Delegates challenge EU money-laundering laws

Delegates had a rare opportunity yesterday to challenge a representative of the Financial Action Task Force (FATF) about anti-money-laundering legislation in the EU. Lawyers discussed their fears with John Carlson of the FATF, the inter-governmental organization whose recommendations have been used as the basis for legislation to control money laundering and associated crime and terrorism.

Introducing the session, Stephen Revell of Freshfields Bruckhaus Deringer described the issues raised by the EU directives on money laundering as among the biggest challenges facing the legal profession. FATF, which has traditionally met infrequently with lawyers, is looking to share ideas with bodies such as the IBA and local bar associations.

The FATF has issued 40 recommendations that it says countries should adopt as part of their anti-money-laundering regimes. These have been used as the foundation for the three EU directives and various domestic laws. The Second EU Money Laundering Directive, which was adopted in 2001, compels lawyers to undertake customer due diligence and report suspicious transactions. It has yet to be implemented across the EU in large part due to challenges from lawyers.

Richard Horning, partner at Tomlinson Zisko, gave a 30-minute speech on how search engines affect trademark rights at a session yesterday morning but never left his home in Palo Alto. Using voice over internet protocol (VoIP) technology and a webcam, he beamed himself into the session and successfully completed his talk without any breaks in transmission. VoIP is a method of sending live video over a broadband internet connection, which can handle more data than a landline, effectively turning a computer into a video-phone.

"It was very good and I enjoyed it a lot," said Juan Manuel Gutierrez Canau, a partner at Uruguayan firm Olivera & Delpiazzo who attended the session. "But you couldn't hear it very well at the back."

According to Microsoft, VoIP accounts for 30% of global internet traffic. This month, a Bloomberg survey found that 80% of companies are looking to switch to VoIP within two years.

The video link was apt for a session that looked at the use and abuse of IP rights on the internet. Lawyers discussed how to protect copyrighted material from file-sharing networks, where users can obtain music and video releases for free.

Thomas Legler, partner at Swiss firm Python Schiffeli Peter chaired the first part of the session. He told the IBA Daily News: "The internet asks the question of who exactly is behind the infringement. The networks are so big that it's not easy to get to the place where the uploading of material is taking place."

Australian network Kazaa, the subject of court proceedings in September, has more than 100,000,000 users. Lawyer Richard Horning, who has represented Kazaa before the Norwegian court, said: "It is a global phenomenon, very difficult to tackle."

"We can't stop people from sharing files, but we can stop them from using the software," said Carlos Ocampo, partner at Uruguayan firm Ocampo & Segrera. He highlighted the use of Kazaa as a communications network, where users could chat with each other while sharing files.

"It is a question of engineering and of user behaviour," said Ocampo.
In the meantime, the Third Directive was adopted on June 7 2005 and is due to be implemented by late 2007. Among other things, it introduces the concept of risk-based analysis to customer due diligence. The EU directives have been implemented to varying degrees, and in some cases supplemented, through domestic legislation such as the UK’s Proceeds of Crime Act 2002.

Lawyers are continuing to press for changes to provisions in the Second and Third Directives that they argue threaten their rights of privilege or professional secrecy, and which they say might also be effective in preventing crime. Many of these actions are being made through bodies such as the IBA and local bars.

Speaking at yesterday’s session, Bernard Valter, president of the Council of the Bars and Law Societies of Europe, discussed his organization’s difficulties with the EU directives, about which it has petitioned the European Parliament. He described the directives as “an exercise in exorcism”, and complained that the EU has failed to understand the true nature of the legal function and worked poorly in various important definitions.

For many speakers, being required to report suspicious activities to the authorities constitutes a breach of their professional privilege or secrecy. Kevin Martin, a member of the Law Society of England and Wales, said that lawyers recognize the importance of stopping money laundering and the terrorism it can support, and that they are “vulnerable” to being unwittingly used by criminals. But he maintained that governments must be careful in framing legislation. “The fear of terrorism and organized crime must not take away from lawyers their ability to advise clients in confidence,” he said.

A number of speakers also questioned the effectiveness of the directives in stopping money laundering, particularly when confronted with the costs of implementation. “What you might set up is a vast bureaucratic machine that at the end of the day only finds smoke and mirrors,” said one delegate.

In September, a court in Taiwan handed a three-month commutable jail term to a user of the Kuro file-sharing network. This uncertainty has forced lawyers to look at case law, rather than the civil and criminal codes, as a guideline for internet IP protection.

The session also featured Trevor Albery, in-house counsel at Warner Brothers and the lawyer charged with protecting the company’s IP rights in Europe. Explaining his company’s strategy to IBA Daily News, Albery said: “We are looking at technology we can use to protect our content. We have a legal and enforcement division, which is self-explanatory. We are also looking at public policy and consumer education and whether new business initiatives, like making films available on the web, could cut our exposure to online piracy.”

High-profile court cases such as the US Supreme Court’s decision to close down Grokster this summer, have had an effect on the public’s perception of piracy. Legler pointed to a Swiss survey by technology magazine www.infoweek.ch. In 2004, 40% of respondents said they would continue to use file-sharing services despite it being illegal to do so. In 2005, after courts had shut down several sites, this figure had fallen to 28%.

