donations.

Both the offences of giving or receiving a bribe incorporate the notion of "improper performance", or a "wrongfulness element". In other words, has the recipient of the bribe breached an expectation of "good faith", "impartiality" or "trust"? The key to whether an offence has been committed is the connection between the bribe and this "wrongfulness element". Without the connection, no offence is committed.

How does this apply to corporate hospitality?

The broad definition of a bribe also covers corporate hospitality and promotional expenditure. This raised questions over the line to be drawn between legitimate business expenditure and bribery. The Guidance addresses these concerns, clarifying that the Act is not intended to stop companies from engaging in reasonable and proportionate corporate hospitality. It emphasises that, for corporate hospitality to be an offence, there has to be a direct link between the corporate hospitality and an intention for that hospitality to induce improper conduct.

What is reasonable and proportionate will depend on factors such as:

- the standards or norms applying in a particular sector,
- whether or not the hospitality or expenditure is clearly connected with the legitimate business activity or whether it was concealed, and
- how lavish the hospitality is - the more lavish the hospitality or expenditure the greater the inference that it is intended to encourage or reward improper performance.

As an example, the Guidance confirms that it is legitimate for a company to pay the travel and accommodation expenses of foreign government officials invited to visit the company's mining operations, where the purpose of the visit is to satisfy those officials of the high standard and safety of the company's installations and operating systems.

Facilitation payments

Facilitation or "grease" payments are bribes paid to secure routine, non-discretionary acts from public officials. While the FCPA contains an express carve-out of such "routine government action", the UK Government decided not to follow suit. As a result, the payment of facilitation payments is an offence under the Act.

Jurisdictional reach

Any individual or corporate can be prosecuted for acts of bribery committed in the UK.

For acts of bribery committed overseas, only individuals or corporates with a close connection to the UK can be prosecuted. This includes British citizens, individuals resident in the UK and UK incorporated companies.

The section 7 corporate offence applies to acts of bribery, wherever committed, carried out on behalf of a UK company or an overseas company that carries on business in the UK.

Why is the Bribery Act relevant to overseas companies?

Overseas companies will be caught by the Act if they commit acts of bribery within the UK. However, the real extra-jurisdictional reach of the Act lies in the new section 7 offence: the failure of a company to prevent bribery committed on its behalf. Under section 7 a company could be prosecuted if an associated person commits a bribery offence with the intention of benefiting the company. It does not matter where the bribery took place or that the company had no knowledge of it.

It does not matter where the bribery took place or that the company had no knowledge of it.

Overseas companies will fall within section 7 if they "carry on a business or part of a business in the UK". What is meant by carrying on business in the UK will be established over time by the English courts. However, the UK Government expects a "common sense" approach to be applied so that companies that do not have a "demonstrable business presence in the United Kingdom" are not caught. Applying that test, the Government would not expect the fact that a company's securities are traded on the London Stock Exchange to qualify that company as carrying on business in the UK. Something else would be required. Equally, having a UK subsidiary will not automatically mean that a parent company is carrying on business in the UK, since a subsidiary may act independently of its parent or other group companies.

The prosecutors have indicated that they will take a broad view as to whether an overseas company satisfies the test. Representatives of the Serious Fraud Office have publicly stated that they will use section 7 to protect ethical UK companies from overseas companies that are paying bribes in order to gain business. In view of this uncertainty, any overseas company with a business presence in the UK should assume that it is caught.

What is an associated person?

The corporate offence was drafted broadly to cover the whole range of individuals and corporate entities connected to a company who might be capable of committing bribery on the company's behalf. It covers any person who performs services for or on behalf of the company. Whether a person is "associated" is a question of fact, taking into account all the circumstances and not just the legal relationship between the company and that person. It could include employees, subsidiaries, sub-contractors, suppliers, agents and joint ventures.

However, for a section 7 offence to be committed, the associated person has to bribe another person with the intention of benefiting the company. The Guidance clarifies that indirect benefit through simple ownership of or investment in a company will not be sufficient. The Guidance recognises that subsidiaries and joint ventures can act independently of their parent companies and shareholders. Unless an intention to directly benefit the shareholder or particular member can be shown, liability under section 7 will not arise.

Any overseas company with a business presence in the UK should assume that it is caught under the Act.

What do overseas companies need to do about it?

A company will have a complete defence to a section 7 offence if it can show that "adequate" procedures to prevent bribery were in place. All overseas companies that are caught by the Act therefore need to review their anti-bribery policies and procedures to ensure that they are adequate. What is "adequate" is not defined in the Act but is covered by the Guidance. The Guidance adopts a principle-based approach to help companies work out what procedures they need to have in place to prevent bribery. It sets out six guiding principles that apply across all sectors and all types of business. As the principles make clear, companies are expected to adopt a risk-based approach to managing bribery risks, and procedures should be proportionate to the risks faced by a company. Based on the Guidance, the following are the practical steps that companies should be taking.

Having adequate procedures against bribery in place may protect you against conviction.

The six principles

- Proportionate procedures
- Top-level commitment
- Risk assessment
- Due diligence
- Communication and training
- Monitoring and review

Conduct a risk assessment

What will be adequate in terms of a company's procedures will depend on the bribery risks the company faces. Therefore, the first step any company has to take is to look at what bribery risks it faces. There are several ways of assessing risk and how a company carries out its risk analysis will depend on the level of perceived risk and size of organisation. An internal risk assessment may be appropriate or external expertise may be required. Different approaches include the use of workshops, questionnaires or roundtable meetings. Whichever method is chosen, the risk analysis needs to be documented.

In identifying areas of risk, the Guidance distinguishes between external and internal risk.

Assessment of external risks includes looking at:

- Country risk: certain countries have a reputation for corruption and companies with business operations in those countries will need to ensure that their procedures are adequate to deal with the additional risk. A useful resource is Transparency International's "Corruption Perceptions Index."[2]
- Sector risk: certain sectors are higher risk than others, e.g. oil and gas and construction.
- Transaction risk: certain types of transactions tend to be higher risk, e.g. charitable or political contributions, licences and permits, and transactions relating to public procurement.
- Business opportunity risk: risks may arise in, for example, high value projects or projects involving several contractors or intermediaries.
- Business partnership risk: certain relationships may involve higher risk, e.g. consortia or joint venture partners.

Internal structures or procedures may also add to a company's risk, for example:

- a bonus culture that rewards excessive risk-taking;
- frequent use of lavish corporate hospitality;
- deficiencies in employee training, skills and knowledge;
- lack of clarity in the company's anti-bribery policies;
- lack of clear financial controls; and
- lack of a clear anti-bribery message from top-level management.

