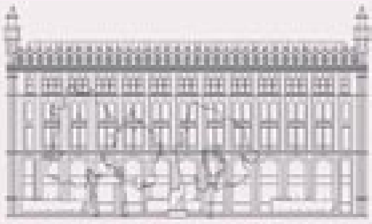

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Regulatory Breach

Christmas Issue 2006

Seasons Greetings...

This is the final edition of 'Regulatory Breach' this year. We have been encouraged with the response from clients, new and old, and have agreed to look at various subjects of interest in the new year.

This edition concentrates upon the new wave of Financial Services Regulation which threatens London's position as a major centre for global financial transactions. We are delighted to have had a preview of a major report prepared by Keith Boyfield, the leading Economist, who is a fellow of the Institute of Economic Affairs, a reseach fellow of the Centre for Policy Studies, and Projects Director of the Globalisation Institute.

Our thanks also goes to Jon Moulton, founder of Alchemy Partners, the private equity group with over £2 bn under management, for his help in preparing the article in this edition. Jon has expressed the view that the increase in government regulation will force hedge funds offshore, and place impossible burdens on firms, large and small.

Also, we feature an interesting article on the DEFRA Cattle Identification and Database Regulations, which may have resulted in unlawful prosecutions between 2000 and 2006.

We hope all of our friends enjoy the festive season, despite the recent encroachment of regulation, which now even threatens the Christmas party!

Jeremy Barnett

The EU Financial Services Action Plan

Jeremy Barnett

A wave of new regulation threatens the City of London's pre eminent postion as Europe's most important financial centre. Because of the increase in regulation in the USA, largely due to the 2002 Sarbanes- Oxley Act, London now has a chance of overtaking New York, but the introduction of the FSAP may allow ambitious and epanding centres such as Bermuda, Dubai, Shanghai and Zurich to step into London's position.

The FSAP is a major initiative by the European Commission aimed at creating a single European market in Financial Services. It was adopted by the European Commission in 1999, endorsed in 2000 and involves the implementation of 42 separate initiatives which will affect banking, securites, trading, insurance, fund management, pensions and both public and private listed companies.

The FSAP has introduced three key directives related to securites trading. They are;
The MiFID Directive, codified as Directive 2004/39/EC on 21 April 2004, which is an acronym for Markets in Financial Instruments Directive. It aims to promote fair competition between exchanges and banks, enhanced pre – trade transparency and enables investment firms to apply for a passport that enables them to conduct business anywhere in the EU.

In his address to the Manchester Insitute of Chartered Accountants on 17th November 2006, Jon Moulton, the founder of Alchemy Partners, a leading private equity house, related the unfortunate history of policitcal wrangling between member states, which concluded with UK voting against adoption of MiFID at the Finance Ministers Council on 7th October 2003, where Paul Boateng took a last minute 'return' from Gordon Brown, and failed to persaude the Council to adjourn the decision following a rushed briefing late in the day.

The mishandling of the directive were recognised both by the Chairman of the FSA and Paul Boateng who described key elements of the directive as being 'misguided and anti competitive, speculating that the provisions would send £300 m of business to New York. When MiFID is implemented, there will be stricter requirements on how and when the price of a security should be revealed to the market, with the focus on attaining 'best execution' in trading. Criticism of MiFID includes the failure to conduct a cost benefit analysis, significant IT and compliance costs, a regime of pre- trade transparency which requires sellers to publish the price of the share prior to sale which will force smaller firms out of business.

Estimates of the cost of implementation have been vast. A recent in depth survey by investment bank JP Morgan predicts that European banks earnings per share could be reduced by as much as 7% in the first year, making a reduction in the European banks capitalisation of 19 Billion Euros.

The Market Abuse Directive codified as Directive 2003/51/EC, adopted on 18th June 2003, relates to insider dealing and market manipulation abuse. The new changes adopt mandatory reporting of suspicious transactions and the keeping of lists of staff who have access to inside information, [in line with other new regulation for example in the General Product Safety Regulations].

In the UK the cost of implementation of MAD is put at £50m, yet the Treasury recognise that there will be ' no incremental change in benefits'. It is unclear whether the names of family members of the board and office cleaners are included. The obligation placed on bank employees that all transactions with a reasonable ground for suspicion should be reported without delay creates uncertainty. Some feel that the restriction of information creates greater fluctuations in price, thereby helping the insiders.

There is also a possible Clearing & Settlement Framework Directive, aimed at cross border transactions, aimed at proper handling of post trading paperwork to promote efficiency. [This dovetails with new high level guidance from the FSA issued to regulate reinsurance contracts, in consultation paper 144 in July 2002]

Other directives to wrestle with include:
- -The Takeovers Directive
- -The Prospectus Directive
- -The Capital Requirements Directive
- -Cross Border Pensions ; UCITS III [Collectve Investments]and the Occupational Retirement Provision Directive
- -The Insurance Mediation Directive.

The conculsion of Keith Boyfield, author of the report 'Impact of the Financial Services Action Plan', is that the FSAP puts in jeopardy the global competitivness of London, the EU's most productive and valuable financial centre. The estimated cost to the UK economy of implementation is £17 – 23 Billion, the largest proportion of the costs falling on the London financial services industry. Compliance costs will soar, in IT infrastructure, staff and external compliance.

