ISSN 1758 8421

Criminal Law News

THOMSON REUTERS

www.sallyramage.net

November 2010 Issue 25

PUBLISHED BY SALLY RAMAGE
COPEHALE, COPPENHALL, STAFFORD,
UNITED KINGDOM

TEL 01785 - 211370
FAX 01785 - 228281

US Justice Department in litigation with Oracle Corporation

Sally Ramage

Oracle Corporation owns a vast suite of software that combine all the best features of some of its biggest applications, such as human resource management, sales management and other necessary tools to run big companies and governments.

In US federal law, a whistleblower is any employee who takes it upon themselves to report, to authorities, instances of their company's unlawful behaviour. Examples of this behaviour may include corporate fraud, misstatements in financial documents, noncompliance with payroll regulations, or discovery of health and safety violations in the workplace. In July 2010, the US government filed litigation proceedings against Oracle for alleged overcharging by millions of dollars and misrepresentation of its sales practices, forcing the government to overpay (See *US v Oracle Corp*., 1:07-cv-00529, US District Court, Eastern District of Virginia). It is of note here that at least 15 states have enacted their own versions of the False Claims Act. Although some state acts closely track the provisions of the federal False Claims Act, many do not. For instance, some state statutes apply only to Medicaid fraud; others do not permit private citizens to file qui tam actions. Almost every state statute differs from the federal Act in some substantive manner. Virginia's version of the False Claims Act was enacted in Va. Code Ann. § 8.01-216. The lawsuit was filed in federal court in Virginia by Paul Frascella, Oracle's senior director of contract services, using the whistleblower protections of the False Claims Act. The Department of Justice then decided to intervene in the case.

The False Claims Act 1863

The US False Claims Act of 1863, is a specialized statute that was first signed into law by President Abraham Lincoln during the Civil War, creating a unique private-public partnership that permits each citizen to act as a 'private attorney general' and file suit on behalf of the United States against anyone committing fraud against the federal government. The Act requires that the qui tam complaint be served on the Attorney General and the United States Attorney for the district in which the complaint has been filed. Immediately after a qui tam complaint is received, attorneys from the USAO and the Fraud Section should confer to ensure that both offices have received the complaint and to decide how the case will be handled.

An ex-employee was the whistleblower who first filed a complaint. The US False Claims Act (as amended and codified at 31 U.S.C. §§ 3729-33) enables private citizens to sue on behalf of the government and share in any recovery and this is what has taken place in this case. It is reported that 21 government agencies use Oracle software, including the defence and treasury departments, with contracts worth hundreds of millions of dollars. It is of note that the False Claims Act provides protection for any employee who is a whistleblower. Section 3729 (B) (1) states:

> *'A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.'*

The protection of the statute extends to any employee who is discharged, demoted, suspended, threatened, harassed '*or in any other manner discriminated against in the terms and conditions of employment by his or her employer'* in retaliation for any lawful act taken by the employee in furtherance of an action under the False Claims Act. The protection extends to all activities involving the investigation and initiation of a False Claims Act case, testimony in such a case or any assistance in an action filed or to be filed under the Act.

In order to fall within the Act's employment protections, most courts require an employee to demonstrate that he or she engaged in an activity protected by the statute in furtherance of a qui tam suit; that the employer knew of the employee's actions, and that the employer retaliated against the employee as a result of these actions. An employee who obtains relief under the Act is entitled to reinstatement with the same seniority status that the employee would have had but for the discrimination, two times the amount of back pay owed, interest on the back pay and compensation for any special damages sustained as a result of the discrimination, including litigation costs and attorneys' fees.