Top Level Commitment

Leadership on anti-corruption has to come from the top. Senior management (i.e. board members and owners) should be at the forefront of creating a culture in which bribery is never acceptable. Without that top-level commitment there is a risk that any company's procedures will be perceived as "inadequate". This is the case whatever the level of bribery risk.

In practice, senior management will be expected to:

- communicate the organisation's anti-bribery stance internally and, if appropriate, externally;
- endorse all anti-bribery procedures and publications;
- be involved in critical decision-making relating to anti-bribery, for example, sanctions for serious breaches of the procedures; and
- become involved in developing bribery prevention policies and procedures;

Most of all, senior management will be expected to practise what it preaches.

Adequate procedures – what should they look like?

Having undertaken a risk assessment, a company should be in a position to revise or draft its policies and procedures. First, management will need to decide who will be responsible for implementation. Ideally, this should be someone from senior management. The anti-bribery policies and procedures can be stand-alone or incorporated into existing policies and procedures but will need to be clear, practical and applicable throughout the company regardless of location. They should set out the standards of behaviour expected of all employees and, if appropriate, third parties associated with the company.

Generally, the issues anti-bribery policies would cover include:

- a zero-tolerance ethics statement from senior management;
- gifts and corporate hospitality;
- promotional expenditure, travel, accommodation and per diem allowances;
- facilitation payments;
- charitable and political contributions; and
- penalties for breaches of agreed policies and procedures.

Companies should also consider whether they need to put in place policies on due diligence in relation to employees or other associated persons such as contractors, agents, and joint venture partners. The level of due diligence required will depend on the perceived risk but methods might include:

- carrying out background checks on individuals;
- asking to see the relevant company's anti-bribery policies;

- asking for business references and financial statements, to ensure the third party has suitable experience and a good reputation;
- checking the information received against other sources, e.g. via business contacts, local chambers of commerce or on the internet; and
- general research, e.g. official records, registration documents and court records.

Companies may also need to put in place procedures that provide for transparency and accurate recording. Existing procedures can be used for bribery prevention purposes, for example, financial and auditing controls. Examples of issues procedures will need to cover include:

Existing auditing and financial procedures can be used for bribery prevention.

- reporting incidents of bribery;
- recording corporate hospitality and promotional expenditure payments;
- recording any exceptional facilitation payments;
- recording payments to third parties, particularly intermediaries; and
- effective management of all incidents of bribery, including arrangements for internal investigation, reporting the outcomes to senior executives and/or the Board, and the disclosure of material findings to the relevant external authorities and interested parties, e.g. shareholders and business partners.

Monitoring and review

A company's bribery risk will change over time. Companies therefore need to put in place systems that monitor and review the effectiveness of their anti-bribery procedures so that the procedures remain adequate.

Companies who are involved in joint ventures, regularly appoint intermediaries or agents, or operate in jurisdictions where the payment of facilitation payments is commonplace are at greater risk. The Guidance offers practical advice on minimising those risks.

Joint ventures

When entering into a new joint venture, companies might consider:

- having representation on the board of the joint venture company;
- ensuring the joint venture itself has adequate anti-bribery procedures in place;
- establishing an audit committee for the joint venture; and
- including a contractual term in the joint venture agreement prohibiting any partner from breaching applicable anti-bribery laws.

Agency agreements/intermediaries

These can involve risks since it may be difficult for the company to monitor what the agent or intermediary is doing. The following might mitigate the risks:

- establish at the outset a clear statement of the precise nature of the agent/intermediary's services, costs and commission (or other remuneration);
- due diligence;
- communicate the company's anti-bribery procedures to the agent/intermediary, and give training where appropriate;
- ask the agent/intermediary about their own anti-bribery strategies;
- review contracts with agents/intermediaries annually, and include terms requiring the agent/intermediary not to offer bribes; allowing the company to audit activities and expenditure; requiring the agent/intermediary to report any requests for bribes by officials; and giving the right to terminate if the agent/intermediary's actions are suspicious.

Facilitation payments

These are illegal under the Act and companies that are regularly faced with requests for them should adopt strategies to deal with this, including:

- training staff on how to respond to a request for a payment, such as questioning the legitimacy of the demand, or requesting paperwork (e.g. the official's ID, or receipts);
- clarifying in written policies that facilitation payments are not permitted;
- seeking local law advice relating to facilitation payments, in the particular country; and using diplomatic channels, or participating in local non-governmental organisations to apply pressure on authorities in the particular country.

Communication and training

Companies should ensure that the zero-tolerance approach to bribery is clearly communicated both internally and externally. Internal communications should convey the "tone from the top" and should focus on the company's policies and procedures. Training is a useful way to communicate the message.

The level of external communication will depend on the kind of industry an organisation is involved in and the level of risk. Many global organisations make their zero-tolerance approach to bribery clear on their website via ethics statements or codes of conduct. Organisations in high-risk industries communicate that message to third parties they contract with and insert appropriate warranties into their contractual arrangements.

The level of bribery risk and the size of the company will also determine the requirement for training and whether training will be required for individuals associated with the company.

Conclusion

What is clear is the need for any overseas company with a business presence in the UK to undertake risk assessments and due diligence exercises on their current business partners and arrangements. They also need to take stock of their current policies and procedures and consider how they may need to revise them in light of the Guidance. This should not be too onerous for those companies that already have sound ethical policies and procedures in place. However, those companies that have no policies or procedures in place need to act fast before the Act comes into force on 1 July 2011.

[1] *The Bribery Act 2010: Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing (section 9 of the Bribery Act 2010),* published by the Ministry of Justice on 30 March 2011.

[2] Transparency international is one of the leading international organisations with the primary aim of monitoring countries and providing information and resources to assist the reduction of global bribery and corruption. It produces a number of surveys and indices highlighting areas of corruption risk. See their website for more detail: http://www.transparency.org/.

NECESSITY KNOWS NO FINANCIAL MARKETS SUPERVISION ACT

By Willem de Nijs Bik

In the aftermath of the crisis, it is natural to want to point fingers at those who caused the almost total meltdown of the financial system. Banks, regulators, directors, politicians – all bear some responsibility. The threshold for directors' personal liability is very high. As it stands (currently), if there is not a sufficient degree of serious fault then directors are not held to be personally liable[1]. The Netherlands Supreme Court[2] formulated this high threshold explicitly to avoid 'defensive' behaviour. Thus, the Supreme Court wants entrepreneurs to take entrepreneurial risks. Without taking any risks there would not be major financial institutions in the Netherlands that creates thousands of jobs and makes significant contributions to the treasury. Are entrepreneurs, when they are enterprising, also allowed to break the rules? Is that part and parcel of 'being an entrepreneur' or is the threshold just as high for non-enterprising mortals? The specific question that I want to raise is this: if one or more directors fail to share price-sensitive information with the market in a timely manner, does this lead to mismanagement or even personal liability of directors? Another question: how much knowledge of the obligation to publish price-sensitive information can you actually expect from the Board?