Boyfield calls for political overhaul of FSAP, with a recognition that failure to act might increase calls for London to follow the lead from Switzerland, and go it alone and withdraw from the EU entirely.

Some interesting facts

- It is estimated that London Generates €60 bn per annum and the total cost to the UK Economy of FASP implemenation will be £17 - £23 bn by 2010
- EU Enterprise Commissioner, Gunter Verheugen, has said that the overall cost to the European economy resulting from EU regulation is now €600bn per year.
- Future measures include the Pensions Directive and the Consumer Credit Directive.
- By 1985, the eurobond securities market was worth $2 trillion, with between 70 to 80 per cent of this annual turnover arranged in London.
- In 2004, London accounted for 31 per cent of worldwide turnover in foreign exchange transactions, while New York accounted for 19 per cent.
- One of the main reasons why London has been catching up with New York is Sarbanes Oxley. Just one piece of heavy-handed regulation has caused a haemorrhage of business out of the New York. In 2001, before Sarbanes Oxley, New York attracted nine out of ten of the largest international IPO's. It now attracts just one in ten, the remainder having migrated, predominantly to London.
- KPMG, Capturing value from MiFID, (April 2006) reveals that 48% of UK firms have a poor or very poor understanding of MiFID's implications

Recent Case Law

Alun Jones

Administrative Court

COUNCIL FOR THE REGULATION OF HEALTHCARE PROFESSIONALS v
(1) GENERAL MEDICAL COUNCIL
(2) GURPINDER SALUJA
[2006] EWHC 2784 (Admin)

The Council for the Regulation of Healthcare Professionals (CRHP) appealed against a decision of the Fitness to Practise Panel (FPP) of the first respondent GMC to stay proceedings against a Doctor as an abuse of process.

The Doctor concerned was caught by an undercover journalist who asked for a sick note making it clear that she was not sick but just wanted time off work. The Doctor agreed to this course of action if she returned nearer to the time when she wanted to be off work. The principle issue in this case was whether situation concerning entrapment by non-state agents (e.g. journalists) differed from the position involving state agents (e.g. policemen).

The Court first had to consider if it had the jurisdiction to intervene against the FPP's decision. The Administrative Court firstly decided that the appeal by the CRHP related to a criminal law application.

The imposition of a stay for abuse of process in a criminal case meant that it would be an abuse of the process of the court for the case to be tried and such a finding was the effective end of a case. In other words, it amounted to a final determination and it meant that the case against the doctor could never be decided on its merits and no penalty at all could be imposed.

The Administrative Court considered the position if the decision to stay the case on the basis of abuse of process was manifestly wrong. It was held that the court should intervene. In the current case, the actions complained were committed by a non-state agent. The position was therefore different than misconduct by a state agent.

The Doctors rights under Article 8 of the Convention may have been infringed but the fact that there was entrapment did not mean that the evidence in question had to be excluded.

The Court held that the FPP had wrongly applied the law as it had failed to consider proportionality properly and had appeared to substitute journalists for policemen by relying on the case of Attorney-General's Reference (No 3 of 2000). Furthermore, the issue of Section 78 of PACE does not become a live issue until the decision not to stay proceedings has been made.

Court of Arbitration for Sport

INTERNATIONAL RUGBY BOARD (IRELAND) -V- JASON KEYTER

Jason Keyter is a Professional Rugby Union player for Esher Rugby Club. During a random drugs test, his urine sample was found to be positive for a banned stimulant. His 'B' sample was also found to be positive.

Mr. Keyter admitted that the result of the samples was accurate. He claimed that he may have been the unwitting recipient of having his drink spiked with cocaine when in a nightclub. He provided evidence of his good character and the disciplinary tribunal accepted the account and suspended him from playing for a period of 12 months.

The IRB appealed against this ruling. Under IRB regulations, the minimum suspension period for such a drugs offence was 2 years, unless there was exceptional circumstances such that he either bears no fault or negligence or that he didn't know or suspect after proceeding with the utmost caution that he may have taken a prohibited substance.

The IRB argued that Mr. Keyter had failed to provide evidence to the requisite civil standard to support his assertion. He failed to exercise the utmost caution given that at the nightclub he had consumed almost half a bottle of vodka, champagne cocktails and vodka and red bull. Mr. Keyter made no submissions.

The panel held that the IRB were correct and that it would create a dangerous precedent to allow drunken sportsmen to obtain an unwarranted reduction in the length of any suspension by claiming exceptional circumstances. Accordingly, the period of suspension was increased to a period of 2 years.

Financial Services and Market Tribunal

JAMES PARKER -V-
FINANCIAL
SERVICES AUTHORITY

This case review only addresses the issue of how the tribunal can decided what is an appropriate punitive element to a penalty for market abuse.