The allegations

The case concerns alleged frauds due to discounts which had not been passed on by Oracle to the US government. The alleged fraud is in relation to a $1.1B contract with the General Services Administration between 1998 and 2006. The statute states that:

(1) In general, subject to paragraph (2), any person who—
(A) knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval;
(B) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim;
(C) conspires to commit a violation of subparagraph (A), (B), (D), (E), (F), or (G);
(D) has possession, custody, or control of property or money used, or to be used, by the Government and knowingly delivers, or causes to be delivered, less than all of that money or property;
(E) is authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;
(F) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge property; or
(G) knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government, or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government, is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, as adjusted by the Federal Civil Penalties Inflation Adjustment Act of 1990 (28 U.S.C. 2461 note; Public Law 104-410), plus 3 times the amount of damages which the Government sustains because of the act of that person.'

The lawsuit filed states that The U.S. General Services Administration (GSA) often works out multiple award schedule contracts with vendors such as Oracle. The MAS contract lets vendors list their products and prices in a catalogue from which government agencies can make purchases without dealing with the usual red tape caused by procurement regulations. These contracts, GSA Schedules are supposed to provide discounts that are as good as or better than that given to the vendor's most favoured customers. The GSA schedule discounts means that the government is likely to be one of the largest purchasers of a company's products, and is entitled to take advantage of the discounts that its large buying power should command, the filed lawsuit states. The lawsuit states that Oracle's false statements and fraudulent conduct in the negotiation and performance of the contract led to the submission of false claims for payment to the United States. Frascella, employed as a contract specialist by Oracle since 1997, had learnt that Oracle was finding ways around the GSA restrictions in order to give commercial customers deeper discounts.

This is a criminal action, although it could have been dealt with under civil law as Civil statutory remedies are available for fraud against the government as set forth in the False Claims Act, *as amended,* 31 U.S.C. § 3729 *et seq.*, the Anti-Kickback Enforcement Act, *as amended,* 41 U.S.C. §§ 51 to 58, 42 U.S.C. § 5157 (misapplication of disaster relief funds), 12 U.S.C. § 1715z-4a(a) to (e) (violation of HUD Multifamily regulatory Agreement), and section 5 of the Contract Disputes Act, 41 U.S.C. § 604. One possible reason for this is that under civil law, a civil penalty imposed under the penalty provisions of the False Claims Act may be held to be so large in comparison to the government's damages that it violates the excessive fines clause of the Eighth Amendment. *See Austin v. United States,* 509 U.S. 602 (1993); *United States v. Advanced Tool Co.,* 902 F. Supp. 1011 (W.D. Mo. 1995).

One reason why the United States government has taken this matter so seriously is because one never knows where the rot would lead to. As is well known, globalization today confers great benefits to people all over the world and generates enormous and unforeseen opportunities for the growth of crime. People who commit such illegal activities, having become adept in their use of the tools of international finance may prey, not only in the US, but elsewhere, assisting organised crime, knowingly or unknowingly. It is known that leaders of such corporations can come to wield more influence than heads of state or legitimate businesses.

US court limits employer background checks to protect privacy

Sally Ramage

Injunction granted against NASA-9th Circuit

NASA scientists were at the U.S. Supreme Court where they argued against the extent of NANA probes into their background, asserting that it breaches their privacy rights. The case is an appeal to overturn an injunction at the Supreme Court, the injunction issued by the 9th Circuit concerning violation by NASA of its employees' privacy rights. This is not surprising as the Ninth Circuit is known to be 'politically liberal' and out of step with Supreme Court precedent. NASA requested such information as was viewed as intrusive of the employees' right to informational privacy. [1]

In defence of NASA

In their defence, NASA behaved like many employers today. Job applicants and existing employees as well as volunteers may be asked to submit to background checks. For jobs at NASA, screening is required. The current emphasis on security and safety has dramatically increased the number of employment background checks conducted. Employers being cautious, might dig into their employees' past in ways that have nothing to do with the job and things that employer NASA wants to know about the employee are important to them because of an increase of 'negligent hiring' lawsuits, since, if an employee's actions hurt someone, the employer may be liable. This threat of liability gives employers reason to be cautious in checking an applicant's past. A bad decision in employing someone can damage the firm's reputation as well as ruin the career of the human resources official. The terrorist acts of September 11, 2001, have resulted in heightened security and identity-verification strategies by employers. Potential job candidates and long-time employees alike are being examined with a new eye following September 11, 2001. Corporate executives, officers, and directors now face a degree of scrutiny in both professional and private life unknown before the Enron debacle and other corporate scandals of 2002. False or inflated information supplied by job applicants is frequently in the news. Numerous studies and news articles have been published on the topic of resume fraud and such embellished or outright falsehoods make employers wary of accepting anyone's word at face value.