These questions were triggered by two very recent developments:

1. Court rulings about price-sensitive information in situations where a transaction is imminent; and
2. the Fortis enquiry.

To refresh your memory: information is price-sensitive if:

1. specific information is available;
2. that is not public; and
3. this information could have a significant influence on the price (higher or lower)[3].

Postponing the immediate publication of price-sensitive information may take place, if:

1. an interest exists to do so;
2. there is no likelihood of deception; and
3. the confidentiality of the information can be ensured[4].

We will begin with recent jurisprudence regarding price-sensitive information. I am referring to the following cases: Super de Boer[5], Wavin[6] and Fortis[7] in March, April and May of this year. It was a productive spring. What happened in these affairs? In each case, a transaction was imminent and in each case the Management Board and the Supervisory Board decided not to publicise the

outcome or the normal course of negotiations in order not to exert an influence on the outcome or because internal decision making was still pending. I will briefly discuss these cases, stripped of all nuances. The central elements of each of these cases are the elements of 'specificity' and 'ensuring confidentiality'.

Firstly, Super de Boer: the major shareholder of Super de Boer, Casino, made a deal with Jumbo for Jumbo to take over all assets and liabilities of Super de Boer. On 4 September 2009, the Board of Directors and the Supervisory Board were informed of this. Subsequent negotiations resulted in a deal on 18 October 2009. Previously, on 17 September 2009, Super de Boer was phoned by a journalist from *De Telegraaf* newspaper, who appeared to be well informed. There seemed to be a leak. Super de Boer immediately issued a press statement. However, prior to this there had been an exceptional increase in trading volume from 9 September 2009 (approximately twice as high as in the preceding period) without the price changing significantly. Apparently, there were also investors who wanted to sell their shares. Super de Boer also published its quarterly figures on 15 September 2009. At no time did the AFM, the Dutch Supervisory authority, intervene. The discussion was on the issue of whether Super de Boer should have waited until 18 September 2009 before issuing its press release. 'Yes', said Super de Boer: the AEX index rose, there was speculation regarding the quarterly figures and there were constant rumours of a takeover. 'No', said the VEB, the Dutch Association of Stockholders, and the Utrecht District Court: Super de Boer should have issued a press release by 11 September 2009 at the latest. Super de Boer has failed to demonstrate that the factors it mentioned caused the increase in share price (albeit slightly) and the increase in turnover. The Utrecht District Court ruled that Super de Boer acted unlawfully *vis-à-vis* the shareholders who sold their shares between 11 and 17 September 2009.

Then we come to Wavin. It was a difficult period for Wavin at the end of 2008/early 2009 and the company was looking for a capital injection. Project Weather was initiated (an unfortunate code name, in my opinion, as the name suggests bad weather). On 26 February 2009, Wavin's Supervisory Board approved the proposed approach to the project: the aim was to attract a claim emission of EUR 50 million and an anchor investor with EUR 75 million in convertible preference shares. On 3 May 2009, an agreement 'in principle' was concluded between CVC (an investment company) and Wavin in which it was agreed to place either convertible preference shares or bonds of between EUR 125 million and EUR 175 million with a significant discount on Wavin's share price. A few employees and major shareholders were informed and banks were sounded out. The share price rose and Wavin 'asked' an analyst if he knew what was going on. It was a dangerous phone call. The analyst told Wavin that there was a rumour that approximately EUR 100 million in convertibles would be placed. Wavin issued a press release a little later on 5 May 2009. Ultimately, the deal misfired after negative responses from major shareholders and banks. The AFM started an investigation. Wavin argued that it was merely an agreement in principle, and that

it issued a press release within 24 hours of the phone call with the analyst and that it was entitled to postpone. 'No', said the AFM and the District Court: the agreement in principle was sufficiently specific despite the lack of support from the banks or the major shareholders and, moreover, 24 hours is not necessarily 'prompt'.

Finally, Fortis[8]. A lot has been happening to Fortis. One of the many aspects of this case involves the disclosure of information on solvency issues and the EU Remedies Directive. This is a nice word for the forced sale by the European Commission of, *inter alia*, HBU. The Rotterdam District Court recently ruled on this. I will limit myself to the considerations of the EU Remedies. Fortis was compelled by the European Commission to sell HBU in order to be able to integrate with ABN AMRO. At the end of April 2008, discussions took place with prospective buyers where Deutsche Bank was the preferred bidder. At the beginning of May 2008, Fortis received a binding offer from Deutsche Bank. The conditions for this offer were extremely onerous and, in the words of Deutsche Bank, it should be considered as a 'take it or leave it offer'. At that time, no other interested party made a binding offer. On 21 May 2008, exclusive negotiations with Deutsche Bank commenced. In early June 2008, a draft SPA was drawn up and timely preparations were underway for internal approval. Deutsche Bank appears to have made good use of its negotiation position. Fortis would suffer a significant loss, unless a better deal could be found with a third party. On 13 June 2008, approval was sought from the Fortis Board for the transaction with Deutsche Bank. On 14 June 2008, an article appeared in the Dutch newspaper *De Financiële Telegraaf* over the deal. The article – briefly – stated that Deutsche Bank was the only serious bidder, that the code name for Deutsche Bank was 'Denmark' and that the terms of Deutsche Bank were very negative. On 18/19 June 2008, the Board granted permission to finalise the deal. At the time, the deal was not quite finalised and it is also clear that discussions were still taking place with other interested parties. These other interested parties withdrew definitively on 26 June 2008. On 3 July 2008, the deadline for Fortis to sell HBU expired and at that time Fortis had no other option: it had to sell to Deutsche Bank. At the time (*i.e.* 26 June 2008), Fortis announced the deal, with a negative impact, with Deutsche Bank, while the name of Deutsche Bank could not be mentioned as the internal approval process at Deutsche Bank had not been completed. The transaction was disclosed in more detail on 2 July 2008, shortly before the expiry of the deadline for the European Commission. The AFM and the Rotterdam District Court both thought this was too late. According to the Court, it is crucial when 'negotiations are underway and there is a reasonable probability of consensus.' According to the Rotterdam District Court, this took place on 21 May 2008 when Fortis decided to commence exclusive negotiations with Deutsche Bank. According to the Court, deferment was no longer permitted after *de Financiële Telegraaf* had printed the article.

