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Building an Effective Antitrust Compliance Program in Europe

By Dimitri de Bournonville (*dimitri.de.bournonville@tnt.com*) and Sean-Paul Brankin (*sbrankin@crowell.com*)

The need for effective compliance with European antitrust rules has never been greater. Over the last five to seven years, antitrust in Europe has undergone a revolution. The consequences for businesses involved in infringements have become much more serious. Fines are stratospheric and damages actions have become increasingly common. For individuals, criminal sanctions have finally become a reality. The increased effectiveness of enforcement agencies has also increased the risk of detection and punishment. And now a further reason for increased compliance has emerged: the global downturn is likely to make market manipulation look like an attractive way to maintain prices and profits to some.

Why It Matters

Stratospheric Fines and More

In 2008, the European Commission fined Saint Gobain a staggering € 896 million for its participation in the car glass cartel. This was no isolated example. The table on the next page compares total EU and US fines for cartel activity over the last five years. EU penalties far outstrip those in the United States and are increasing rapidly — the relative decline in 2008 included the record individual fine on Saint Gobain.

The European Commission no longer has a monopoly on large fines in Europe. National antitrust agencies are getting in on the act. In 2008, the German Bundeskartellamt imposed fines totaling over € 300 million and the UK's Office of Fair Trading (OFT) has announced fines totaling £ 375 million over the last 18 months.

Year	EU Fines (€ million)	US Fines (€ million)
2004	390	280
2005	680	270
2006	1,800	380
2007	3,300	460
2008	2,300	470

Source: European Commission and Department of Justice information

Actions for damages against infringing companies are also on the increase. A 2004 report for the European Commission found only 12 such actions under EU antitrust law since its creation in 1957. Since 2004, a similar number have reached the courts in the United Kingdom alone. Recent examples include an action for more than £ 100 million against switchgear manufacturers launched by the UK National Grid.

Last year, the threat of jail time for antitrust infringements became a reality for individuals in Europe when UK courts sentenced three businessmen involved in the marine hoses cartel to between 20 months and two and a half years in prison. The consequences for these individuals didn't end there. They were disqualified from acting as company directors for between five and seven years, and ordered to pay back more than £ 1 million of income. A second prosecution against British Airways executives involved in the fuel surcharge cartel has been announced and the OFT has said it will seek further prosecutions in appropriate cases.

Enhanced Enforcement

Two key events in the European enforcement revolution are the introduction of immunity from fines for whistleblowers by the European Commission in 2002 and the extension of powers to enforce EU antitrust law to national antitrust authorities in 2004. Both have lead to increases in the detection of infringements with more than 1,000 cases having been opened under EU law since 2004. Indeed, immunity has proved such an effective inducement to whistleblowing that the problem for enforcement agencies across European Union has become an inability to process cases quickly. This has in turn led to the introduction of fast track case resolution through settlement, freeing up resources for further enforcement — most recently at the EU level in 2008.

In tandem with improved detection has come improved cooperation between authorities. The marine hoses investigation involved simultaneous arrests and raids by the US Department of Justice, the OFT and the European Commission. Cooperation on individual cases both across the Atlantic and within Europe is now routine and daily, where only recently it was the exception.

Greater Incentives to Infringe

Historically, times of economic crisis have coincided with increases in cartel activity. This is no coincidence and the current downturn is likely to be no exception. Targets set in better times can become unachievable through normal competition. Or a steep decline in demand can create excess capacity industry-wide, making price rises impossible without collusion.

Although potentially profitable in the short run, anti-competitive activity creates a toxic legacy for the longer term. The temptation, when cost-cutting is the order of the day, is to scale back on compliance efforts. But prudent organizations will increase compliance activity in line with increased risk.

How to Go About It

Understand Your Goals

The first purpose of a compliance program is to avoid the risks associated with antitrust infringements, and the first task is to ensure that those risks are well understood throughout the organization. However, no program is perfect. Even the most effective cannot protect an organization from a rogue employee (or director). A well-designed program will therefore include procedures to detect infringements if they occur, and measures to put the company in the strongest possible position in the race for leniency.

Seek Support from the Top

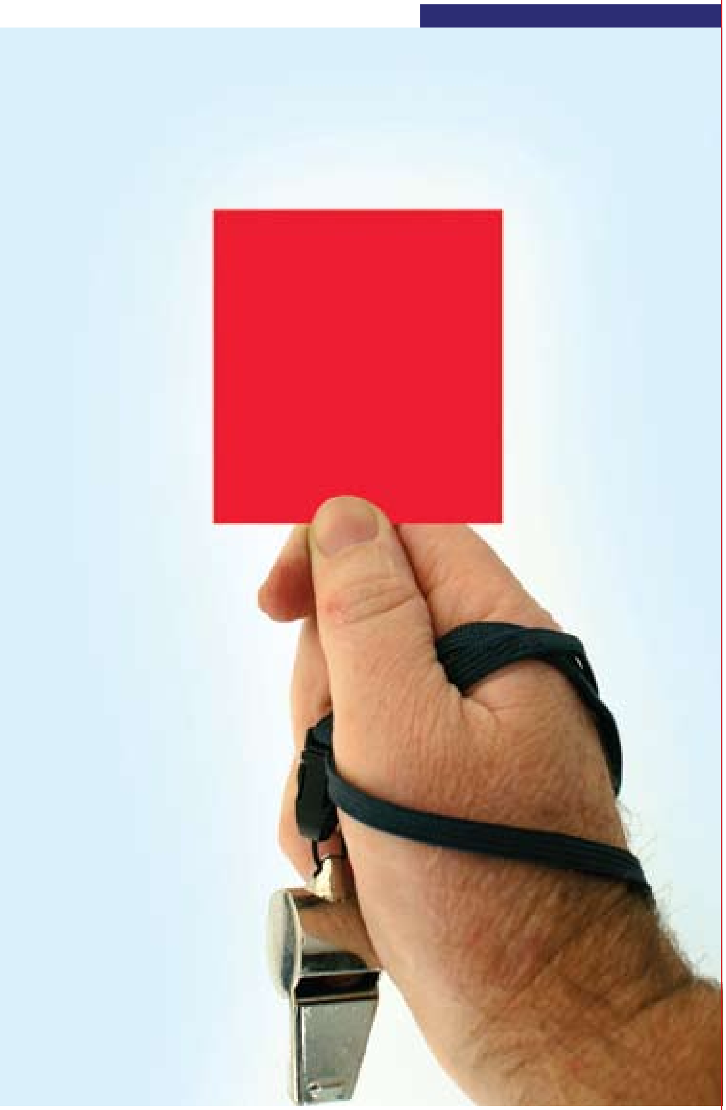
Involvement of the board and senior management is identified as a key element by those authorities that issue guidance on compliance.[1] The reasons are clear. For compliance to be effective, it needs to become part of the way a company does business. Without support from the very top, this is unlikely to happen. A program that lacks appropriate support will not succeed and may become a liability rather than an asset. The European Commission has in the past increased fines on a company that failed to give effect to undertakings in its own compliance program.[2]

Ideally, the commitment of senior management should be visible. Communications expressing that commitment are helpful. Attendance of senior representatives at staff training is even better. Setting up a regular system for reporting action on compliance to the board is another useful way of sending the message.