What information can an employer seek?

In the US, the Medical Information Bureau (MIB) is a nationwide specialty consumer reporting agency that compiles and maintains records concerning individual life, health, long-term care, and disability insurance. Generally, you will have an MIB file *only* if you have applied for one of these insurance products within the last seven years, and only if you've applied as an individual rather than as a member of a group. IntelliScript and MedPoint are databases that report prescription drug purchase histories to insurance companies. Like the MIB reports, IntelliScript and MedPoint reports are used primarily when consumers are seeking private health, life or disability insurance. Prescription drug databases can go back as far as five years, detailing drugs used as well as dosage and refills. As regards housing, a number of companies prepare reports for landlords concerning individuals who have applied to rent housing. Embellishments of past salaries can be verified. The Work Number provides employment data reports, which are entirely different from the employment background screening reports discussed in the previous section. Employment Data Reports are limited to basic employment information (such as name of employer, dates of employment, salary, and job title) obtained from participating employers. The Work Number is an employment and income verification service, not a background screening service. There are services, such as provided by LexisNexis, which provides a broad range of information to both businesses and government for numerous purposes including identity authentication, employment screening, fraud prevention, claims management, and debt collection. Information provided by LexisNexis includes public records, other publicly available information, and some non-public information. Public records include records created and maintained by government agencies that are open for public inspection. This includes information such as real estate title records, liens, death records, and motor vehicle registrations. Publicly available information is information about an individual that is available to the general public from non-governmental sources such as newspapers, magazine articles and telephone directories.

[1] In *Campbell v Woodward Photographic, Inc.* [2006] the United States District Court for the Northern District of Ohio, Western Division, held that an employee may proceed with claims against his former employer for violations of the federal Employee Polygraph Protection Act and for invasion of privacy under Ohio state law. The employee's claims were based on the termination of his employment following his former employer's investigation of a workplace theft.

US Supreme Court appeal by NASA

Nelson v NASA [2010] is the appeal case in which the Supreme Court must decide whether to uphold the 9th Circuit's preliminary injunction which halted extensive investigations into the personal lives of employees at the Jet Propulsion Laboratory (JPL) in Pasadena, California. The case has implications for the privacy rights of employees, even though the background enquiries of employees as per Homeland Security Presidential Directive 12 [2004] which instituted a standard identification badge to gain access to federal facilities. NASA required its contractors' employees to sign a waiver permitting investigators to collect any adverse information from anyone, including information related to abuse of alcohol and/or drugs, mental or emotional stability, general behavior or conduct and other matters. NASA's privacy policy must follow Directive 12, the legal basis of the policy. If there are weaknesses in how NASA retained employee information, and how it updated and removed it; if risks are identified in the transfer employee files, financial records, and other information around the globe. What is apparent is that European employee data protection rights appear to be much stronger than the protection provided to US employees.

Further reading

Obligations of Furnishers of Information under the FCRA
www.ftc.gov/os/2004/11/041119factaappg.pdf
Obligations of Users of Information under the FCRA
www.ftc.gov/os/2004/11/041119factaapph.pdf
Consumer Reports: 'What insurers need to know'
www.ftc.gov/bcp/edu/pubs/business/credit/bus07.shtm
Credit Reports: 'What information providers need to know'
www.ftc.gov/bcp/edu/pubs/business/credit/bus33.shtm
Using Consumer Reports: 'What employers need to know'
www.ftc.gov/bcp/edu/pubs/business/credit/bus08.shtm