The session was hosted jointly by the IBA Technology and e-Commerce and IP committees.
Law firms face switch to efficiency model

Law firms will have to change the way they provide legal services and restructure their businesses if they are to meet the changing demands of corporate clients, a session heard yesterday.

Quoting a Coudert Brothers lawyer who said that great lawyering doesn’t make for great business, Paul Smith of Eversheds in the UK explained how working for Dupont had influenced his firm’s business strategy.

The Dupont model is based on efficiency, a value that corporations are increasingly prioritising as they seek services more closely aligned to business norms. Dupont’s law firms use an intranet system to share knowledge of case studies and procedures, are billed electronically within a week, and meet annually with the corporation’s in-house department to discuss how to cut costs and eliminate waste.

“Dupont is not about lowering hourly rates,” Smith said. “It’s about using tools to bring about a more efficient service.”

Eversheds is not alone in restructuring its approach to meet the demands of the market. Multinational clients have developed sophisticated business programmes, and now expect firms to share risk in matters, accept value billing over time-based billing, and incorporate the latest technology in the provision of their legal services.

Sylvia Khatcherian, of Morgan Stanley’s legal division, explained that in-house legal teams are under pressure to manage an increasing volume of work with limited resources, and to focus on process and cost efficiency. Budget proposals, alternative fee arrangements and matching an appropriately experienced lawyer to each task are now standard strategies for in-house teams dealing with outside counsel, she said.

Lawyers often assume that clients consistently want a level of service that leaves no stone unturned. But corporations prefer assurance that the legal services to be provided are worth the cost-benefit trade-off. They will expect the bulk of routine work to be done by associates and junior lawyers, and some work to be done by paralegals and administrative staff. Corporations refer to this as a “right shift” towards the least expensive appropriately qualified person for a given project.

Law firms will also have to become more technologically savvy to stay competitive, he said. By giving in-house staff access to real-time data relating to agreed performance indicators, firms will save their corporate clients time and money, as well as allowing them to administer quality control more easily.

One delegate questioned whether the investment required to implement this technology might prejudice against firms with smaller turnovers.

Logan Robinson, vice president and general counsel of Delphi Corporation, refuted this idea. “There is pressure within the bar to create dynamic full-size law firms, but they aren’t necessarily better for a sophisticated client with a strong in-house team,” he said. “You just end up with higher overheads.”

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Lawyers criticize UN for lacking democracy

The democratic value of the UN was questioned this week in the light of the so-called lost summit in New York last month, where members failed to reach agreement on proposed reforms.

At a session on Monday, African lawyers in particular were vocal in their condemnation of the UN’s continued lack of geo-political representation. “If the UN is to have a great role, it needs radical revival and a permanent seat for Africa,” said a South African delegate. A Zimbabwean lawyer was blunter, saying: “The structure of the UN is undemocratic and not supportable in a world of democratic values. In its current form, it can’t reform itself.”

Hans Corell, former head of the UN Office of Legal Affairs, responded by saying that a true world government was not possible until more democracies emerge. The more pressing aims of the UN include the empowerment of women and ensuring that the major member countries abide by the charter, he said.

But Justice Richard Goldstone, who will publish his final report on the Oil for Food scandal in October, was concerned about the failure of the major countries to respect the rules of international law. “If some UN members, like the US, are going to treat these laws like an à la carte menu, then the whole system will break down,” he said.

In his March 2005 report entitled In large freedom, Kofi Annan outlined his recommendations for strengthening the UN, which include two proposals for a new security council. One is for six new permanent seats and 13 two-year seats, the other for eight four-year renewable seats and 13 two-year seats. He recommends Brazil, Germany, Japan and India for consideration for permanent membership.

Ambassador Emilio Cárdenas, the previous IBA president, said he was wary of any additions to the security council. “You don’t combat privilege by giving more privilege,” he said. “If you add veto rights, you increase the number of agendas that the Security Council won’t be able to deal with.”

The 2005 World Summit was dubbed the lost summit because of its failure to reach a consensus on many of Annan’s more radical proposals for reform, including new measures against nuclear proliferation, references to disarmament and changes to the structure of the security council.

One of its successes, however, was an unprecedented agreement that nations have a responsibility to intervene to protect civilians from genocide and ethnic cleansing. Cárdenas, who participated in the UN’s stalled negotiations on whether to intervene in R wanda, said that this legislation would have prevented what he called “one of the UN’s greatest failures”.

But Michael Reisman, professor of international law at the Yale School of Law, was more sceptical, saying that the UN tends to consider passing resolutions as more important than action itself. “It gave the example of the humanitarian disaster in Darfur, Sudan, where instead of intervening, the UN referred the situation to the International Criminal Court. He supported unilateral intervention in situations where there is evidence of a gross violation of human rights.”

Hans Corell argued that such an approach is politically dangerous. “Members would refuse to take responsibility for human rights violations knowing that someone else would do it instead, he said.

Annan’s report also proposes replacing the Commission on Human Rights with a Human Rights Council, whose members would be elected directly by the General Assembly with a two-thirds majority. The Commission, described by Cárdenas as “one of the most shameless corners of the UN” has been undermined by declining credibility and professionalism. In particular, states with doubtful human rights records have sought membership to protect themselves from criticism or investigation.