What can we learn from this ruling? On the grounds of this jurisprudence, deals 'in principle' or almost deals can provide price-sensitive information. It is apparently sufficient that there be a reasonable expectation of a transaction. What is a 'reasonable expectation'? Whoever knows the

answer to this should tell us. It appears not to be relevant whether authorised bodies or other important stakeholders (such as banks and other major shareholders) have approved the deal. This makes it very difficult in practice. In such cases, it will therefore be necessary to revert to a deferment arrangement. It is clear that increases in volume, statements by analysts regarding a specific rumour or reasonably detailed newspaper articles quickly throw this into disarray. The policy of 'we never respond to rumours' is therefore of no help. There has been a lot of criticism regarding these judgements, particularly regarding the 'specific requirement' issue. Should companies report 'almost' deals or exclusive talks the moment that rumours appear? One thing is clear: informing the market of an 'almost' deal that is subsequently quashed by the absence of internal approval or the lack of a signature of one or more of the parties, is damaging (or worse) to the company and its investors. No one profits from this. I hope that higher courts will demonstrate an understanding of this.

Lack of knowledge at board level can be mismanagement.

Furthermore, and this is the second trend I have identified, in the Fortis enquiry an assessment will be made on whether there was mismanagement at Fortis. One of the aspects advanced by the researchers is the alleged lack of knowledge about price-sensitive information at board level and the lack of an audit trail. Apparently, this is the written record of a decision to postpone publication of price-sensitive information. To this end, researchers asked a number of former directors of Fortis (mostly non-lawyers and many foreigners – Belgians) whether they could describe what the Dutch definition of price-sensitive information is and exactly when you may make use of the temporary exemption. It was a sort of price-sensitive information examination for foreign directors. The researchers were surprised that one year after their resignation, not all the directors knew the correct answers. The fact that, allegedly, it was not defined precisely (in the minutes of meetings) on what basis the temporary exemption was applied surprised researchers. I think that the researchers set the threshold too high. This is really not an easy issue, particularly for foreign directors. In my view, what should happen is that directors develop a sense of 'price-sensitive issues' and that, if in doubt, they should speak to their compliance officer, legal department or lawyer. In my experience, this is what usually happens. A paper trail of decisions regarding price-sensitive information is too much to ask for in what are almost always hectic circumstances. Decisions need to be made immediately, sometimes at the instigation of the regulator. It will be interesting to see how the Enterprise Chamber will deal with this, particularly now that the rules are more complex and casuistical.

Compliance officers should be part of the M&A team.

Do corporate governance codes still have relevance to this issue? Yes, they do. Both the 'general' Corporate Governance Code[9] and the Banking Code[10]

contain various relevant provisions on compliance with laws and legislation. In short: the Board of Directors is responsible for compliance with all relevant laws and regulations. The Banking Code prescribes, interestingly, that the chairperson of the Board of Directors has a duty to oversee a programme of permanent education.

The Board of Directors is responsible for compliance with all relevant laws and regulations.

We know that these soft law provisions can have bite. Judgements by the Enterprise Chamber (including HBG[11] and ASMI[12]) refer to rules that have a general legal effect in the Netherlands.

What if the interests of the company are not served by strict compliance with the rules? Does 'policy discretion' apply or should we just say, 'rules are rules'. To my knowledge, this question is not clearly answered by case law. I think that we all agree that a systematic and deliberate infringement of the rules is unacceptable. It is a testimony to mismanagement and may possibly lead to personal liability. However, what about an occasional exceptional instance? Think of the bank executives in the midst of the crisis. Around the world, plans were developed to improve solvability and liquidity, whether or not with the assistance of governments. Panic reigned and markets reacted completely irrationally. Read *'Too big to fail'*[13]. Once you inform the market that you are simply 'thinking' about these plans, you may perish. The risk of a bank run must have kept many bank executives awake at night. There were numerous, sometimes very specific, rumours. It was a difficult dilemma. The same thing happened when Fortis was nationalised. Should the shareholders be asked to approve such a transaction (Article 2:107a of the Dutch Civil Code) or do you break the law by necessity? 'Yes', said The Hague Court recently, the shareholders may be bypassed in such exceptional circumstances.[14] I think that in such a case, grounds for justification must exist, as they do in criminal law. If members of the Board of Directors and Supervisory Board can, in very exceptional circumstances, show that the company has a major interest not to share certain information with the market, then they should be allowed this discretion. This may not mean that there is no risk of a penalty for the company, however, at least mismanagement or personal liability can not be construed on the part of the directors.

[1] HR 10 January 1997, *NJ* 1997/360 with note J.M.M. Maijer , *JOR* 1997/29 (Staleman/Van de Ven).

[2] HR 20 June 2008, *NJ* 2009/21 with note J.M.M. Maeijer and H.J. Sneijders, *JOR* 2008/260 with note Y. Borrius (Willems/NOM).

[3] Cf. Article 5:53 paragraph 1 Financial Markets Supervision Act.

[4] Cf. Article 5:25i paragraph 3 Financial Markets Supervision Act.

[5] Utrecht District Court 30 March 2011, *LJN* BP9796.

[6] Rotterdam District Court 27 April 2011, *LJN* BQ4117.

[7] Rotterdam District Court 4 May 2011, *LJN* BQ3832.

[8] Rotterdam District Court 4 May 2011, *LJN* BG3832. The writer is involved in the Fortis case. This article does not represent the point of view of firm or client.

[9] Corporate Governance Code, principle in II.1, p. 12.

[10] Banking Code, Article 3.2.1, p. 9.

[11] Amsterdam Court of Appeal (OK) 21 January 2002, JOR 2002/28 with note M. Brink following HR 21 February 2003, *JOR* 2003/57, with note M.P. Nieuwe Weme (HBG)

[12] Amsterdam Court of Appeal (OK) 5 August 2009, *JOR* 2009/254 with note Hermans following HR 9 July 2010, *JOR* 2010/228 with note Hermans (ASMI)

[13] A.R. Sorkin, *Too big to fail*, Penguin Books Ltd 2010.

[14] Amsterdam District Court 18 May 2011, *LJN* BQ4815.

GLOBAL COMPLIANCE FROM A DUTCH PRACTICAL PERSPECTIVE: FROM FIGHTING WINDMILLS AND A FINGER IN THE DIKE TOWARDS A ROBUST COMPLIANCE DELTA PLAN

By Joost Wiebenga[1]

The plum tree – A story

Johnny saw some fine plums hanging,
Oh! like eggs, so very large;
Johnny seemed about to pluck them,
Though against his father's charge.
Here is not, said he, my father,
Nor the gard'ner near the tree,
From those boughs so richly laden,
Five or six plums - who can see?[2]

This famous Dutch verse written in the 18th century for school children by Hieronymus van Alphen, a Dutch poet and Attorney General at the Court of Utrecht, was cited by judge Verpalen of the Haarlem Court at the start of the Amsterdam Zuidas Property Fraud case, early 2011. This case involved former directors at Philips Pension Fund and Rabo Bouwfonds who allegedly channeled 200 million euro into their own accounts. The tone and the gist of the court case was set, but the defense attorney successfully sought recusal arguing that the bench had created *"an impression of partiality"* by suggesting that the suspects may have assumed that Philips and Rabo bank are too big to miss some "plums". By the time this article has been published the court verdict will most likely be publicly known.