US defendant cannot subpoena a non-US witness

The United States Federal Rules of Criminal Procedure (Fed. R. Crim. P.) authorise courts to issue subpoena orders for potential witnesses who reside abroad and may testify in criminal proceedings. Fed. R. Crim. P. 17(b) and (e) authorize trial courts to issue subpoena orders for service on named witnesses. This subpoena order must be served (1) at any place within the U.S., and (2) when related to a witness located in a foreign country, it must be served under the circumstances and in the manner provided in 28 U.S.C.S. § 1783. 28 U.S.C.S. § 1783 states that U.S. courts may issue subpoena orders requiring the appearance as a witness before them of a national or resident of the U.S. who is in a foreign country. The language of the federal statute, therefore, implies that U.S. courts do not have power to summon foreigners with no ties with the U.S. residing abroad.
A defendant in a US court criminal proceeding does not have the means to subpoena a witness who is residing outside the United States, and is not a US citizen. Rule 15 of the Federal Rules of Criminal Procedure provide for a defendant to take a trial deposition of the witness for admission at trial, if the defendant can satisfy the Court as to the necessity. The deposition is not for purposes of discovery but for admission at trial. In the case of *United States v Jinian*, N.D.Cal., 2010, the defendant Jinian, charged with 14 counts of wire fraud under 18 USC 1347, sought to depose witnesses abroad, including a witness in Mexico who might testify in support of the defendant. However, the Judge ruled against this. It is alleged that Jinian embezzled funds without his employer's authorisation; however Jinian has pleaded not guilty, claiming that the money was part of compensation. The court refused permission on grounds that such witness statements are vague and the defendants had not established its relevance or the likely admissibility of such deposition testimony. It might be argued that this is in breach of the defendant's Fifth Amendment rights which is part of the Bill of Rights, protects against abuse of government authority in a legal procedure. Its guarantees stem from English common law which traces back to the Magna Carta in 1215. For instance, grand juries and the phrase due process both trace their origin to the Magna Carta.

Ireland enforces anti-money laundering Directive 2005/60/EC

On 5 May 2010, the Third-Anti Money Laundering Directive (2005/60/EC) was finally transposed in Ireland by the Criminal Justice (Money Laundering and Terrorist Financing) Act 2010 (the Act). The aim of the Third AML Directive is to widen the scope of previous anti-money laundering and terrorist financing legislation based on the revised recommendations of the Financial Action Task Force (FATF). Apart from Chapter 9 of Part 4 (Authorisation of Trust and Company Service Providers, the Act came into force in July 2010. The Act introduces the important changes for designated persons, namely: the definition of money laundering has been widened to include the proceeds of any criminal conduct, however minor; the terminology of 'know your

customer' has been replaced by 'customer due diligence' (CDD); the level of CDD required determined using a risk based approach; enhanced obligations to identify the 'beneficial owner' whereby the designated person must ensure that it takes reasonable measures to understand the ownership and control structure of the client; a new requirement to identify non domestic politically exposed persons (PEPs) as defined in the Act; the definition of 'trust and company services provider' now needs to be authorised; the power of a district court judge to direct a designated person not to carry out a specified service for a specific timeframe where a customer is subject to investigation; and Guidance Notes to be used by designated persons.
Internal risk assessment must consider factors such as the nature of the customer base; nature of the products or services to be provided; methods of distribution; and geographic areas of operation. The significant change for designated persons is the time at which customer due diligence is required to be made. The Act specifies that the CDD must take place prior to the occurrence of any of the following circumstances: establishing a business relationship with a customer; carrying out a transaction or series of transactions for a customer greater than €15,000 (previously €13,000); carrying out a service for a customer if there is a suspicion of money laundering or terrorist financing; carrying out a service for a customer where there is doubt about the veracity or adequacy of previously obtained identification documentation. In relation to life assurance business the verification of the beneficiary of a life assurance policy can be deferred at the time a policy is taken out. Other exceptions to the prior to rule are where a designated person has reasonable grounds to believe that prior identification would interrupt the normal conduct of business and there is no real risk that the service or customer is involved in money laundering/terrorist financing; a credit institution may allow a bank account to be opened before verifying identity. However no transactions can be carried out through the account until verification is completed. In order to complete CDD, a designated person must complete the following steps: verify the customer's identity; identify any beneficial owner connected with the customer or service concerned; obtain information in relation to the purpose and nature of the business relationship; and carry out ongoing monitoring. A customer's identity can be verified electronically but with more additional checks. If electronic verification is relied upon, then the first payment should be through an Irish/EU/Equivalent jurisdiction bank account in the customer's name. Under simplified CDD, a designated person is not required to verify the customer's identity; establish the beneficial ownership; or establish the purpose of the business relationship. However, ongoing monitoring of the business relationship is required.