“Negotiations have been deferred, but the commission will turn into a permanent council,” said Cárdenas. “This will demonstrate that the status of human rights is now higher in the UN.”

“The structure is hard to predetermine, but it would be a permanent organ of open participation operational all year round. Countries would be less likely to veto the proposed council if they had to make a public veto.”

Investor protection in Russia improving

Speakers expressed optimism yesterday over the prospects for foreign investment in Russia.

Plans in place to improve the rights of foreign investors and boost direct investment into Russia are a positive change, they said. Meanwhile, in a recent address to the Federal Assembly, President Vladimir Putin conceded that difficulties in the investment climate are hampering growth.

The Russian authorities’ recognition of the problem and forthcoming econo- mics are reason to be confident that conditions for foreign investment will improve, said panel member Vasiliy Rudomin from Afrod law firm, Moscow. With the parliamentary and presidential elections on the horizon, the branches of government will do their best to improve the investment climate, said Rudomin. “The situation is more than favourable for foreign investors.”

Fellow panellist at the session, Andrei Baev of Allen & Overy, continued in a cautiously optimistic vein. “Investors are naturally drawn to Russia’s vast reserves of oil, gas and minerals. The country has 30% of the world’s proven gas reserves and the economy has expanded rapidly in recent years”, said Baev. “But huge investment of capital is needed and investors continue to have tax, regulatory and transparency concerns.”

Despite positive conditions in the international fuel and raw materials markets, the economy is slowing. The rate of growth decreased during 2004 and, during the first six months of 2005, foreign investment declined by 13% on last year. “For a number of reasons, including the Yukos case and tax agency treatment of businesses, the invest- ment climate has deteriorated,” said Rudomin. “Investor trust has been under- mined.”

The panel was of the opinion that Russian authorities are moving in the right direction to restore trust, but cautioned that, with the current system of administration, proposals are not always properly implement- ed. “To turn the initiatives into factors that affect the investment climate in Russia, the government and the legislature must take steps to turn them into laws,” said Rudomin.

Aside from welcome legislative initiatives, Baev said that the onus remains on the investor to properly investigate opportunities in Russia. “Some of the initiatives are half-baked and not yet fully developed,” said Baev. “You must do your homework.”

Konstantin Orlov of Renaissance Capital Group, agreed, counseling that whatever the outcome of the reforms, in terms of manag- ing transactional risk, “proper due diligence is the answer.”
This is
Thomas Müller.

He’s a senior lawyer for a top
Swiss international law firm based
in Geneva.

Advising high profile clients from
Argentina, Bulgaria and India on matters
of energy and infrastructure law, Thomas
understands just how important it can be for
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Law firms try many ways to encourage their lawyers to work harder to win business – mostly with less success than managers would hope. Conversations on the topic often go something like this:

"We want to get more of our people involved in business development."

"Is this a new idea, or have you been working at it for a while?"

"Oh, we’ve been working at it a lot. We’ve tried quite a few things."

"Such as?"

"Well, the first thing we did was try to convince them of the wonderful things business development would do for the firm if we were all successful at it."

"A nd?"

"They all agreed, but only a few were moved to action by things that were good for the firm. Most of the others were more interested in things that were good for them personally."

"So what did you try next?"

"We tried to make it personal. We changed our compensation system to put more reward in for business getters."

"Did that work?"

"A little, but it mostly ended up paying more to the people who were already good at winning work. It turned out that promising to pay you if you got terrific at a completely new skill wasn’t enough to overcome the lack of confidence that many had about whether they could learn it."

"And what happened next?"

"Well, we put our people through sales training courses."

"Were they effective?"

"They were very useful for those who were already interested in business development. They didn’t have much impact on those who weren’t interested. It was pretty much a waste of time, because it was the ones who weren’t interested that we were trying to reach."

"And the next step?"

"We designed a process for targeting our key clients with cross-discipline teams and we gave people access to marketing staff specialists, laying out a programme of how to make relationship building programmes effective."

"And what happened?"

"Well, where individual people or groups did what we planned, it worked fabulously. Some people always wanted to do this in an organized fashion. But many of our supposed teams never did execute the programmes that they had themselves submitted as plans."

"Why not?"

"The same syndrome, I suppose. Tools, systems and organization are wonderful aids for people who already want to do this stuff, but they seem to have little impact on people who don’t. If the underlying problem is attitude, no amount of processes, forms and support will change things."

Stop doing what doesn’t work

Firms try an amazing range of things to get people involved in business development. Included in the preceding dialogue are references to visions, rewards, punishments, training, processes, support resources and restructuring of teams. Seldom do they work as well as people hope they will. There’s still a need to find a way to elicit enthusiastic participation in business-getting.

The reason most of these business development initiatives deliver poor results is that firms fail to address the central question of those who do not participate: “Why should I get involved in this?”

Firms keep trying to prove to partners why their efforts would be good for the firm (“Do it for the glory of the institution; do it to achieve our strategic goals”) or because it will make them rich (“Don’t worry about whether this is interesting stuff – do it for the money”.

Not only are these appeals often ineffective but, perhaps surprisingly, encouraging professionals to put effort into business development for the money turns out to backfire badly. Less money is earned, not more.