Make It Relevant

The complexity of antitrust rules and the risk of training overload are real challenges in the compliance context. To be effective, compliance training must be straightforward, short and above all, relevant. That can only be achieved through careful preparation. The first step is to identify key areas of risk within the business. Focus on those activities:

- in markets where there have been previous infringement findings (whether in European Union or not);
- involving contact with competitors (e.g., attending trade association meetings);
- in which the company may be dominant;
- in regulated sectors; and/or
- that are subject to particular media scrutiny.



Focus on those staff that have:

- contact with competitors (through trade associations or otherwise);
- the ability to set prices or discount levels;
- responsibility for specific client accounts; and/or
- legal or compliance responsibilities.

In higher risk areas, live interactive training is advisable but it must be tailored to the needs of the specific group targeted. Legal teams need to respond to questions and issue spot, so they must know what the law is in some detail. Others need fewer specifics and more practical guidance. Identify the issues that the individuals you're talking to actually face and deal with those. Don't waste time on issues that are not relevant: Don't address abuse of dominance at length in areas where there is no risk of being dominant, or how to deal with competitor contacts in areas where there are none. Make sure you create opportunities for questions and discussion, and an environment where staff are comfortable to make use of them.

Documentation should be short and focused. Rather than a comprehensive manual, think about separate issue-specific documents (e.g., attending trade conferences, prices and rebates, etc). Keep each one short, two or three pages ideally, and make sure the language is non-technical.

Outside counsel are often a useful source of support in terms of documents and training, but make sure that anything they provide is properly tailored to your needs. Material that betrays a failure to understand the way the business really works will not command respect.

Make It Memorable

Training that does not stick in the mind is wasted. But at the same time, horror stories of gigantic fines and prison sentences may not provide much guidance on how to stay compliant in practice. Anything that makes the training more concrete is a great help. The covert recordings of participants in the lysine cartel made by the FBI provide a very real and even (unintentionally) funny example of what not to do. Closer to home, the case law of the Commission and national authorities are full of examples of communications that should never have been sent. Emails quoted in the OFT's Toys decision are a particularly fine example.[3] A meeting with agency officials is also an excellent way of bringing home the reality of the issues. Finally, an opportunity to work through case studies starts turning theoretical lessons into practical knowledge.

Incentive Setting

Part of making a compliance program real is giving it real teeth. Attending and updating compliance training should form part of the appraisals process. Annual certification of non-involvement in anti-competitive behavior is a useful reminder of compliance obligations and has been known to flush out potential problems.

Employment contracts could include provisions making involvement in infringements of antitrust law a serious disciplinary offense that potentially triggers dismissal. An obligation to cooperate with the business in the event of an investigation may also be worthwhile. Account needs to be taken of the potential for a conflict of interest between a company that wishes to pursue leniency and an individual employee who may face criminal sanctions. Creating a contractual framework that involves both potential carrots (payment of legal fees, retention of pension rights) as well as sticks (dismissal, liability in damages) can avoid the risk of a business finding itself unable to control its own destiny because an employee refuses to cooperate.

Similarly, consideration should be given to creating hotlines and internal whistleblower programs for individuals wishing to seek advice or provide information about possible infringements. In addition to reducing the risk of infringement, such mechanisms make it more likely that issues come to light early, putting the business in the best position to seek leniency if appropriate. The ability to guarantee anonymity to users is key and involving outside counsel may be helpful here. Note that privacy issues may arise and, in some jurisdictions, works council approval may be needed.

Maintain the Effort

Compliance is an ongoing process and compliance efforts need to reflect that. Some of the measure already mentioned, including annual certification and the submission of regular board reports, will help. Access to online tools may also assist. On top of that, consider repeating compliance training annually or biannually, at least in sensitive areas — and remember to refresh the material and change the case studies.

Think About Privilege Issues

Finally, it is worth remembering that under EU law, the work of in-house counsel does not attract legal professional privilege and, although material prepared solely for the purpose of seeking advice from external counsel may attract privilege, this does not necessarily extend to materials prepared in the context of a compliance program.[4] As a result, involving outside counsel in research and information gathering from the start may be advisable.

Compliance Is Not a Luxury

A compliance program is a substantial, ongoing commitment. It will necessitate a significant commitment of time and resources from individuals at all levels of the business if it is to be successful. The temptation, in the current climate, may be to regard such efforts as an expensive luxury. The reality in Europe is that they have never been more necessary, and prudent organizations will see them not as a cost, but as an investment in risk management.

Notes

1. See, e.g., the US Federal Sentencing Guidelines, Chapter 8, Part B.2 (available at *www.ussc.gov/2008guid/GL2008.pdf*), the Australian Competition and Consumer Commission guidance (available at *www.accc.gov.au/content/index.phtml/itemId/54418*) and OFT guidance (available at *www.oft.gov.uk/advice_and_resources/resource_base/legal/competition-act-1998/compliance*).
2. *British Sugar*, OJ L 76, 1999, at p. 1.
3. *Hasbro*, OFT Decision No. CA98/8/2003, see e.g. para 73 (available at *www.oft.gov.uk/shared_oft/ca98_public_register/decisions/hasbro3.pdf*).
4. Cases T-125/03 etc *Akzo Nobel v. Commission* [2007] ECR II 3523, at para 127.

Company Restructuring and the Impact on Employment — Collective Redundancies

By Emmanuel Plasschaert (*eplasschaert@crowell.com*) Yves Heijmans (*heijmy@cpchem.com*), Chevron Phillips Chemical Company, and Frederik Van Remoortel (*fvanremoortel@crowell.com*), Crowell & Moring, Brussels

The development of a common market in European Union has, almost from the beginning, led to various types of company restructurings, such as closures, insolvencies, outsourcing and delocalization, and (cross-border) mergers and acquisitions. Whereas restructurings and the need to adapt to changing employment circumstances have been present for many years, they are the centre of interest today because of the economic and financial crisis — where restructurings, in particular those involving collective redundancies, seem to be becoming an almost daily occurrence.

The European Commission has recognised the impact and value of restructuring through a range of developments including, for instance, the establishment of a “Restructuring Forum” and closer supervision by the “European Restructuring Monitor.” The EU Lisbon strategy, inter alia, calls on European Union and its member states to tackle the negative consequences of restructuring by adopting active labour market policies, encouraging lifelong learning and anticipating changing circumstances in industrial sectors.