Although judge Verpalen seemed to hit the nail on the head, unfortunately for him, he did so in the wrong place, at the wrong time. Ernst & Young revealed in a 2006 survey report: "A perceived opportunity for fraud exists when an employee believes he can override anti-fraud controls, for example, because the individual is in a position of trust or is aware of weaknesses in the control environment. Fraudsters can often rationalize their actions because they can justify to themselves the circumstances that allow them to commit a dishonest act. Even otherwise honest individuals can commit fraud in an environment that imposes sufficient pressure on them, whether this originates from sources inside or outside the organization".[3]

L'histoire se répète

Also in the area of compliance the history seems to repeat itself. The Tulipmania (in Dutch the "Bollengekte") was a period in the Dutch Golden Age during which contract prices for bulbs of the recently introduced tulip reached extraordinarily high levels and then suddenly collapsed. At the peak of the Tulipmania in 1637, some single tulip bulbs sold for more than 10 times the annual income of a skilled craftsman. It is generally considered the first recorded speculative bubble. Four hundred years later, tulip fanatics invested more than 85 million euro in the NovaCap Florales Future Fund, an investment vehicle set up to support the development of new and profitable tulip varieties on the promise of a possible return of 30%. The entire amount disappeared and all investors lost their entire investment[4]. Bad corporate practice has a long history. It was already discovered in the Dutch East India Company[5], the first Dutch limited liability company established in 1602 with the purpose of trading spices from the Far East with their own sailing ships. The Dutch East India Company was the richest private company in the world by 1669 with over 50,000 employees, 10,000 soldiers in a private army, 40 warships, and 150 merchant ships. Due to monopoly complacency, sudden competition by other European nations, insider trading, corruption and "lorrendraaierij" (contraband for own account) this monopoly went almost bankrupt and was nationalized at the very end of the 18th century[6]. The first national bribery scandal dates back to Dutch Supreme Court case law in 1926 regarding bribes received by a civil servant from a building contractor[7] (Goudse Bouwmeester). More recently, in October 2010, the former director of the Rotterdam Port Authority was sentenced by the District Court of Rotterdam to a prison sentence of one year for amongst others accepting bribes for inducing the Port of Rotterdam to enter into agreements and guarantees for the benefit of RDM, a shipbuilding and repair company[8].

In 1976 Prince Bernhard, father of Queen Beatrix, received a 1.1 million US dollar bribe from the American aerospace company Lockheed to ensure the American Lockheed F-104 would win out over the French Mirage 5 for use by he Dutch Air Force. During his life Prince Bernhard always denied the charges, but after his death on December 1, 2004, interviews were published showing that he admitted taking the money, despite the fact he said it was not for personal gain but for World Life Fund charity[9]. This event triggered the enactment in 1977 of the Foreign Corrupt Practices Act (FCPA), a United States federal law aimed at bringing a halt to the bribery of foreign officials and to restore public confidence in the integrity of the American business system. It is estimated that systemic corruption in public contracting can add 20-25% to the costs of government procurement, and frequently results in inferior quality goods and services and unnecessary purchases. While, for instance, the estimates of bribery exchanging hands for public procurement bids are estimated near 200 billion US dollars per year, the overall annual volume estimate of the rigged procurement projects, where such bribes take place, may be close to 1.5 trillion US dollars or so[10]. This is a major obstacle to social and economic development. One can imagine what this amount a year could do to eradicate world hunger, improve health worldwide

and develop universal education. Corruption is illegal in most, if not in all countries. The problem is that in many countries the existing laws are simply not enforced. It has been considered by too many and for too long as just "the cost of doing business" and as unavoidable obstacles that are too ingrained in local culture.

The lesson learned from all this is that lessons learned seem to be quickly forgotten and institutional memories rapidly lost. Besides, the Dutch seem to have the tendency to procrastinate when new laws and regulations prevail over old practices and habits. There is a Dutch proverb which is ascribed to the famous German poet Heinrich Heine which goes as follows[11]: *"when our planet Earth will come to an end, better go to the Netherlands because there everything happens 50 years later than anywhere else".* Until the 1990s, the Netherlands was known for being a cartel paradise. This state of affairs had persisted in spite of European Community competition law, which by then had been applied for over forty years. Especially sectors which were sheltered were used to implementing the possibilities of the old competition regime, among them medical services, banks, insurance, telecom and construction. In 2002 as a result of a whistleblower, the Dutch Competition Authority (NMA) started investigating some large construction bidding projects and indeed discovered that bids were rigged through coordinating bids or quotations practices. More than 20 construction companies eventually settled with the Dutch government for substantial punitive amounts. To date the European Commission and NMA yearly bring substantial cases to justice. For example: in 2007 brewers Heineken, Grolsch and Bavaria were fined an 273 million euro after the EC's anti-trust department uncovered evidence of price-fixing, with top management using code names to arrange secret hotel and restaurant meetings.

Dutch companies are unlikely to be less corrupt than companies from other countries, according to a partner of PricewaterhouseCoopers[12]. Perhaps not so strange in such a small country as the Netherlands with its century long exporting focus, history, and "Dutch East India Company mentality"[13]. The criminal law revision, making bribery of foreign government officials a criminal offense, became effective as of February 2001 and only in April 2006 the Netherlands enacted legislation to expressly prohibit the tax deductibility of bribes to foreign public officials. Until that time a judicial award was required to that effect. In 2007 Akzo Nobel agreed to settle with the Dutch prosecution allegations that two of its subsidiaries paid illegal kickbacks to the Iraqi government under the United Nations' scandal-plagued oil-for-food program. AKZO Nobel paid a fine of 381.000 euro and also settled with the U.S. Securities and Exchange Commission Akzo Nobel paying 750,000 US dollars in civil penalties and about 2.2 million US dollars in disgorgement of profits. Recently Philips Electronics was accused by a Polish prosecutor of bribery, because three employees allegedly bribed hospital directors in Poland to buy Philips' medical equipment. In the Netherlands' biggest ever corporate accountancy fraud, Ahold revealed massive bookkeeping irregularities at its U.S. Foodservice business and other foreign subsidiaries, overstating profits by almost 1 billion euro. The Amsterdam appeals court sentenced

three former Ahold executives to suspended sentences and fines. I am afraid that these few examples might only be the tip of the iceberg, taking into consideration that white collar crime enforcement is generally still at a moderate level and in some sectors there are no visible results at all. Only seven foreign bribery cases, all related to the Oil-for-Food program, were settled out of court. In court there are no foreign bribery convictions yet. This number is somewhat embarrassing if compared to other OECD member states, such as the USA, UK, Germany, Switzerland, Italy, Norway and Denmark, which have been much more active in this field[14]. Ernst & Young's "European Fraud Survey 2011"[15] used researchers who interviewed more than 2300 people in 25 European countries in both developed and developing economies with some alarming trends, such as: Almost 1 in 5 of company employees, regardless of grade, consider it to be acceptable to pay bribes to win or retain business; almost 60 % of those interviewed expect management to cut corners in order to achieve targets and half of management agrees; two thirds said that bribery and corruption are widespread in their country and according to 40% of them it has become worse during the economic downturn. Among the Dutch respondents 26 % believes that bribery takes place in the Netherlands. Arguing that the global marketplace is not a level playing field will not help. The defensive argument that companies from successful emerging markets unfairly compete because their country condones export practices that are no longer allowed in the OECD environment, is worthless when prosecuted in a jurisdiction with an unambiguous rule of law, consistent enforcement and freedom of opinion.