There are two reasons for this: the impact of incentives on partners’ motivations, and the impact of the money orientation on their approach to business development.

What’s wrong with “Do it for the money”

In 1999, Alfie Kohn published an important book, Punished by Rewards (Mariner Books), in which he pointed out that all incentive schemes are doomed to failure because they divert people’s attention away from inherent meaning, purpose,
true stimulating. The better you are at marketing, the more truly professional you can be, because you are not forced to take money from anyone and everyone just because you need the cash.

Paradoxically, if one takes this view of marketing (it’s about finding things you really want to work on and people you truly want to help) the energy and involvement in marketing that would be created (in addition to the sincerity and passion immediately evident to clients) would make you much more likely to get the volume and the cash.

Go for the money and you’ll get less. Go for things that turn you on and you’ll get the money.

The trouble, of course, is that finding exciting work and enjoyable clients is not the reason that firms give their people to participate in business development. Helping partners find more fun, fulfillment and meaning in their practices is not really why firms hire marketing directors, is it? But if firms want increased revenues, it should be.

Clients and “Do it for the money” attitudes

These surveys results also make completely clear why so many people fail at business development. Take a guess at the answer to this question: Do you think that clients can tell when professionals are doing it only for the money and have no special interest in them or their problems?

When you are the target of some other professional, how easily and quickly can you tell if they are interested in you or just trying to get your business and your cash? How transparent are their underlying motives when they are engaged in selling to you?

How easily or quickly can you tell if they have a passion for what they do – or whether they view themselves simply as solid, competent people just doing a job?

If you are able to detect these things when you are the buyer, how do you feel about them? Do such factors affect your decision about whether to hire specific professionals?

My guess is that you can spot these things almost always and that, most of the time, it significantly influences your desire to work with such professionals. It matters to 95% of the people I have asked around the world for more than 15 years now (among professionals around the world).

People tell me that they really like the clients they work for and find the clients’ sectors interesting about 30% to 40% of the time. Again, the rest is acceptable.

Notice that this is what people tell me. It is not my judgment about their lives but their own assessment.

These proportions certainly help us understand why people aren’t all that keen to go out, get active and work passionately on business development. Getting more business just brings in more stuff they can tolerate for clients they don’t particularly care for.

If you don’t love what you do or those you do it for, why would you want to go out and get more of it?

The traditional answer is, of course, because they’ll pay me if I do. They’ll pay me to do stuff I have no feelings for, for people I don’t care for. That, of course, is the dictionary definition of prostitution. Which is exactly the way many professionals feel when their firms try to get them to market themselves. No wonder marketing management efforts have such a low success rate.

If firms wish to get enthusiastic participation in business development, they need to start talking and behaving very differently in their attempts to entice non-participants into the programme. The very purpose of being good at business development, they need to start talking and behaving very differently in their attempts to entice non-participants into the programme. The very purpose of being good at business development, they need to start talking and behaving very differently in their attempts to entice non-participants into the programme. The very purpose of being good at business development, they need to start talking and behaving very differently in their attempts to entice non-participants into the programme. The very purpose of being good at business development, they need to start talking and behaving very differently in their attempts to entice non-participants into the programme. The very purpose of being good at business development, they need to start talking and behaving very differently in their attempts to entice non-participants into the programme.
two decades, and it probably matters to your clients too.

"I’m doing it for the money" is an attitude most people can spot easily. And nothing is designed to make us less likely to want to hire such a person. Yet that is the number one reason firms give when they try to get their people to go out and generate business.

The message from management seems to be: "Do it for the money, but try and convince the prospective client that you’re not doing it for the money."

The bad news for law firm managers is that people are just not that good at acting. If their real motivation to engage in marketing is for the money, it will inevitably show. Motives matter.

This is not an idealistic anti-money argument. When I’m your buyer, knowing that you want the money is nothing to be embarrassed about or to apologize for. We all want the money. But if you truly want me to give you my business, then you will need to be a little more sophisticated about how you get it.

You must win my business by showing me that you are interested in more than just the money. You need to prove that you are prepared to earn and deserve my trust and my interest in more than just the money. You need to prove that you want to help me and not just that you want the money.

Managing as if what we do has meaning

It should be clear by now that my experience has taught me that most firms’ marketing problems are not marketing problems at all, but management-of-marketing problems.

Specifically, people are being encouraged into ineffective and counterproductive mindsets and habits by the words and behaviour of firm management and marketing directors as they go about getting their professionals to think about business development.

It will come as a surprise to many, but if firms wish to be more successful at generating revenues, they need to stop saying, “Do it for the money,” or even “Do it for the firm.”

They must stop saying these things not because they are immoral, but because they cause many professionals (particularly the novices who need the most help) to profoundly misunderstand what works in business development. By saying these things they are, just as Alfie Kohn pointed out, drawing people’s attention away from the true reasons they might want to be enthusiastically involved.

They need to start saying, “Let’s act as if we are planning to be in business for a long time. Let’s do it really to be helpful and valuable to people who can care about, and let’s have more fun and fulfillment.” Then they will be able to say: “Oh, and by the way, a wonderful consequence will follow – clients will love it and we will get richer.”

So how does a marketing director or managing partner help the firm’s professionals get good at being trusted and hence start generating the cash?