The publication "*Restructuring in Europe Report*"[1] by the European Commission on 16 December 2008, has put the issue in the spotlight again. It is the first of a series of reports dedicated to regularly analysing the restructuring process and its effects on employment.

The report mentions that from the beginning of 2002 to the end of 2007, over 7,000 cases of large-scale restructuring were recorded in the member states. Until now, these cases equate to just over 2.9 million jobs. It is to be expected that the effects of the economic crisis in 2008-2009 will not make these figures look any better. It is therefore very likely that the legislation discussed below will become even more important.

EU Legislation

In the framework of restructurings, EU legislation aims to ensure that all parties concerned are involved at various stages of the restructuring process and that workers affected are protected. Various EU directives on the matter all pay particular attention to workers' information and consultation. They include:

- The directive on employer insolvency,[2] which aims to provide minimum protection for employees in the event of the insolvency of their employer. It obliges member states to establish an organisation which guarantees the payment of employees' outstanding claims. Moreover, member states must take the necessary measures to ensure that non-payment of compulsory contributions due from the employer, before the onset of its insolvency, will not adversely affect employees' benefit entitlements in so much as the employees' contributions were deducted at the source from their remuneration.
- The directive relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses[3] in particular provides that rights and obligations that arise from an employment relationship that exists on the date of a transfer must be transferred from the transferor to the transferee. It also provides for prior consultation with and informing of workers' representatives before a transfer occurs.
- The directive relating to collective redundancies,[4] which is discussed below.
- The directive establishing a general framework for informing and consulting employees in the European Community,[5] which sets forth general obligations for consultation and information of worker representatives' on strategic development within companies; foreseeable changes in employment; and any decision with an effect on employment contracts. It applies to companies with at least 50 employees or establishments with at least 20, and provides that employee representatives be informed and consulted on developments in the undertaking's economic situation, development of employment and decisions likely to lead to changes in work organisation or contractual relations.
- The directive providing for the establishment of a *European works council,* or a procedure for informing and consulting employees in community-scale undertakings and groups.[6]
- Three directives on involvement of employees in companies adopting the European Company Statute, the European Cooperative Society Statute or deriving from a cross-border merger.[7]

As with all directives, they are transposed into national rules, and it is up to the competent national authorities to ensure the correct and effective application thereof.

Given the current economic and financial situation, we hereafter highlight the most important principles of the Collective Redundancies Directive.

Collective Redundancies

The Collective Redundancies Directive provides that employers who envisage collective redundancies must provide workers' representatives with specified information concerning the proposed redundancies and must consult in good time to reach an agreement.

These consultations should cover ways of avoiding or reducing the redundancies, and of mitigating their consequences by recourse to social accompanying measures aimed at, in particular, aid for redeployment and retraining of the redundant workers.

The directive also provides for notification of the public authorities for any projected collective redundancy and requires that these collective redundancies take effect no earlier than 30 days after that notification.

We will, as an illustration, focus hereafter on Belgium. But as the applicable rules are based on the above EU directives, rules in other European member states are likely to be similar.

In Belgium, collective dismissals are those carried out over 60 days, affecting:

- at least 10 employees in an undertaking employing more than 20 and fewer than 100 employees;
- at least 10 percent of the employees in an undertaking employing an average of at least 100 and fewer than 300 employees; or
- at least 30 employees in an undertaking employing an average of at least 300 employees.

Collective bargaining agreements may provide for lower thresholds.

The relevant Belgian rules apply to any undertaking that is a technical business unit under Belgian law that employed 20 or more employees in the preceding calendar year. It therefore does not need to be a separate legal entity, but should enjoy a level of economic and social autonomy. This notion has been extended to any division of an undertaking.

Consequently, employers need to closely monitor their intention to terminate employment agreements and the frequency with which they do it. At company and at department level, employers should ensure that even when they are not considering a "collective dismissal" sensu strictu, applicable national procedures are being followed.

The information and consultation procedure should be initiated before the actual decision to proceed with a collective dismissal — or any public announcement — is made.

In order to complete the procedure, the timetable for collecting and consulting about the information, including termination of the individual employment agreements, should realistically take between two and six months.

> "Poorly managed restructurings may also result in a loss of image for the company, or even for the entire sector, and may create a general resistance to change, while well-managed restructurings can result in new challenges and opportunities."

As said, non-respect of applicable national rules may lead to criminal sanctions (fines and, in theory, prison sentences). In addition, in Belgium, trade unions and employee representatives may also obtain an injunction ordering information and consultation procedures to be carried out properly and preventing the redundancies from taking place until this happens. Such a delay carries serious financial consequences for the employer.

Employees can also bring a claim in cases of non-compliance. If found by a Belgian court to have breached these procedures, an employer may be ordered to pay the employees' salary from the date of termination until 60 days after the renewed notification to proceed with the redundancies. Again, this can mean that a new procedure would need to be started and completed.

Collective dismissals frequently occur in the context of the closure of an undertaking. Here, "closure of an undertaking" is the cessation of the main activity or of one of its divisions, where the number of employees is reduced to less than 25 percent of the total number employed on average during the calendar year before the calendar year in which the activity stops. In such circumstances, additional procedures are to be complied with alongside the collective redundancy procedures. Closure of undertaking procedures also includes giving government authorities notifications that are different to the collective dismissal notifications. Employers therefore should carefully work out a timetable before commencing any such proceedings, combining obligations under the various legislation.

Although this is not based on any legal obligation, it is usual in Belgium (especially since the Renault debacle some years ago) that, in case of restructuring of a company or group, a so-called "social plan" is negotiated with the employees or their representatives. Under this plan, the parties agree on specific conditions accompanying the restructuring (e.g., agreeing that the employees are entitled to the normal termination indemnities and obtaining some additional benefits). Such social planning is often useful in order to try and limit negative reactions from the employees. This planning can also take into account other obligations of the employer such as offering outplacement services to employees above 45-years-old. Employers should, however, make sure that when agreeing on a social plan, it is not based *i.a.* on criteria such as age or the health condition of employees, which may be in violation of discrimination laws.

Restructuring Requires a Comprehensive Approach

Restructuring that is not properly anticipated can have various negative effects, both from a financial and an employee management perspective. Poorly managed restructurings may also result in a loss of image for the company, or even for the entire sector. It may also create a general resistance to change, while well-managed restructurings can even result in new challenges and opportunities.

Consequently, employers should develop an integrated and comprehensive approach to restructuring — starting from its planning, putting forward a detailed timeline indicating responsibilities of the various actors — and ending with its evaluation, tackling the various problems and legal obligations under EU law as implemented by the national legislations of the operations concerned, and consulting and involving in due time all the relevant actors and stakeholders. eb.