Trust or Company Service Providers
Under Chapter 9 of Part 4 of the Act any person carrying out the business of a trust or company service provider (TCSP) will be required to be authorised by the Minister and will be classed as designated person under the Act. A TCSP is any person whose business involves forming companies or other legal persons; acting as a director or secretary of a company under an arrangement with a person other than the company (e.g. personal service company); arranging for another person to act as a director or secretary of a company; acting as, or arranging for another person to act as a partner of a partnership; acting as or arranging for another person to act as (i) a trustee of an express trust, (ii) a nominee shareholder for another person (other than a company listed on a regulated market which is subject to disclosure requirements), or (iii) providing a registered office, business address, correspondence or administrative address or other related services for a company or a partnership. Once a TCSP is authorised by the Financial Regulator, the authorisation will be valid for a period of three years. The Department of Justice and Law Reform has not yet confirmed the commencement date for Chapter 9 of Part 4 (Authorisation of Trust and Company Service Providers) of the Act.

Record Keeping
Under the Act, a designated person is obliged to keep the following documents and information for use in any investigation by the Gardai Siochana or the Revenue Commissioners or other competent authorities into any suspected cases of money laundering or terrorist financing: in the case of customer due diligence, the designated person must keep records of the procedures applied and the information obtained about the customer. An original or copy of all documents used to verify the identity of the customer/beneficial owner must be retained for a period of at least five years after the relationship ceases with the customer or the date of the last transaction, whichever is the later; in the case of the ongoing monitoring, the designated person must keep records evidencing the history of services and transactions carried out in relation to that customer for a period of at least 5 years from the date on which the transaction was completed. Copies of STRs made to the Gardai Siochana and the Revenue Authorities should be retained for at least five years. Records relating to staff training include material used and attendance records should also be retained for a period of at least five years. The records referred to above may be retained electronically so long as they are capable of being reproduced in electronic form. Core Guidance Notes and sector specific Guidance Notes for the Banking and Insurance sectors are available on the Financial Regulator's website and are subject to public consultation with the closing date for comments being the 2 July 2010 for the Core and 9 July 2010 for the sector specific. Sector specific Guidance

Notes for the Investment Funds, Stock broking and Credit Union sectors are at an advanced drafting stage. Policies and procedures must meet and comply with the new requirements. The consequence of non-compliance with these requirements may result in a prison sentence of up to 5 years and /or an unlimited fine

Cartels-where are we in 2010?

Sally Ramage

Criminal liability for cartel conduct is not universal but cartels are criminal in Canada, Austria, Brazil, France, India, Ireland, Israel, Japan, Korea, Russia, United Kingdom and United States. Cartel offences do not carry a prison sentence in the jurisdiction of China.

Marine hose cartel in the United Kingdom

In the UK, the Enterprise Act 2002 makes individuals criminally liable for cartel activity and possible prison sentences of up to 5 years and unlimited fines can be imposed. Three people received prison sentences in 2008 for their involvement in the global marine hose cartel. They were arrested in the United States following a cartel meeting that was covertly recorded by US authorities. The three persons were allowed to return to the UK as part of a guilty plea agreement.