They need to help professionals understand that we don’t get rich by selling. We get rich by making people want to hire us and work with us.

Achieving that requires a new attitude towards why we are doing marketing and selling, and why we work in the profession we chose. It is the job of management and marketing directors to create those attitudes in the firm.

You do not need to teach your partners how to sell. You need to find out, partner by partner, what kind of work turns each partner on and what kind of clients each partner could get interested in.

Your partners can’t love everyone (or everything), but if they can’t learn to really care about some kinds of clients and some kinds of work (or the problems of those certain kinds of clients), they are not going to get a higher percentage of clients to give them business.

And if your professionals truly are interested in no one and nothing, there are almost certainly bigger issues at stake.


Prior to launching his (solo but global) consulting practice in 1985, he served as a professor at the Harvard Business School. You can automatically receive David’s future articles free via e-mail by registering on his website (www.davidmaister.com).
The heart and soul of Prague's old town (Stare Mesto) is the enormous old town square, the centre of life in the city since the 10th century. The building's pretty facades frame a lively scene of sidewalk cafes and buskers. On the hour, the astronomical clock on the Old Town Hall comes to life.

You'll need at least half a day to explore Prague Castle's extensive grounds, including St Vitus Cathedral, the old palace and hall, and Golden Lane, a picturesque cobbled lane that was once home to Franz Kafka. The views over Prague from the castle ramparts are stunning.

A visit to Prague isn't complete without a stroll over Charles Bridge, which affords grand views of the Vltava River. Most of the Baroque statues lining the bridge were erected in the 18th century and depict saints such as St Wenceslas, although many are copies with the originals housed safely in the National Museum.

The Jewish quarter (Josefov) is where Prague's Jewish community was confined within a walled ghetto until 1848. Its many synagogues and the sombre cemetery provide a poignant reminder of the Jewish community's troubled history.

The main street of the baroque quarter Malá Strana (the Small Quarter) is the steep Royal Way that climbs up from Charles Bridge to the castle. Many of the houses lining the street display emblems, such as the house of the two suns, or the house of the three fiddles. These date to the period before numbering houses became common.

HOT lives up to its name in more ways than one, providing a spicy menu with an Asian focus. Try the restaurant's famous stir-fried prawns with fruit and jasmine rice. HOT occupies the ground floor of the Jalta Hotel on Wenceslas Square. (Tel: 222 247 240)

The Mucha Museum is dedicated to the life and work of Alphons Mucha, who helped to shape the aesthetics of French Art Nouveau at the turn of the century. Mucha is perhaps best known for the posters he designed for fashionable French actress, Sarah Bernhardt. (Kaunicky palác, Panká 7, open daily 10:00 am to 6:00 pm)

The Rudolfinum is home to the Czech Philharmonic and its Dvorak Hall is one of the finest places in the world in which to enjoy a classical concert. The Prague Autumn Festival runs from September 12 to October 1 and has, since 1991, gained a reputation for attracting the world's great artists. (www.pragueautumn.cz)

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Lawyer joins defence against threat of deadly epidemics

Former EU commissioner David Byrne talks to IBA Daily’s Daniel Andrews about how lawmakers are fighting the threat of avian flu, Sars and even bio-terrorism

"Not only is there a Sars outbreak, there will be rules," says David Byrne. Rules that will be literally a matter of life or death. Byrne, a former EU commissioner for health and consumer protection who will speak at the conference today, is referring to the newly revised international health regulations set earlier this year by the World Health Assembly. As a special envoy to the World Health Organization, he was instrumental in building a consensus among member countries during the drafting of regulations, which are designed to help countries respond to disease outbreaks such as Severe Acute Respiratory Syndrome (Sars) and avian flu.

The regulations impose reporting obligations on member states and confer inspection and investigative powers on health authorities. They also include a matrix to help decide whether incidents constitute public health events of international concern. This depends on whether an outbreak is serious, unusual or unexpected, whether there is a significant risk of a disease spreading internationally and whether there is a significant risk of international travel or trade restrictions.

The new rules become legally binding on any member state that does not reject them before the end of next year. In total, 192 countries are members of the World Health Organization and will be bound by the regime. Non-member states may also sign up to the regulations. Increasing air travel means outbreaks are relevant to everyone. The fear is that diseases such as Sars and avian influenza could be transported across borders more rapidly than ever before," says Byrne.

Public health concerns create interdependence in dealing with hazard control and, during the drafting process, Byrne became an advocate for collective action. "The regulations contain a degree of pooled sovereignty," he says. "It is about consensus building. Developing, and some more developed, nations are concerned about ceding sovereignty."

The regulations aim to protect against the spread of diseases, while minimizing interference with travel and trade. "There is a balancing act to be struck," says Byrne. "Responses by the authorities will significantly impact trade and travel. This is contemplated by, and woven into, the regulations."

The rules also provide a code of conduct for notifying and responding to public health events. This means that their success depends in part on the capacity of member countries to track diseases and act quickly to contain them. Under the revised regulations, countries commit to improve their ability to close ports, airports and land borders and to monitor transport in the event of an outbreak.

The ability of countries to comply with requirements to detect, assess and notify the international community about disease depends in part on funding, says Byrne, an issue that is beyond the scope of the current regulations.