Notes

1. Cfr. *http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/793&format=HTML&aged=0&language=EN&guiLanguage=en.*
2. Directive 2002/74/EC amending Council Directive 80/987/EEC, OJ L 270 of 08.10., p.10-13.
3. Consolidated by Council Directive 2001/23/EC of 12.3.2001, OJ L 82 of 23.3.2001, p. 16.
4. Consolidated by Council Directive 98/59/EC of 20.07.1998, OJ L 225 of 12.8.1998, p. 16.
5. Directive 2002/14/EC of the European Parliament and the Council of 11.3.2002, OJ L80 of 23.3.2002, p. 29.
6. Council Directive 94/45/EC of 22.9.1994, OJ L 254 of 30.9.1994, p.64.
7. Council Directive 2001/86/EC of 8 October 2001 supplementing the Statute for a European Company with regard to the involvement of employees, OJ L294 of 10.11.2001 p.22; Council Directive 2003/72/EC of 22 July 2003 supplementing the Statute for a European Cooperative Society with regard to the involvement of employees, OJ L207 of 18.08.2003 p.25; Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-border mergers of limited liability companies, OJ L310 of 25.11.2005 p.1.

TABLE 1: WHEN PUBLIC PROCUREMENT PROCEDURE APPLIES

The contract value thresholds which an invitation to tender must be published throughout European Union are laid down in EU directives. The following table provides information on the nature of a contract, the contract value (thresholds) and the relevant EU directives.

Current thresholds (in EUR, excl. VAT) - since 01 Jan 2008		
Type of Contract	Directive 2004/17	Directive 2004/18
Supplies and Services	412,000	133,000[2]
	750,000[1]	206,000[3]
Works	5,150,000	5,150,000
Public Works Concessions	n/a	5,150,000
Service Design Contests	412,000	133,000[2]
		206,000[4]
		206,000[5]

1. The thresholds relevant to publication of a periodic indicative notice.
2. The threshold relevant to contracts awarded by central government authorities.
3. The threshold relevant to contracts: a) awarded by CAs which are not central government authorities; b) covering certain products in the field of defense awarded by the central government authorities; concerning certain services in the fields of research and development (RTD), telecommunications, hotels and catering, transport by rail and waterway, provision of personnel, vocational training, investigation and security, certain legal, social and sanitary, recreational, cultural and sporting services.
4. The threshold relevant to other CAs.
5. The threshold concerns all CAs where the contests concern certain services in the fields of RTD, telecommunications, hotels and catering, transport by rail and waterway, provision of personnel, vocational training, investigation and security, certain legal, social and sanitary, recreational, cultural and sporting services.

European Procurement and Secrecy

By Simon Vumbaca (*sv@simonvumbaca.com*)
and Charles C. W. Dunn,
Parametric Technology Corporation (PTC)

A recent report (December 2008) highlights that public procurement is a slower process and more costly than private sector procurement. The said reason is the careful specialized attention needed in respect to tight public procurement policies and negotiation behaviors. This also raises the costs involved in a public procurement transaction by an average of 28 percent compared to a similar transaction in the private sector.

Yet in times of financial uncertainty, in-house counsel all over the world will be increasingly involved in public procurement, having to balance — almost as alchemists — internal procedures, standard agreements and specific legislations. Trying to combine two elements clearly not engendered to be assembled in the first place is a very tricky exercise, all help being welcome.

Moreso, in-house counsel are likely to be under special pressure from their colleagues to provide fast turnaround on what is often assimilated to a “normal” big deal in the forecast reports, despite the level of difficulty and inevitable timetable involved in public procurement deals.

Public procurement represents 16.3 percent of the European Economical Community GDP, and each year supply and public works contracts worth around € 300 billion are published by public authorities in the European Union. That doesn’t take into account private sector procurement that falls under the public procurement regulation (see table 1 for when a private procurement falls under EU PP rules), which probably represents another substantial amount.

Just to give you an idea of the likelihood of you having to deal with public procurement: in 2007 alone, the United Kingdom generated 54 billion, becoming the largest European country exporting services. Most of it was the result of European Tender and Public Procurement. And 2009 projections are on the rise, despite the generally gloomy European economy.

Public Procurement: A Perfect In-house Headache?

It is safe to say that public procurement represents a substantial amount of money available, quite frankly, to any company that dares to respond and comply with this sui generis procedure.

Being such an important revenue-generating contract typology, European institutions had to make sure a degree of fairness and impartiality was secured for all participants to any given procurement. After an initial trial and error period, mainly corrected by the rulings of the European Court of Justice, the harmonisation of procedures for concluding contracts had to be addressed and today it is regarded as a major achievement of the European market fundamentals.

In practical terms this means that a very pragmatic approach has been used, and being up-to-date on the matter can be very difficult for anyone in charge of a legal department structured to facilitate more standard deal-making. But there is more: trial and error also meant a set of relatively complex elements to be combined for the contract to make legal, economical and long-term sense.

The good news from the European legislation is to encourage competition between companies by means of transparent selection procedures.

The bad news is that this has created a set of procedures and behaviors that deviate from the conventional negotiation procedure most of the participants are used to, and have adopted as business model: A perfect in-house counsel headache. But who could resist being part of such interesting and rewarding deals as public procured ones are? Not many.

Reinforced by the legislation changes and the interesting amounts awarded via public procurement, the most acute companies in each respective industry have — or will be — involved in a public procurement or tender at some point during their growing European presence.

This good-spirited and competitive process will — and does — “sort out the great from the greater.”

Atypical Negotiation Procedure

The objective to grant equal treatment to all participants (known as economical operators) to a tender means that all of them have to follow exactly the same rules.

It also means that the final awarding decision for the contract cannot result from unfair advantage granted to one of the parties.

Though a simple concept in itself, this principle effectively means that the negotiation of the terms and conditions of a tender are far from being typical in private commercial business.

Because of the very human nature of important transactions, the European legislator also has to make provision for redress procedures against awarding authorities less rigorous in their respect for the procedural obligations.

The ability of a party to impose a certain set of standard terms of business is less likely to succeed, even if apparently more pertinent to the reality of the transaction than the offered ones. This causes real blocking situations both from a business and legal point of view, as what is therefore asked from in-house legal counsel is to quantify the real impact such risk can have on the overall revenue generated.

Be under no illusion: There are very great rewards available, but they only come with great commitments and security from the successful companies. A very tight penalty structure will almost always be part of any final contract, followed by equally tight error margins and correction procedures that will make any respondent nervous about the magnitude of the commitment. The procedure is controlled but fair, and therefore worth the effort.

There is little place to discuss or negotiate concepts such as licensing terms, governing law, the existence of penalties, indemnification, termination and other exit clauses. There is rarely room to negotiate other concepts such as "It is free, therefore I have no liability" or the like.

You can find exceptions and negotiate. But you can only seriously do so based on the fairness and reality of the request, its consequences and the overall vision the tender set-off to address.