Why does sustainable compliance matter?

The Greek philosopher Plato (427 BC - 347 BC) already had the wisdom to say that *"good people do not need laws to tell them to act responsibly, while bad people will find a way around the laws".* In the King Report on Corporate Governance for South Africa (2002) it was noted that *"you cannot legislate a company into good behaviour".* Compliance is one of those catch-all terms which means different things to different people. Compliance with what? The strict definition of compliance in legal terms could be confined to *"fulfilling of internal and external laws and regulations"*[16], while compliance risks refer to *"the risk of legal sanctions and of material, financial and/or reputation loss"*[17]. Over time the term compliance has gone beyond what is legally binding and has embraced broader (self regulatory) standards of integrity and ethical conduct[18]. Matten and Crane opine that *"business ethics can be said to begin where the law ends"*[19]. Consequences for non-compliance can range for the company from dawn raids, lengthy investigations, substantial fines, void and unenforceable agreement, civil actions and third party damage, management, accounting and legal costs, loss of tax credit and government contracts, bad publicity and damage to the share price. Exposure for individual employees encompasses prison, high fines, director disqualification, disciplinary offences/loss of job and harm to personal reputation. Depending on the vision, goals and resources a company can decide to strictly comply with the

Compliance goes beyond mere legal obligations.

minimal legal and regulatory requirements on the one end of the spectrum ("keep me out of jail") through full breadth of compliance with guiding principles and codes of ethics on the other end of the spectrum, encouraging behaviour in accordance with the letter and the spirit thereof ("create a competitive advantage"). The latter founded on a sound corporate culture and underpinned by a set of comprehensive assurance procedures and joint ethical values such as honesty, integrity, professionalism, teamwork and respect for people. For example, the strict category might allow the export of drugs which are (still) unapproved in the country of manufacturing to be used by the citizens of foreign nations where the local legislation does not prohibit them, in spite of possible noxious side-effects. The full breadth category would dislike the ethical difficulty of creating a double standard which would legally allow such export that had not yet been determined safe and effective for use in their own country. Ethical values and legal principles are usually closely related, but ethical obligations typically exceed legal duties. In some cases, the law mandates ethical conduct. Sometimes the law does not prohibit acts that would be widely condemned as unethical. And the contrary is true as well. The law also prohibits acts that some groups would perceive as ethical[20].

Strong ethics is good business.

The advantages of ethical behaviour may include: higher revenues through higher demand from positive consumer support, proved brand and business awareness and recognition, better employee motivation and recruitment and new sources of finance for example from ethical investors[21]. The Amercian Corporate Executive Board (CEB) surveyed about 130 companies for the level of integrity within their corporate cultures and found companies scoring the highest marks outperformed those with the lowest by more than 16 percentage points when it came to shareholder returns. The top quartile of companies surveyed averaged a 10-year total shareholder return of 8.8 %, while the bottom quartile averaged a loss of 7.4 %. What these results demonstrate is that not only does an emphasis on corporate integrity make money over the long term, but a lack of corporate integrity will cost a company money over time. Obviously there are also disadvantages for doing business ethically such as: higher costs (e.g. sourcing from Fair Trade suppliers rather than for the lowest price), higher overheads (e.g. training & communication of ethical policy) and a risk of building up false expectations. Sometimes, a company's core values are at odds with the law of a foreign jurisdiction and the incongruity between reality and moral conviction is so strong that it cannot be ignored or rationalized anymore. That is what Google faced after it experienced a sophisticated cyber attack on its Gmail system in China, an attack aimed at identifying Chinese human rights activists. To comply with Chinese law, Google had already been suppressing certain politically sensitive search results, such as democracy movement, Dalai Lama, and Tiananmen Square demonstration of 1989, among other. The massive cyber attack was even taking things a bit further. It caused Google to challenge its business continuity in China[22].

The way compliance is organized and underpinned can vary between rules based, risk-based and values based and combinations thereof. Scandals in the area of corporate governance in USA (Enron, Tyco, Worldcom) , Italy (Parmalat) and the Netherlands (Ahold) led to rule based regulations (Sarbanes Oxley Act, 2002) in USA and principles based corporate governance codes, with less binding legislation, in the Europe. It depends on all kind of aspects in the area of corporate governance and societal aspects. Some countries believe that value based systems eventually provide better results than carving every rule in stone. The stakeholder focused Dutch "Poldermodel" has a different approach and prioritization than the shareholder focused Anglo-Saxon model. Most civil law jurisdictions around the world favor the use of principles and guidelines and extend a belief and trust in their organizations to subscribe to such principles. Such faith also leaves the vigilance of good practice to the larger community, and leaves unclear the specific consequences, assuming that public exposure of non-compliance with these principles will result in significant loss of face and credibility. In the USA, there is a tendency not to extend such trust, and instead to develop and insist on compliance to a specific set of rules. In such a system the consequences of non-compliance are clear, and supposedly swift, yet restricted to the jurisdiction of the regulatory body. Unfortunately, a rules-based approach also tends to encourage those to play games with the rules, to find loopholes in the rules, and to find ways around the rules. Many public multinationals listed in both the USA and the Netherlands apply a mixture of rules, principles and values, in combination with an solid internal control framework that can help management to determine how much uncertainty is accepted and how the risks and opportunities deriving from this uncertainty can be effectively managed in order to enhance the capacity to build value. Besides, the multinational must have a robust, *"breathing and living"*, compliance program, encompassing regular, iterative, live and on-line training (with ethical dilemmas and actual cases), enforceable contractual anti-bribery provisions, intermediary certifications, red flag scenarios, 24/7/365 anonymous complaint opportunities, monitoring and a thorough and relentless incident management. Where norms may have been developed on a foundation of values, the maintenance of norms is an essential component of risk mitigation through educating, motivating ("carrot") and disciplining ("stick") employees as necessary[23]. *"Do as I say, not as I do"* commands may result in an ineffective environment. Worst situations occur when management participated in highly questionable business practices and the board of directors turned a "blind eye".