"Failure to disclose information results in inability to effectively respond and, consequently, the spread of disease," he says. "Capacity building is down to the member states. This is more of a problem for less developed members."

The 2003 Sars outbreak speeded up the whole revision process, as the international health community was shocked by the realization that a deadly disease could spread to quickly across national borders. When people fell ill with the disease in Toronto, the issue was to identify the problem and ascertain how to deal with it. When the disease hit Europe, however, the health community was able to respond immediately. "The difference was information. Dissemination of information allows for effective, rapid response. Europe had the information. Canada did not," says Byrne.

The 2004 Asian tsunami represents precisely the sort of emergency the regulations are designed to address. In the aftermath of the disaster, public health consequences were expected to be severe. "In reality the public health consequences were relatively slight," says Byrne. "There was not the spread of disease feared. This is because of the quick response on the ground."

Byrne also cites the reaction to the 2002 outbreak of foot and mouth in the U.K. as a reason for optimism. Once aware of the problem, the U.K. notified authorities at EU level and all other members had been contacted within one hour of the initial notification. Rapid dissemination is vital in a case such as this as foot and mouth moves quickly. "This is exactly the sort of quick response needed at the international level," says Byrne. "There must be a network established to ensure information flows and responses are rapid."

The origins of the international health regulations date back to the mid-19th century, when cholera epidemics overran Europe between 1830 and 1847. In 1948, the World Health Organization constitution came into force and in 1951 member states adopted the international sanitary regulations, which were renamed the international health regulations in 1969 and modified in 1973 and 1981. The regulations were originally intended to help monitor and control cholera, plague, yellow fever, smallpox, relapsing fever and typhus.

The new regulations are designed to be a "flexible and holistic" approach to a variety of hazards, including the chemical and biological threat posed by international terrorism. Before his appointment as EU commissioner for health and consumer protection, Byrne was attorney-general of Ireland.

Byrne, who is now a senior counsel at All-Ireland media firm, is speaking today at a session on the role of policymakers in assisting the fight against disease epidemics and even biological terrorism (A anthrax, Sars and biowarpony; is globalization bad for your health?).

World health

Keeping watch

The task of ensuring that assistance reaches states affected by outbreaks of disease as quickly as possible falls to the Global Outbreak Alert and Response Network. The network is a collaboration of existing institutions and networks that pool resources for the rapid identification of, and response to, outbreaks of international significance. The network provides an operational framework to link expertise and to keep the international community alert to threats and ready to respond.

The initial meeting of partners in Geneva in April 2000 brought together representatives of technical institutions, organizations and networks in global epidemiology and surveillance and response. Participants identified the need for a global network, building on new and existing partnerships, to deal with the global threats of epidemic-prone and emerging diseases.

The World Health Organization coordinates international outbreak response using resources from the network and provides a secretarial service. The response network brings together technical and operational resources ranging from scientific institutions in member states, medical and surveillance bodies, networks of laboratories, United Nations organizations including Unicef, the Red Cross and international humanitarian non-governmental organizations, including Médecins sans Frontières, International Rescue Committee, Merlin and Epicentre. Since April 2000, the network has been setting agreed standards for international epidemic response by developing guiding principles and operational protocols to standardize epidemiological, laboratory, clinical management, research, communications, logistics support, security, evacuation and communications systems.

The alert and response network represents a major pillar of global health security aimed at the detection, verification and containment of epidemics. In the event of the intentional release of a biological agent, these activities would be vital for effective international containment efforts.

With the intentional release of anthrax spores in the United States in 2001, the possibility of the accidental or deliberate release of a biological agent has been made a frightening reality.

In the event of the intentional release of a biological agent, the WHO’s operational framework, and the technical resources of the Global Outbreak Alert and Response Network will be vital for effective international containment efforts. On request from an affected state, the network would support any specialized investigations and, if required, would also provide direct assistance with an investigation and verification team. In addition, the organization’s network of over 250 collaborating centers would provide assistance with transport and testing of samples at international laboratory facilities.
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Ben Heineman will speak at the IBA conference tomorrow on the wider role that general counsel should aspire to perform, and why a more socially responsible approach is good for business. By Rob Mannix

The guardian of General Electric’s good name

Heineman’s view, which differs notably from the thinking of free marketers such as Adam Smith, is that corruption is an inevitable by-product of unfettered capitalism. Like the former mayor of New York, R udolph Giuliani, he advocates a broken windows approach to policing – zero tolerance. At GE this takes the form of an ombudsman, set up to encourage employees to report anonymously any infraction by another member of staff directly to the directors. Staff are within the legal department report any wrongdoing through the same system but also directly to the company’s general counsel. GE disciplines employees that fail to report a concern they should have passed on. The company fires people for retaliating against those who make reports.

“My client is the company not the individual,” says Heineman. “Our chairman does not sit in his corner office deciding between natural rights and utilitarian theories.” Instead the company makes a traditionalist-style pact with shareholders to improve cash flow and raise the stock price, says Heineman. “Those pressures unconstrained create corrupt capitalism. A good company constrains them with systems and processes – and, more importantly, with a strong culture to do the right thing.”