Because a tender state what is expected from the economical operator up front and for the participant to decide if it is compliant with, there often is room for adjustments, not radical changes. Public procurement level of commitment expected, and therefore demanded, is one of the utmost severity.

It is also a common mistake to believe that public procurement or European tenders only happen between private companies and European institutions. It doesn't. (See Table 1).

Secrecy

In a recent survey, the 2008 IACCM, (International Association for Contract and Commercial Management) companies cited confidential information among the top 10 of the top 30 most negotiated terms in 2007. Companies also cited confidential information as a top 10 in the previous two years. It is clear that the actors of a tender process regard this matter as a priority.

Because by definition public procurement — or European tender, as it was known — deal with transactions of substantial amounts, and normally covers multi-year commitments, the information, knowledge, technology and strategy shared as part of the process are of the utmost secrecy and importance for the participants.

The commitment is normally also the basis of future commitments that will shape the company's growth in its respective products and market credibility.

A sense of unease in disclosing very confidential information at an early stage of a negotiation of this nature is present, particularly if it is as early as when responding to a tender request.

This is also reinforced by the knowledge that most of the other participants to the same tender are very likely to be your usual market competitors.

Suddenly a greater degree of protection of any confidential information disclosed during a public procurement process becomes even more important.

So, how safely is your information disclosed when responding to a European tender? Should you ask the tendering authority to sign your standard NDA? Is it even possible? Can you request to modify — at this stage — an already complex procurement process? What are the real risks?

The Principle: "If It Ain't Broke, Don't Fix It"

Any European tender, regardless of its procedure nature (open, restricted or negotiated) does contain some confidentiality protection.

What is covered under the "confidentiality umbrella" is a general concept of safeguard of the confidentiality and secrecy based on a Court of Justice recommendation stating the importance "...to ensure the protection of fair competition or of the legitimate interests of the economic operators that is required by community law."

This protection does covers business secrecy, as recently reconfirmed by the European Court of Justice's ruling that

> "There are very great rewards are available, but they only come with great commitments and security from the successful companies."

stated that protection of fair competition and legitimate interests of the economical operator also meant the giving of "access to information which could be used to distort competition or to prejudice the legitimate interests of economic operators who participated in the contract award procedure concerned."

Overall, there is already a degree of protection for the confidential information.

But this does not seem to be enough for most private companies. Though there is absolutely nothing wrong in wanting to be protected, this request has created all sorts of problems. On several occasions, the insistence on the addition of specifically drafted language, which is not really required, has led to the disqualification of the requesting company.

So, Is It Possible?

Yes. But to avoid any confusion, in-house counsel must consider what type of public procurement procedure the company is involved with, as this will define the risk involved.

If the European tender is under the so-called restricted procedure, any request of additional language is really difficult as its inclusion modifies the tendering process itself. Any amendment, if agreed and regardless of its nature, must apply to all the economical operators. Therefore, such request would oblige the public authority that accepts the request to notify all other potential participants of the changes. An omission to do so would possibly be enough to invalidate the entire tender. Additional changes then requested by another economical operator that suddenly sees his or her understanding altered could also mean

SOME LESSONS LEARNED ON PUBLIC PROCUREMENT

When does the public procurement procedure apply? Really it applies to any deal, even between apparently private companies, offered under a tender structure above a certain amount. The regulations apply automatically to the public sector. That is any central government, local authorities, and others including corporations if mainly funded by the public sector or subject to its management supervision, or mainly appointed by the public sector and not having an industrial or commercial character ("public authorities"). But it does also apply where a private body acts as an agent for the public sector or where more than 50 percent of funding is provided by the public sector in relation to certain contracts connected with some building works. Think of most of the big defense companies, energy operators, some automotive conglomerate and you see the extent of it.

How do I find public procurement deals? Each year supply and public works contracts worth about EUR 300 billion are published by public authorities in European Union. The supplement to the *Official Journal* publishes over 1,000 tenders containing invitations to tender on a daily basis. Each tender will define eligibility criteria. Also you will be required to apply to get each specific procurement rules. At times you can receive an invitation to tender. If so check the combined effect of the specific rules and the general procedure, as even if not specifically referred to, it will be applicable.

How long, on average, does a public procurement negotiation take? There is no standard answer. On average the time will be equally spent clarifying technical, commercial and legal elements of the response. In some cases additional internal qualification work is required. Occasionally it can last more then 12 months, but it is in really exceptional circumstances. On average it lasts between three to six months, that is from initial contact to awarded and executed agreement. Also, most tenders will have a strict agenda and most of the extra time will be spent after you are shortlisted, once you really have a chance to close the deal.

What is the biggest danger, from a legal perspective, of a public procurement negotiation? Though every deal is different, the major dangers are (1) not understanding and define the entire complexity of the commitment required throughout the entire term of the contract — it can be a 10-year contract; (2) regard some points as minor ones, avoiding to clarify them; (3) not involving legal in all the negotiation process, but only to the contract part of it — that normally lead to "surprises" and additional requests — as everything in a procurement negotiation is legal.

Why do rules that are apparently simple in concept seem to create so much work in practice?: The key word is "apparently" simple. The principles that generates the rules are simple, the procedure far less, hence it can cause additional trouble. For companies that focus on quarterly results, as they want to recognize cash as soon as it is received, it can be even more complex to merge liability and risk over a long period and short term revenue. Also the exit clauses, penalty and other escalation and compensation procedures normally part of the final contract means that it may not be permitted to recognize revenue by the revenue recognition rules as interpreted with the relevant contract terms.

additional time spent on this topic and, effectively, the multiplication of possible grounds to invalidate the entire tender itself.

If it is a negotiated or open procedure, any economical operators could ask — before responding to the tender and provided there is sufficient reasons to do so, for the addition of more severe confidential information terms.

It is then for the public entity with whom you are tendering to decide on the matter and define if it is willing to accept such additional language. The rejection of additional confidentiality terms at this stage does not disqualify the economical operator.

How Safe Is the Disclosed Information?

In some exceptional cases, the receiver could disclose the confidential information. The most notable case is when an economical operator decides to challenge the awarding of the contract, based on a breach of fairness and impartiality.

Two principles can justify the disclosure of confidential information in a European tender: adversarial principle and fair justice principle. These two principles will likely manifest themselves when the tender has already been awarded and a rejected economical operator challenges the decision.

According to the current rules, the relevant National Authority of the Country where the procedure has taken place (normally the country of the entity at the origin of the tender) will have to decide if the tender has been fairly adjudicated.

To do so, information of a confidential nature has to be provided to the national authority. So far the information that companies disclose to a public authority also bind the secrecy of the tender, in a similar exception of the normal disclosing to a court, standard in most NDA's.