Various studies indicate that corporate culture is the single greatest factor influencing corporate conduct. Corporate culture[24] is a decisive factor in getting the compliance contents and related processes successfully accepted, incorporated, and adhered to in the enterprise[25].

Corporate culture is the single greatest factor influencing corporate conduct.

11

If preventive measures such as ethical codes of conduct, (anonymous) whistleblower procedures

and risk management systems are not underpinned with well functioning soft controls, this may in practice create a false feeling of security[26]. These soft controls and their mutual cohesion are pictured in Vink & Kaptein's integrity star (please see Figure 1 at the end of this chapter) suggesting the following preventive measures: (1) Implement the soft controls which encompass (a) clarity of thought, (b) tone at the top, (c) consultation & (dilemma) reviews, (d) commitment, (e) feasibility, (f) transparency, (g) accountability, and (h) internal enforcement[27], (2) ensure that the compliance program is sincere in its set-up and actual implementation and not just a *'paper tiger'*, and (3) stress that lip-service works counter-productive. What really counts in the end is: substance over form.

In the end, substance over form is what will make a compliance program work for you.

The morale: Noblesse Oblige

The French phrase "noblesse oblige", literally meaning "nobility obliges", is generally used to imply that with wealth, power and prestige come responsibilities. In ethical discussions, it is used to summarize a moral economy wherein privilege must be balanced by duty towards those who lack such privilege or who cannot perform such duty. It also refers to providing good examples of behaviour and exceeding minimal standards of decency. "Noblesse oblige" provides a foundation for reputations that take decades to build up and can be ruined in hours through incidents such as corruption scandals or environmental accidents. Albert Heijn Sr., the founder of this retail multinational, mentioned about reputation: *"Everything has its price, except reputation. Reputation is the respect contributed by others to a person or company. Everyone can acquire it and once established, it is invaluable"*[28]. It also means avoiding unwanted attention from regulators, courts, governments and media and building a genuine culture of "doing the right thing" within a corporation which can offset these risks. Leading companies can uniquely leverage individuals across the company to identify and track regulations, use innovative risk assessment methods to identify the greatest threats, and move regulatory compliance efforts from reactive to proactive.

Many companies are raising the bar and voluntarily subject themselves to become involved in and committed to areas of Corporate Social Responsibility (CSR or, in Dutch, Maatschappelijk Verantwoord Ondernemen) because their most important stakeholders expect them to understand and address the social and community issues that are relevant to them. CSR is the deliberate inclusion of the public interest into corporate decision-making, that is the core business of the company or firm, and the honouring of a triple bottom line: people, planet, profit. CSR has been definitively accepted by society as a dynamic social set for norms that has been imposed on the corporate world. This dynamic also has evolved into various aspects of legal relevance in terms of hard law, soft law and self-regulation, which interactive influence.
In the words of Prof. J. Eijsbouts: CSR has become crucial for corporations core strategy, ranging

from offensive (value creation) to defensive motives (risk management), it being understood that from a corporate governance perspective it is easier to legally influence the second aspect rather than the first aspect[29]. This can be illustrated by the following example. ING was thrown a 10 billion euro lifeline to stop it going under, while ABN Amro was nationalised around the same time. Numerous other Dutch financial firms received capital support, including Aegon, SNS Reaal and ASR Nederland. ING's Supervisory Board recently approved CEO Hommen's bonus worth 92% of his 1.35 million euro package[30]. Objectively most, if not all, stakeholders agreed that Mr. Hommen did a fine job in turning around ING having achieved good results in 2010. The bonus was not against any existing laws nor was there a need to "explain" any non-compliance with the Dutch Governance Code[31]. However the general public feeling was one of moral hazard rather than a typical Calvinist backlash which cultivates the view that excessive wealth is somehow morally reprehensible and in contravention of traditional Dutch Christian values[32]. The ING's consumers and other stakeholders no longer accept that the bankers in good times receive big bonuses while in bad times the tax payers have to save or bail out their banks which are "too big to fail". In other words why would they accept any longer that a bank would behave differently if it was fully exposed to the risk of bankruptcy? The moderate opinion in Holland seems united in its belief that banks which received state aid should not be shelling out bonuses. Although ING made a net profit of more than 3 billion Euro in 2010, it still owes the taxpayer 5 billion. In all fairness, Mr. Hommen did eventually not accept the bonus.

For a long time the Dutch believed that compliance challenges were like windmills, which Don Quixote imagined to be real giants in the famous 500 year old Spanish novel written by Miguel de Cervantes[33]. The Dutch reacted like the knight's loyal "sidekick" Sancho Panza: *"No attack required against imaginary danger"*. When compliance became more real and subject to external enforcement, many companies used the reactive tactic of Hans Brinker[34], the 17th-century boy who shoved his finger in a leaking dike and saved his village in the country that but for its dikes would be for half of its surface under the North Sea. Only when companies discovered that compliance infringements are usually more than one-off incidents they start to realize that a more robust plan would be required. Almost like a Delta Plan, resting on two pillars: (flood) protection and sustainability. Consistent with this metaphor, the future of successful companies rests on the two pillars of compliance and sustainability built on a solid foundation of a good corporate governance and corporate social responsibility. In the context of mitigating factors against future compliance violations, the Anglo-Saxon world nowadays refers to an Effective Compliance Program (US Federal Sentencing Guidelines)[35] and Adequate Compliance Procedures (UK Bribery Act)[36].

Consider compliance not a threat or nuisance but an opportunity for a sustainable competitive advantage. Compliance can turn around harmful exposure and surprises into controlled risk mitigation and damage control. Besides, compliance can have a positive impact on employees' attitudes and behaviours and may attract talented people. The major stakeholders will likely perceive compliance as

a benefit and certainly non-compliance as a huge liability, both in terms of monetary damages and loss of reputation. Eric Coutinho, Chief Legal Counsel of Philips Electronics, once told me: *"In the increasingly diverse and dynamic markets in which we operate, our General Business Principles are the rock upon which our behaviour must be based. In fact, as our principles of integrity and business ethics, they are crucial to the growth of our business and our identity as a brand".*

Compliance can turn harmful exposure into controlled risk mitigation.

Finally we go back to the poem of Hieronymus van Alphen (1746 - 1803), citing: From those [plum tree] boughs so richly laden, Five or six plums - who can see? Translating this the white collar executive language: Who would miss a few million euro in the wealthy Philips Pension fund with a total investment portfolio exceeding 13 billion euro[37]? I safely assume that the Dutch court (in all instances) will do justice in this case which for its clarity of culpability is not worth expensive executive time for an ethical reflection. However, there are many less obvious subjects and dilemmas which justify and require appropriate leadership (and middle management!) attention and should be openly discussed. As Adrian Furnham mentions in his book: *"Acknowledge the elephant in the boardroom"*[38]. Don't ignore it by treating it as a taboo.