The company conscience

The offensive element of the lawyer-statesman’s role requires the general counsel to become the conscience of the company and to listen to reasonable concerns about the wider impact of its behaviour. To that end, GE has imposed on itself tougher corporate governance requirements than are called for under US legislation, gone further in its annual reporting to shareholders in a bid to be as transparent as possible and imposed a worldwide ban on the use of bribery by its employees. The company builds greenfield production plants outside the US to avoid environmental standards and is rigorous about ensuring that its supply chain does not tap unethical sources of labour. Heineman also keeps watch on where GE is doing business. The company recently chose to stop trading with customers in Iran in light of the political controversy surrounding the country’s nuclear programme.

“We do not have a senior vice president for political philosophy who derives our actions from moral philosophy,” says Heineman. “Our chairman does not sit in his corner office deciding between natural rights and utilitarian theories.” Instead the company makes a traditional analysis of risk and reward. Heineman claims that every example of GE’s socially responsible actions beyond what is called for by the law is linked to an important business goal. “Problems avoided are hard to measure,” he says. “R eputation is not easy to quantify. But that doesn’t mean it is any less important.”

It is commitment to the role is beyond doubt, but whether the general counsel is the best-placed person to keep watch on a company’s reputation remains a source of disagreement among commentators. The originators of the lawyer-statesman concept did not see in-house lawyers as those most likely to take on the role. General counsel, they assumed, would be compromised by a conflicting desire to keep their boss happy. Heineman acknowledges that the job requires a balancing of conflicting interests.

“You have to be CEO’s conscience and his business partner at the same time,” he says. But he argues that systemic changes in the wider profession mean in-house lawyers are the only individuals suitable to take on that task.

In the past, the role of lawyer-statesman was performed by senior partners at private law firms, advising long-standing clients from a position of detached concern. As private law firms have become increasingly specialized and the commercial pressure under which they operate has increased, there is a worry that such objectivity among advisers is becoming rare. The trend is amplified by the desire of corporate clients to exercise their buying power more effectively with outside advisers. GE itself applies its renowned six-sigma process of analysis as well as an online bidding process to the selection of its panel of law firms. At the same time, in-house legal departments, in the US in particular, have expanded. If outside counsel work less frequently for a client it becomes harder to understand that client’s business and long-term concerns. Heineman, too, has been instrumental in driving the trend towards bigger in-house teams. With more than 1,000 lawyers, the legal team at GE is two-thirds of the present size of the firm he left in 1987 (Sidley & Austin).

Heineman also feels that the changing profile of those recruited to become general counsel makes them ideal candidates for the role. The individuals he has in mind typically join a company from an outside organization, perhaps in their late thirties or early forties, having possibly worked in public service and certainly having worked elsewhere in the private sector. They are well-rounded individuals with a personal reputation to lose if they fail to stand up to a bullying or dishonest boss.

Before joining GE, Heineman held the position of managing partner at Sidley & Austin and before that he worked in the US Department of Health, Education and Welfare during the Carter administration in the 1970s. He does, however, accept that the closeness of the general counsel to company management means they can only truly act as a lawyer-statesman if their chief executive genuinely wants objective impartial advice, no matter how unpleasant that might be.

Heineman’s thinking is matched to an extent by the actions of US policymakers as they have sought to make general counsel more responsible for policing a company’s behaviour. This has extended to requirements under the Sarbanes-Oxley Act for in-house lawyers to report up the company hierarchy if they encounter evidence of wrongdoing and report to the board of directors if nothing is done to investigate or rectify the problem.

But Heineman says the new rules change little about the role of counsel. “My client is the company not the CEO,” he says. “If the CEO is doing something problematic it is my responsibility to go to the board. That has always been true. The question is whether you have the guts and the independence to do that.”
Litigation

Litigation convention needs private backing

States will only ratify the Hague Convention on Choice of Court Agreements if the private sector presses them to do so, said commentators in a session earlier this week.

The Convention, which was adopted at the 20th diplomatic session of the Hague Conference on Private International Law in June, is open for signature and ratification. It aims to match what the UN New York Convention achieved for arbitration by providing the same degree of legal certainty for choice of court agreements in contracts as is already the case for arbitration clauses.

It will be up to the private sector to convince governments that ratification would not only be in the interest of the legal profession, but also of private enterprises doing business in the global market, said speakers.

“The first positive signs have been given, and if these nations stick to the commitment their representatives have shown, other states should follow,” said Gottfried Musger, judge of the appellate court of Graz, Austria. “Ultimately it is down to private practice to show states that the convention is needed.”

The Convention is based on three basic rules, imposed on courts of contracting states: The court that is chosen must adjudicate a dispute, all other courts must decline jurisdiction and that other contracting countries must recognize and enforce the chosen court’s judgment. If states sign up to the Convention, the hope is that it will become the framework for international civil litigation. The question is now whether the EU, the US and other leading nations will ratify the document.

“We are talking about assurance,” said Musger. “Business will have the choice between arbitration and judgment with the same degree of legal certainty.”

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## Today's schedule

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Corporate counsel

In-house counsel back calls for code of ethics

A global code of conduct for in-house counsel is not a viable but difficult goal, according to delegates at a session held by the IBA’s corporate counsel forum yesterday.