Because of the Fair Justice principle, though, some challenging economical operators demand and pretend to have access to such information to get a complete and transparent view of the procurement awarding process.

The immediate conflict is: which one of two very essential principles should prevail? Is it adversarial or is it fair justice?

The consequences of that answer are immediate for the reality of the business involved. In a simplified manner, it boils down to the following:

1. If the adversarial principle prevails, then the confidential information shall not be disclosed, as it would breach the principle under which the information has been made available in the first place.
2. If the principle of fair justice prevails, the appellant must be given the entirety of the parameters used by the authority that took the decision now challenged, which should contain also confidential information.

A pragmatic judiciary has introduced a third option.

As early as 1986, the European Court of Justice Ruling (*AKZO Chemie v Commission c-53/85*) established the protection of business secrets as a general principle.

Such principle was considered acquired and even confirmed by the European Court of Human Rights, involving matters of a criminal nature in the 2000 case *Rowe and Davis v The United Kingdom,* whereby the affirmed principle was confirmed and completed with the following precision: "in some cases it may be necessary for certain information to be withheld from the parties in order to preserve the fundamental rights of a third party or to safeguard an important public interest."

Does this imply that in other cases it has to be disclosed? If yes, who has to decide and according to which criteria?

Public procurement procedures and rulings have since established that it is for the national authority to determine the nature of the information.

Today the situation, also confirmed by the February 2008 ruling *Varec SA v Belgian State*, is that any national authority in charge to review the contract award procedure and the contracting authority "must ensure that confidentiality and business secrecy are safeguarded in respect of information contained in files communicated to that body by the parties to an action, particularly by the contracting authority, although it may apprise itself of such information and take it into consideration. It is for that body to decide to what extent and by what process it is appropriate to safeguard the confidentiality and secrecy of that information, having regard to the requirements of effective legal protection and the rights of defence of the parties to the dispute and, in the case of judicial review or a review by another body which is a court or tribunal within the meaning of Article 234 EC, so as to ensure that the proceedings as a whole accord with the right to a fair trial."

Additional protective confidentiality wording can be requested in a public procurement procedure at an early stage (ideally no later than before submitting the response). Any later and you are exposed to the risk for a competitor to challenge, not the confidentiality itself, but the exception to a defined procedure that could give unfair advantage to you. This could be sufficient to invalidate the tender, regardless of the reality or gravity of the matter you are trying to protect.

Now at times, some extra protection will be needed. If so, there must be a serious enough reason to ask for extra specific confidentiality language. Be aware of the real opposability of such a request. To date, in case of conflictive outcome, the national authority in charge to review the contract award procedure can simply re-qualify the nature and importance of the secrecy, regardless of your understanding when disclosing such information as part of your tender.

If the national authority decides to re-qualify, it will have to evaluate the extremely serious damage which could result from improper communication and give to the economical operator concerned the opportunity to plead that the information is in fact of a confidential nature and/or a business secret.

Combating Copyright and Trademark Infringements on Online Platforms

By Yves Heijmans (*heijmy@cpchem.com*), Chevron Phillips Chemical Company, and Christoph De Preter (*cdepreter@crowell.com*), Crowell & Moring LLP, Belgium

Online internet protocol infringements can take many forms. Some examples are: illegal sharing of copyright protected songs via peer-to-peer software; illegal postings of a copyright protected movie or clip on a video platform; and the sale of parallel imports or counterfeits on auction websites. All these infringements have one thing in common: They can be committed, but through the existence of an intermediary, which can take many forms. In the previous examples, it is:

- the internet access provider (e.g., Deutsche Telekom) availing the internet connection necessary for the file sharing;
- the video platform (e.g., YouTube) on which the movie or clip is posted; and
- the auction website (e.g., Ebay) on which the infringing goods are offered to the public.

Holders of copyright and/or trademark rights — whether it be collecting societies, record companies or manufacturers of luxury or consumer goods — are increasingly interested in combating online infringements of their IP rights by attacking these intermediaries rather than the individual infringer. The reasons speak for themselves: online intermediaries are easily identifiable, often have tangible assets, and are (sometimes wrongly) thought to be technically able to stop infringements, either by removing (reactive) or filtering (proactive) infringing material.

Three Key Questions

An IP right holder wishing to take action against an online intermediary must first ask itself what it wants to achieve:

1. damages for past infringements or collaboration by that intermediary in combating,
2. current, or
3. future infringements.

Liability for past infringements. The liability regime for online intermediaries is set forth in Articles 12-14 of the Ecommerce Directive 2000/31/EC. A distinction must be made between intermediaries merely providing a connection or network through which infringing content is led (the "mere conduit" of Article 12 — in our examples above, Deutsche Telekom) and intermediaries actually storing third-party content on their network on a permanent basis (the "host" of Article 14 — in our examples above, YouTube or Ebay).[1]

The law is clear: To the extent certain basic conditions are fulfilled, IP right holders cannot hold these intermediaries

liable. In other words, the Ecommerce Directive provides for a "safe haven" regime.

In the case of the mere conduit, the only condition is passiveness: The mere conduit will only be exempt from liability if it remains entirely passive and in no way interferes in the communications on its network. Whether the mere conduit is knowledgeable or not about the fact that illicit activity takes place on its network is irrelevant.

In the case of the "host," there are two conditions: The host must not be aware of facts or circumstances from which the infringement is apparent, and the host must act expeditiously to remove or disable access to the infringing materials or products upon obtaining awareness.

These rules seem clear at first sight, but have given rise to tremendous litigation. For the mere conduit, the question has been raised, for instance, whether an internet access provider operating an anti-virus firewall does not remain entirely passive and therefore loses the benefit of the safe haven. The safe haven benefit is not lost since virus filtering is a mere technical intervention that does not effect the information transported by the mere conduit.[2]

For the host, the question has been raised whether intermediaries such as YouTube or Ebay may lose the benefit of the safe haven because they derive financial benefit from the infringing content that was hosted, or because they provide a certain "look and feel" on the platform whereby the infringing content is arranged and presented in a certain way. French courts have in the past been very favorable to such arguments,[3] but this case law has been later on reviewed[4] and seems to stand counter to other case law in the Benelux and Germany[5] as well as to the clear wording of the Ecommerce Directive.[6] For the host, the question has also been raised when the removal or disablement of access should be considered as "expeditious." Courts and legal authors seem to consider this with some degree of reasonableness and hold that the reaction speed must be commensurate with the graveness of the infringement.[7]

It should be noted that, once it is established that the benefit of the safe haven is not open to a given mere conduit or host, this does not necessarily imply that the intermediary concerned is liable — of course, there needs to be a legal basis for liability under national law. For IP infringements, the intermediary may in some countries be held liable on the basis of contributory infringement. In other countries, the intermediary may be held liable on the basis of tort law: German, Dutch and Belgian courts have held that intermediaries have some kind of "duty of diligence" ("*zorgvuldigheidsverplichting*") and are simply liable because of the market disruption caused by their activities ("*Störerhaftung*").[8]

Intermediary collaboration to stop current infringements.
The considerations above immediately give the response to the question whether intermediaries can be forced to end IP infringements that are ongoing on their networks and/or platforms. Again, the distinction should be made between mere conduits and hosts.