Mr. Parker, a Senior Accountant, had engaged in market abuse in the form of spread betting relying on information no generally available. He pursued this action whilst working for his employer, a listed company on the stock exchange. A penalty of £300,000 was subsequently imposed.
In dealing with the amount of the penalty, the Tribunal only considered the actual gains made and the losses avoided by the abusive conduct. If there was doubt, this was resolved in Mr. Parker's favour. In this case, the total abusive profit made was £121,742.

In addition to the above, the tribunal considered the approach as to how it could quantify the punitive element to the penalty. The tribunal noted that there are surprisingly few precedents in this area as it only became a civil offence in 2001.

The tribunal considered the actual conduct by offenders was a useful guide but was by no means conclusive. This was not a victimless crime as there was a loss in the confidence of the financial markets. The penalty should not just recover the abusive profit but there must also be a deterrent element.
The punitive element must mark the gravity of the offence. Mr. Parker's Counsel submitted previous decisions in the range of £1,000 to £25,000. In this case there was calculated misconduct with a repeated flouting of the rules. Mr. Parker did not suggest any mitigation for the misconduct itself and did not make any effort to put the matter right.

Accordingly, the total penalty in this case would be £250,000 including the £121,742 of abusive profit.

DEFRA's legislative lacuna?

John Harrison and Danielle Graham

The Cattle Identification Regulations 1998 (CIR) and the Cattle Database Regulations 1998 (CDR) were brought into force on the 28th of September 1998 and the 15th of April 1998 respectively. These statutory instruments provided for the enforcement of Council Regulation (EC) No. 820/97. This EU Regulation was repealed by EU Regulation No. 1760/2000 with effect from August 2000. The CIR and CDR were not amended to provide that references to EC No.820/97 were to be construed as references to EC No.1760/2000.

Defra's initial attitude towards this problem was to assert that no problem existed due to the direct applicability effect of EU Regulations in domestic law. Further, EC No.1760/2000 states in Article 24(2) that 'references to 820/97 shall be construed as references to this Regulation'. It would appear that Article 24(2) only applies to references in other EC legislation and not to domestic law.

As a matter of principle the EU Regulation 1760/2000 should not determine criminal liability without adoption by domestic law. The necessity of enforcing EU regulations requires domestic legislation.

Without domestic legislation EU Regulations are applicable but unenforceable.

One potential conclusion appears to be that the CIR and CDR were not in force between August 2000 and June 2006. Any prosecutions brought for offences under the CIR and CDR for the relevant period may be without legal substance and convictions for offences within the relevant period maybe unlawful. The case of Belgium v. Kennes [REF] is of assistance in framing this argument.

The strength of this argument will be determined by how the prosecuting authority has drafted the indictment. Clearly, if the indictment is framed to allege breaches of the EU Regulations 1760/2000 at a time when there was no domestic enforcement provision then this argument will have some force. If the indictment is framed to allege breaches of the CIR & CDR then this argument may be thought to have little weight.

It is the view of the authors that while the EU Regulations 870/1997 may have been repealed and replaced there has been no repeal or revocation of the domestic Regulations.

Consequently, so long as offences are framed as being contrary to the domestic 1998 Regulations then the courts will have power to hear them. This was the conclusion reached in the unreported Crown Court case of **R. v. Drake [REF]**. As yet, there has been no test of this issue at an appellate court level.

Similar concerns exist as to the validity of the **Eggs (Marketing Standards) Regulations 1995** which enforce Council Regulation 1274/91. This EU Regulation was repealed and replaced by the Commission Regulation 2295/2003 in January 2004. The new Regulations do not make any procedural or practical changes. There has been no update to domestic legislation until the **Eggs (Marketing Standards)(Amendment)(England and Wales) Regulations 2006**, which came into force on the 15th of June 2006. Once again, it is the view of the authors that there is a potential gap from January 2004 until June 2006 where domestic legislation may be unenforceable.

Regulatory Breach cases presently being conducted in Chambers.

Leeds	Defending Firework Manufacturer under Explosives Act & Manufacture and Storage of Explosives Regulations
Nottingham	Defending Manfacuturing Company relating to Fatal Accident, Working at Height Regulations
Leeds	Prosecution for West Yorkshire Trading Standards – Ebay
Manchester	Defending Mail Order PLC in relation to electric mosquito repellant
Various	Representing solicitors before SDT
London	Defending before Professional Conduct Committee of Nursing and Midwifery Council
Portsmouth	Defending retailer of Fireworks under Explosives Act and Manufacture and Storage of Explosives Regulations
Wakefield	Representing 4 serving Police Officers as interested persons at inquest arising from Death in Custody

Recent Statutory Law

Alun Jones

The Trade Marks (Amenent) Rules 2006. S.I. 2006/3039)

The rules, in essence, provide that when a Trade Mark is registered, it shall be classified according to the Nice Classification1 that had effect on the date of the application for registration.

This statutory instrument amends sections 65 and 78 of the Trade Marks Act 1994 and revokes schedules 3 and 4 of the Trade Mark Rules 2000 and Rules 3 to 5 & 7 to 8 of the Trade Marks (Amendment) Rules 2001.

This means the Nice Agreement concerning the International Classification of Goods & Services for the purposes of the Registration of Marks 15.6.57 & 28.9.79.

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