Last but not least a Dutch Phd. student researched the relationship between CEO narcissism and fraud propensity as alleged in Accounting and Auditing Enforcement Releases by the SEC[39]. The results show that high narcissistic CEOs are more inclined to commit managerial fraud to keep up appearances and retain their status. The warning of the psychologists Bapiak and Hare to watch these "snakes in suits" may have came too late for those who invested in Bernard Madoff's massive pyramid Ponzi scheme[40].

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[2] *Jantje zag eens pruimen hangen,*
O! als eieren zo groot.
't Scheen, dat Jantje wou gaan plukken,
Schoon zijn vader 't hem verbood.
Hier is, zei hij, noch mijn vader,
Noch de tuinman, die het ziet:
Aan een boom, zo vol geladen,
Mist men vijf zes pruimen niet.

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[7] Goudse Bouwmeester, HR 12-03-1926, NJ 1927, 777.

[8] Client Alert May 2011 Baker & McKenzie.

[9] P. Broertjes en J. Tromp, 2004, De Prins spreekt, Uitgeverij Balans, Amsterdam.

[10] World Bank: 2004, The Cost of Corruption, www.worldbank.org

[11] Mentioned by Edward de Bock, partner of Houthoff Buruma, at the National Compliance Debate 2011 in Amsterdam.

[12] D. Tapp of PricewaterhouseCoopers, October 2010, speech at Transparency International Nederland symposium "Hoe corrupt is Nederland en wat doen we er aan?, Den Haag.

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[24] Corporate Culture: a corporate-wide shared system of meanings and the way in which a group of people in a specific company or organization solves problems and reconciles dilemmas. The heart of the organization. (Kiewit and Pleunis, 2006). It dictates what the company or organization pays attention to, how it expects its employees to act and what it values. The culture comes in layers: On the outer layer are the products of culture while the layers of values and norms are deeper in the "onion", and are more difficult to identify and are in different parts of the world. (Trompenaars and Hamden Turner, 2008).

[25] Edmondson, A.C. and Cha, S.E.: 2002, When Company Values Backfire, Harvard Business School Publishing Corporation, pp. 2-3.

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[29] Jan Eijsbouts, "Elementaire beginselen van maatschappelijk verantwoord ondernemerschap", preadvies 2010 Nederlandse Juristen Vereniging over de civiel- en ondernemingsrechtelijke aspecten van Maatschappelijk Verantwoord Ondernemen, Kluwer Deventer 2010.

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[33] El ingenioso hidalgo don Quijote de la Mancha, is a novel written by Spanish author Miguel de Cervantes. Published in two volumes a decade apart (in 1605 and 1615).

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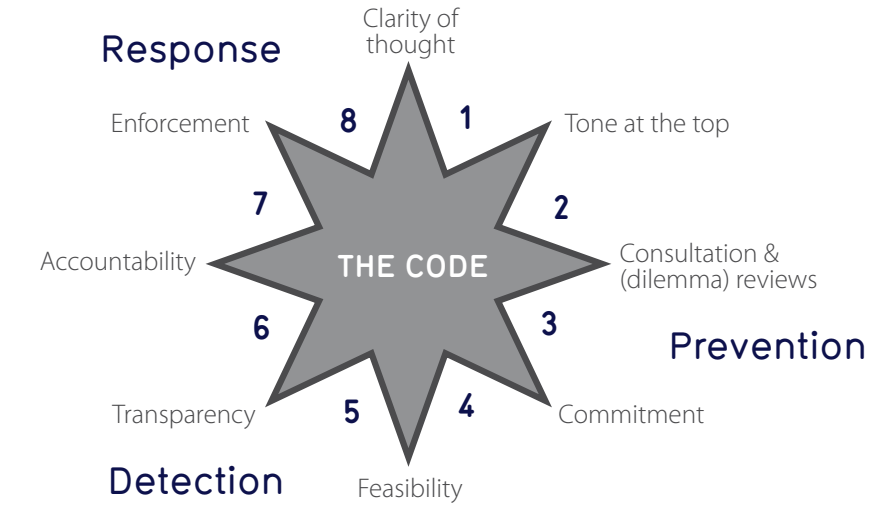
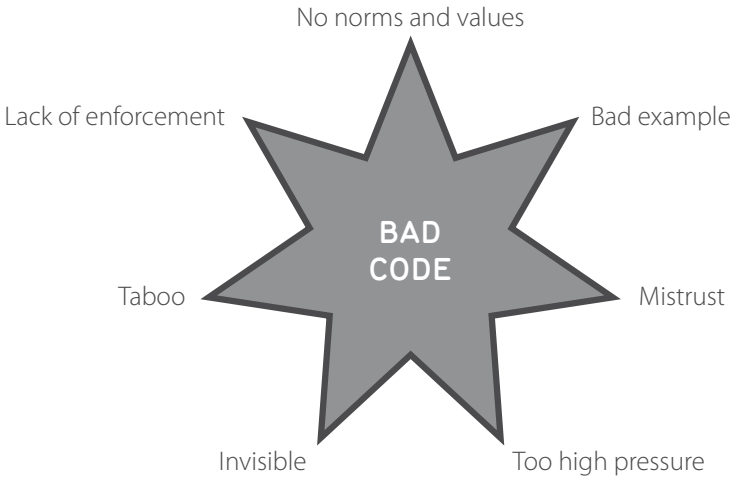
Figure 1. The Soft Controls Integrity Star: Prevention, Detection & Response (Vink & Kaptein)



The Seven Red Flags: The Bad Code



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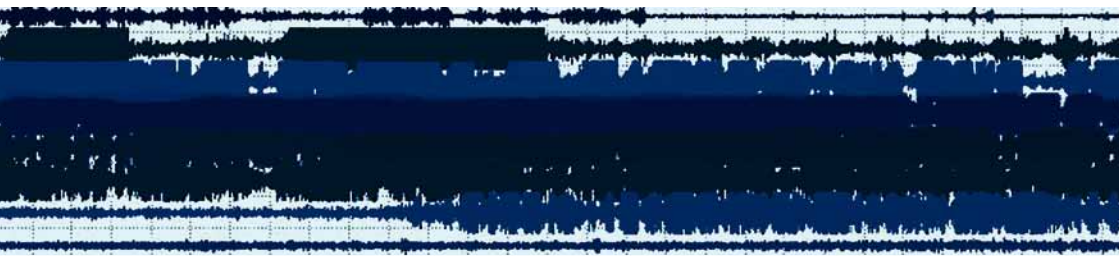

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