Mere conduits do not have any incentive or ground for ending ongoing IP infringements. As a matter of fact, whether they become knowledgeable or not of these infringements, they are in any event protected from liability by the safe haven-provision in Article 12 of the Ecommerce Directive. In addition, mere conduits even have a disincentive from ending ongoing infringements: If they would do so, they could arguably lose their "passiveness" and lose the benefit of the safe-haven provision.

Hosts, on the contrary, have an interest in expeditiously ending infringements once they are formally put on notice by an IP rights holder — otherwise, they risk being held liable.

Intermediary collaboration to prevent future infringements.
The question whether mere conduits and hosts can be forced to prevent future infringements is a hotly debated topic. It is our opinion that, in principle, they cannot. As a matter of fact, Article 15 of the Ecommerce Directive provides that the host and mere conduit intermediaries set out above shall not be imposed "*a general obligation… to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.*" It is striking, however, that national courts tend to neglect — and therefore violate — this provision.

As far as mere conduits are concerned, the Brussels Court of First Instance ordered internet access provider Scarlet to implement a filtering solution to prevent subscribers from downloading copyright protected material.[9] The French Supreme Court also recently confirmed a court order obliging an internet access provider to indefinitely block access to infringing content.[10]

As far as hosts are concerned, the German Supreme Court already ruled in 2004 that an online auction platform should not only remove counterfeit products *already* offered on an auction platform, but also *future* postings of identical products. In France, Google was similarly convicted for not removing material that had been posted anew after it had been previously removed.[11] Also in Belgium, a platform operator was obliged to prevent future infringing exchanges via its platform.[12]

Interestingly, a recent decision from the Brussels Court of Commerce in the pan-European *Lancôme c. Ebay* litigation correctly applies the Ecommerce Directive.[13] The Brussels Court refused to impose a monitoring obligation on Ebay, despite the fact that the IP Enforcement Directive 2004/48 provides for the possibility to impose measures upon intermediaries. The Court held that any such measures may in any event not come down to ignoring Article 15 of the Ecommerce Directive and the monitoring prohibition set forth therein.

> "The French Supreme Court also recently confirmed a court order obliging an internet access provider to indefinitely block access to infringing content."

IP Rights Holds Intermediaries Accountable

Intermediaries are increasingly under siege by IP right holders trying to prevent online IP infringements. In the past, some courts, especially in France and Germany, but also in Belgium, have seemed quite favorable to imposing monitoring and filtering obligations upon such intermediaries, whether it be internet access providers, video platform operators or auction websites. In other words, IP right holders are now largely prevailing in their fight against online IP infringements.

The Ebay victory before the Brussels Court of Commerce may, however, sound the bell for this practice, which indeed seems in contradiction to Article 15 of the Ecommerce Directive. This does not mean that IP right holders are left without recourse. First, they can still organize surveillance activities of their own, triggering the liability of those intermediaries that do not react promptly after being put on notice. Second, the European Court of Justice has recently indicated that national rules, pursuant to which intermediaries must disclose the identity of individual infringers to IP right holders, do not violate EU law.[14] The prospect of being identified at the end of the ride may act as a serious deterrent to such individual infringers. eb.

Notes

1. The third category of « caching » intermediaries, set forth in Article 13 of the Ecommerce Directive, is not of immediate interest to this contribution.
2. C. De Preter, « Nieuwe aansprakelijkheidsregels voor de dienstverlener », in J. Dumortier and P. Van Eecke (ed.), *Elektronische handel. Commentaar bij de wetten van 11 maart 2003*, Die Keure, Brugge, 2003, 217.
3. Tribunal de Grande Instance Paris, 22 June 2007, *Lafesse c. MySpace*; Tribunal de Grande Instance Paris, 13 July 2007, *Christian C and Nord Ouest Productions c. Dailymotion.*
4. Tribunal de Grande Instance Paris, 29 October 2007, *Wikimedia.*
5. Commercial Court of Brussels, July 31, 2008, *Lancôme c. Ebay*, Bundesgerichtshof, 30 April 2008 and 11 March 2004, *Rolex c. Ricardo* and Court of Zwolle, May 3, 2006, *marktplaats.nl.*
6. The Ecommerce Directive clearly provides that the safe haven regime benefits to 'providers of information society services', defined in Directive 98/48/EC. In this Directive, it is clearly set out that these providers can perfectly well derive financial benefit from their activities (Article 1 para. 2).
7. E. Montero, « La responsabilité des prestatairs intermédiaires sur les réseaux », in *Le commerce éléctronique sur les rails?*, Cahiers du Centre de Recherches Informatique et Droit, Bruxelles, Bruylant, 291.
8. Bundesgerichtshof, 30 April 2008 and 11 March 2004, *Rolex c. Ricardo*, Court of Zwolle, May 3, 2006, *marktplaats.nl* and Civil Court of Antwerp, October 5, 2006, *Seniorennet.*
9. Civil Court of Brussels, June 6, 2007, *Sabam c. Scarlet.* The author notes that he acts in the appeals case as counsel to Scarlet. However, the present contribution fully reflects his personal views.
10. French Supreme Court (*Cour de Cassation*). 19 June 2008, D07-12.244.
11. German Federal Supreme Court (*Bundesgerichtshof*)-, 30 April 2008 and 11 March 2004, *Rolex c. Ricardo* and Paris Court of First Instance (*Tribunal de Grande Instance Paris*), 19 October 2007, sarl Zadig Productions c. Google Inc.
12. Civil Court of Antwerp, October 5, 2006, *Seniorennet.*
13. Commercial Court of Brussels, July 31, 2008, *Lancôme c. Ebay.*
14. European Court of Justice, 29 January 2008, *Promusicae.*

On the Chopping Block

By Carolyn Boyle
(*www.internationallawoffice.com*), ILO

In straitened economic times, job losses are a necessary evil. As recession tightens its grip on Europe, employers will inevitably become quicker to seize on dismissal as a solution to inefficiencies or disciplinary dilemmas. But recent court rulings from across the continent serve as a reminder that the letter and the spirit of the labour laws must be observed before wielding the axe — for whatever reason.

In Spain, employers facing a financially uncertain future can take some comfort from a recent Supreme Court decision which lightens the evidentiary burden when justifying dismissals on commercial grounds. Under Spanish law, employers may reduce their workforce for business reasons if they can demonstrate that this would help the company overcome a negative financial position. In this case, one of nine employees let go on commercial grounds challenged his dismissal, arguing that since it was not enough to turn the company around, it should be declared unfair.

