

ARTICLE 29 Data Protection Working Party



Brussels, 16 February 2006
JLS-C5 D(2006) 1925

Mr. Christopher COX
Chairman
SECURITIES AND EXCHANGE
COMMISSION
F 100 St NE
WASHINGTON, DC -20549
UNITED STATES

Subject: Whistleblowing schemes in the fields of accounting, account auditing, financial reporting and fight against bribery, financial corruption, banking and financial crime accounting.

Dear Mr. Cox,

I am writing in my capacity as Chairman of the independent EU advisory body on data protection and privacy which has been established by Article 29 of Directive 95/46/EC (so-called "Article 29 Working Party").

On February 1st 2006, the Article 29 Working Party issued, after intensive consultations with the industry and other stake-holders, an opinion concerning the application of EU data protection rules on whistleblowing schemes in different fields, including those covered by the Sarbanes-Oxley Act. A copy of this opinion is enclosed for further reference.

The Article 29 Working Party believes that this opinion will not only give guidance to the industry but will also greatly contribute to alleviate the concerns of companies as to whether EU data protection and privacy rules could prevent whistleblowing schemes from happening in Europe. If this were the case, EU companies listed on US stock markets or European subsidiaries of US companies listed on these markets would not have been in a position to comply with the whistleblowing requirements provided for by Section 301(4) of the Sarbanes-Oxley Act, and would be liable to important sanctions from the stock market authorities and from your Commission.

The adopted opinion makes it clear that EU data protection rules neither prevent companies from setting up such whistleblowing schemes nor from processing personal data reported by whistleblowers through these schemes.

It also refers explicitly to Section 301(4) of the Sarbanes-Oxley Act when finding that such processing of personal data may be legitimate.

However, the Working Party fixes some conditions on the functioning of these schemes with regard to relevant privacy regulations in the EU. These conditions refer, in particular, to the possibility to file anonymous reports, to the internal and external management of the scheme, and the periods of time during which the data may be retained in databases. The opinion also gives insight into how personal data collected in such a scheme may be transferred to third countries which do not provide an adequate level of data protection within the meaning of the EU Directive on privacy.

These conditions enabled the Working Party to strike a very difficult balance between the legitimate purposes of whistleblowing requirements, the risks at stake for the persons who may be incriminated in such schemes, and the social acceptability of such systems in Europe. In this respect it is important to notice that the positive feedback the Article 29 Working Party has received so far shows that the opinion is well understood and supported by private companies across Europe.

However, the Article 29 Working Party is also aware of the fact that companies dealing with such schemes are anxious to hear from the competent US institutions and bodies, including the Securities and Exchange Commission, whether this guidance also enables them to comply with the whistleblowing requirements imposed on them by the Sarbanes-Oxley Act.

I consider it important to report these remaining concerns to you with a view to furthering our transatlantic dialogue on all related questions and finding common positions for the benefit of our economies.

The Article 29 Working Party is clearly aware of the policy constraints which the SEC is subjected to. However, I would greatly appreciate your willingness to deal with this issue in order to reach a common understanding of the challenges we are facing. Therefore, I am convinced that you will share the same concern as the Article 29 Working Party that the companies concerned must soon be assured that the opinion makes it possible to comply with both EU data protection rules and the Sarbanes-Oxley Act whistleblowing requirements.

I remain of course at your full disposition to provide any further clarification that you might wish from the Article 29 Working Party on this issue and look very much forward to hearing from you.

Yours sincerely,



Peter Schaar
Chairman

Cc: Ethiopis Tafara, Director, Office of National Affairs of SEC,
Shannon Ballard, Lauren Saadat, US Dept of Commerce,
Yael Weinman, Elena Gasols, Federal Trade Commission,
Jurgen Tiedje, Mr. Philippe Pelle, Internal Market DG,
Dimitriou Dimitrios, Employment DG, European Commission

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