The meeting was the latest move towards drafting some form of protocol to guide lawyers who work at companies. The process began at a conference in Rome last year, and the forum hopes to establish whether there is enough backing within the profession to take the idea forward.

The discussion has been sparked by the changing role of in-house lawyers and the increased scrutiny under which they operate, even while they are often denied full legal status and privilege. “The role of the company lawyer has evolved,” said Jean-Claude Najar, general counsel for GE Oil & Gas in Italy.

Jaap Winter of De Brauw Blackstone Westbroek described how in-house lawyers are becoming increasingly involved in their companies’ financial statements, internal controls, investor relations and issues such as the remuneration of the board. He also discussed how they fulfil an increasing number of roles, including internal gatekeeper, compliance officer, referee over ethical conflicts as well as trusted adviser.

“We have traditionally relied on what you might call our schizophrenic ability to be able to handle all these roles, but my sense is that the outside world is no longer satisfied with us doing so,” said Winter.

“We may need to expand and divide these roles between more people.”

The Akzo Nobel case, and changing attitudes in several civil law countries across the EU, hold the potential to change the way in-house counsel are regulated. In the U.S., new rules under the Sarbanes-Oxley Act, notably reporting-up-the-ladder requirements, are also affecting the way in-house counsel work with their companies.

“I think the counsel in companies are now the subject of three conflicting pressures: one, to serve the client, two, to give advice and three, to be the holder of the flame of compliance,” said GE’s Najar.

The hope for many in-house counsel is that a global protocol will take into account these changes and pressures, and will help them establish their credentials as lawyers while enabling them to serve their companies more effectively. In drafting such a document they face a number of difficult questions, however, particularly regarding whether the protocol should be binding or simply a set of guidelines.

There is a precedent for such a code. In 2000, the Australian and New Zealand associations of corporate counsel adopted a set of guidelines covering issues such as confidentiality, conflicts, privilege and discovery. Speakers at the session said that it had proved useful for dealing with their companies and educating in-house counsel, particularly junior lawyers.

However, a number of speakers from the floor and the panel highlighted the difficulties in setting up a code of conduct. “How do we get senior management to buy into a code?” asked one delegate.

“It’s a nice idea but it would be very difficult to have anything binding because of the differing rules in different countries,” said Kirsi Komi, general counsel for Nokia Networks. “But even if we have a protocol it will not make us better lawyers. That boils down to the corporate culture.”

Najar joined with Komi in saying that too much blame has been placed on lawyers for company failures. He argued, however, that a code would help in-house counsel understand and assert their independence and ethical judgment within companies, particularly in jurisdictions and companies that do not have favourable cultures in this regard.

Another speaker from the floor questioned whether having a code of conduct would increase the standards applied to in-house counsel by regulators and plaintiffs. Jaap Winter warned against using a code of conduct in a defensive way to avoid problems with regulators. Instead, drafting a protocol should be an opportunity, he said, to present a positive view of what in-house counsel can do. Najar also argued that a code would help clarify to companies who in-house lawyers are and what their role should be.

The session ended with a show of hands. A majority voted in favour of adopting some form of code, probably non-binding, and the forum said that it would put together a document after this week’s conference.

EU treaty will return

The European Constitution is not dead, but neither is it a constitution, a panel agreed yesterday at a session run by the Public Law Section.

Professor Joseph Weiler, from the New York University Law School, said that if the treaty had never been called a constitution it might have been ratified by all member states. Instead the treaty caused public anxiety about the transformation of the EU into a federal state, leading to its rejection by the French and Dutch public in May and June.

The term constitution is elitist and legally wrong, the panel said, because the treaty has been drafted by states without public consent. Weiler described the nomenclature as “a political earthquake”, adding that a lack of public debate had ultimately failed to produce a treaty of enhanced legitimacy.

There was universal agreement with the declaration made last week by José Manuel Barroso, the president of the European Commission, that the EU will not have a constitutional treaty for at least two or three years. Nevertheless, all were convinced that the treaty will emerge in a repackaged form.

“The content of the constitution isensible, in some cases necessary, in a few instances indispensable,” Weiler said.

But several obstacles must be overcome if a full constitution is to be ratified, aside from the problem of how to label it, speakers said. For example, although the European Bar did contribute to the drafting process of the constitution, private practitioners were absent from negotiations on the legal technicalities concerning the European Court of Justice. The participation of local lawyers would strengthen the document’s credibility, as well as making those lawyers more aware of the challenges pan-European simplification poses to their profession.

The media has also undermined the credibility of the constitution in countries such as France and the UK. The right-wing press in particular has attacked the bureaucracy of the EU, while drawing attention to its more obscure directives – such as those dictating the permissible shapes of fruit. Panelists called for more informed media debate of the merits of a new treaty, with a greater reference to the content of the text.

The enlargement of the EU necessitates institutional reform based on pragmatic methods, it was argued. But in the constitutional proposal, the European Parliament focused on less pressing issues such as the superiority of EU law over the laws of individual states. “This is already sound and accepted,” said Weiler.

A future constitution would not bring Europe any closer to being a federal state, one speaker said. Member states would play a greater role in the implementation of union laws than would be the case in a federal government. “When the dust settles, we will go back to the constitution and reassess it,” said Weiler.

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