At first and second instance, the courts agreed that although the company had proved its parlous financial position, it had not shown that the dismissal would enable it to overcome its economic difficulties. The employee was thus entitled to the enhanced severance pay applicable to unfair dismissals (45 days' salary per year of service capped at three and a half years' salary, as opposed to the usual 20 days capped at one year); or alternatively to reinstatement.

On further appeal, however, the Supreme Court confirmed that the law requires employers to demonstrate only that the dismissal will help them in resolving their financial problems. They need not prove that the dismissal — either by itself or in tandem with other measures — will definitively reverse the company's fortunes. In this case, the employer's attempt to shore up its financial position by effecting redundancies was a valid response to the sustained and substantial losses revealed on its balance sheet: The wages bill would be slashed and the workloads of departing employees would be absorbed by the surviving workforce. Sonia Cortés and Noemi Vicente of Cuatrecasas suggest that the ruling should finally lay to rest the previous interpretation of the law, which resulted in many dismissals on commercial grounds being found unfair because the employers could not satisfy the courts' excessive evidentiary demands.

The Finnish Supreme Court has likewise come down on the side of the employer in a matter involving conflicting interpretations of the labour laws. The Employment Contracts Act 2001 provides that if an employee misses at least seven days of work without giving the employer a valid reason, the employment contract can be scotched from the first date of absence. In this case, the plaintiff was on a permanent contract working a standard Monday to Friday, but missed a whole working week without notifying his employer. On the employee's return to the office the following Monday, he was told that his employment contract was considered cancelled. The employee maintained that this was illegal, since he had not missed seven days of work and insisted that the employer had known why he was absent. For its part, the employer contended that weekends are included in the seven-day period specified by law and that it was therefore justified in terminating the contract.

Here again, the employee was initially successful. Both the district court and the appellate court held that although the employee had been absent for seven consecutive days, only five of these were working days, so the employment contract could not be considered cancelled. However, the Supreme Court pointed to the wording of the former Employment Contracts Act 1970, which referred to a week's absence from work — wording which was interpreted as denoting a seven-day calendar week. Moreover, the preparatory works for the revised act expressly stated that the meaning and interpretation of this provision were not intended to change. In the spirit of this legislative guidance, the Supreme Court held that the seven-day period refers to calendar days. As the employee had missed work from Monday to Monday without giving the employer good cause, the contract was considered cancelled and the employer had no obligation to indemnify the employee for illegal termination.

The decision provides welcome clarification where employees work a normal working week, although Dittmar & Indrenius's Seppo Havia observes that there is still a question mark over how the period of absence should be calculated for part-time employees with irregular schedules. Working hours can be a thorny issue in themselves and a recent unfair dismissal case the Maltese Industrial Tribunal seized the opportunity to warn employers that they cannot use creative scheduling to dodge their legal obligations. The plaintiff worked full time for one company and part-time for an associated company, in each case in the same role of housekeeper at a tourist complex. After one and a half years of employment, she was summarily dismissed by telephone on her day off. She received a single termination letter from her full-time employer, stating that she had lost her job because she had failed to stay behind after her regular full-time shift had ended even though work was still outstanding, and because complaints had been received about the cleanliness of two rooms.

The Industrial Tribunal found that the employee's working arrangements were clearly designed to allow her employers to avoid paying her overtime while still requiring her to work beyond a normal 40-hour week: the extra hours she worked were treated as her part-time job and were thus remunerated at lower part-time rates. The tribunal applied a strict interpretation of the employment terms in order to find the dismissal unfair. It ruled that the full-time employer had no right to discipline the housekeeper over her failure to stay on after her regular shift had ended, since during those extra hours she was not in its employ; it was rather down to the part-time employer to argue that she had not turned up to work. The tribunal also found that there was no fault on her part in relation to the complaints received from guests. It further emphasized that before employees are dismissed, they should be given the opportunity to present their version of events and plead their case, and slated the employers for failing to hear their employee out in this instance. The tribunal's opprobrium for the employers' sharp practices and harsh treatment of their employee was reflected in the severity of the penalty. The companies were hit with a combined fine of €18,000 — this despite the relatively low level of the employee's position and the fact that, as Joseph Vella of GVTH Advocates notes, "the Maltese legal system usually operates according to a limited concept of damages." The ruling is a stark warning to employers that should they fire in haste, they may well end up repenting at leisure.

In Italy, the Supreme Court has also highlighted the importance of a considered approach to dismissals, in a decision reported by Stanchi Studio Legale's Andrea Stanchi. When a casino customer hit the jackpot on the slot machines, an employee fraudulently increased the winnings by entering a higher sum on his personal digital assistant, but was caught in the act by a colleague. The casino accounts confirmed the scam and the employee was duly dismissed for cause, but challenged the dismissal on the grounds of late notification of the disciplinary process. Under Italian law, an employee must be notified of disciplinary measures in a timely manner and then has five days in which to explain his or her behaviour. In this case, the employer had discovered the fraud just moments after it occurred but the employee did not receive notification until one month later. Given the gravity of the situation, the employee claimed, he should have been notified of the disciplinary measure in a timely fashion.

> "When a casino customer hit the jackpot on the slot machines, an employee fraudulently increased the winnings by entering a higher sum on his personal digital assistant, but was caught in the act by a colleague."

The Supreme Court gave this argument short shrift, however, ruling that the one-month period was reasonable in the circumstances. It stressed that timeliness is relative, depending on both the time required to investigate the incident and the complexity of the employer's management structure, which may mean that the disciplinary process cannot commence immediately. The employee's interest in receiving notification as soon as possible after an incident must be weighed against the employer's need to have all the facts before it before it can commence disciplinary proceedings. It is this balance that determines whether notification is timely.

Finally, Irish employers have similarly been reminded of their duty to ensure that inquiries into serious misconduct are full, frank and fair — both in the workplace and beyond. The employee in this case, reported by the team at A&L Goodbody, had worked for his employer for more than 30 years and had a pristine disciplinary record, but was sacked after a dust-up at the office Christmas party left a junior staff member nursing a cut nose. The individual who had conducted the formal investigation into the incident had also been a witness to the fracas — something which compromised the objectivity of the inquiry, in the view of the Employment Appeals Tribunal. The case ultimately hinged on whose version of events would be accepted as fact, so witness credibility was paramount. To that end, witnesses should never have been involved in the subsequent inquiry in order to ensure procedural fairness. The tribunal further pointed out that the employer had no disciplinary code for management in place. The tribunal's award to the dismissed employee — an eye-watering €155,000 — should give employers pause for thought: In serious circumstances, the decision to dismiss should not be taken before first undertaking the most scrupulous of investigations.

Carolyn Boyle is managing editor of the International Law Office, www.internationallawoffice.com.