Tobacco cartel in the UK

The Office of Fair Trading (OFT) has in September 2010, fined two tobacco manufacturers and ten retailers a total of £225 million for engaging in unlawful practices in relation to retail prices for tobacco products in the UK/ The OFT found that Imperial Tobacco and Gallaher each had a series of individual arrangements with each of ten retailers comprising Asda, The Co-operative Group, First Quench, Morrisons, One Stop Stores, Safeway, Sainsbury's, Shell, Somerfield and TM Retail. The arrangements, which were in force between 2001 and 2003, linked the price of a tobacco brand with that of a competing manufacturer's brand and restricted the ability of retailers to determine their selling prices individually. Imperial Tobacco was fined £112 million and Gallaher £50 million with each of the retailers fined around £1.3 million. A number of the parties have received discounted fines as a result of participating in the OFT's leniency programme, or because following the OFT's Statement of Objections issued in April 2008, they each admitted liability in respect of the infringements alleged against them.

Possible property cartel offences in the UK from April 2011

From 6 April 2011, land agreements will become subject to the UK competition rules prohibiting anti-competitive agreements. What's more, the prohibition will apply to agreements whether they were entered into before or after this date. A land agreement is essentially any agreement between undertakings which creates, alters, transfers or terminates an interest in land, or an agreement to enter into such an agreement. Until now, such agreements have been specifically exempt from the Chapter 1 Prohibition, but the decision has been taken to revoke this exemption with effect from April 2011. In effect, parties to a land agreement will now need to consider whether the agreement (or any part of it) prevents, restricts or distorts competition in the UK.

This means that clauses in land agreements which restrict the use of commercial property, restrict landlords from leasing premises to particular third party tenants, restrict landowners from selling land to particular third parties, or require parties to obtain services (for example cleaning or insurance) from a particular supplier, now risk falling foul of the Chapter 1 Prohibition. Indeed in some cases, clauses which have previously been considered to be standard provisions will now have to be considered in a whole new light. If a clause does breach Chapter 1, this could potentially render the agreement null and void. It should be noted that, in the absence of price fixing or market sharing, such clauses will only be caught by the Chapter 1 Prohibition where they have an appreciable effect on competition. This will largely depend on the size of the market concerned, the relative market shares of each of the parties, and the actual effect on the market (for example higher prices, lower quality, or reduced innovation).

If, however, the parties can show that the economic and consumer benefits arising from such a clause in an agreement outweigh the negative impact on competition within the market, the clause will not be deemed to fall foul of the Chapter 1 Prohibition. So, for instance, it may be that a restriction in a shopping centre lease is required to ensure a broad mix of tenants for the benefit of consumers. The key point here however is that if such a restriction is included in a lease, benefits arising must be shown and it must be shown that such benefits outweigh any negative impact on competition. Before changes take effect and by December 2010, guidance on how the removal of the existing exemption will impact upon land agreements is due to be published. In the meantime, those party to land agreements would be well advised to use the interim ‘comfort’ period to establish

whether their agreements contain any such restrictive provisions, and if so, whether such provisions are likely to have an appreciable effect on competition.

Citroën dealership cartel in Ireland

In Ireland, cartels were first criminalized in 1996, and courts can impose prison sentences of up to 5 years and fines of up to €4 million. On 30 November, 2009, Ireland's Central Criminal Court imposed its first custodial sentence on an individual for involvement in a cartel. This prison sentence was imposed for non-payment of a criminal fine and is a stark reminder that involvement in cartels and other hard-core anticompetitive conduct exposes individual executives to the risk of imprisonment. The Citroën Dealers Association was prosecuted by the Director of Public Prosecutions. Fourteen senior persons among the association's members, including James Burse, a director of Burse Peppard Motors Limited, were charged with cartel offences. The Competition Authority found that, for a period spanning more than 10 years, members of the Citroen Dealers Association had conspired to fix the price of Citroën cars sold in dealerships throughout Ireland. In April 2009, James Bursey was convicted. He received a 15-month prison sentence, suspended for five years, and was fined €80,000 for his involvement in the cartel. His Citroën dealership was fined an additional €80,000. When Bursey failed to pay his fine by the deadline set by the court, he was sentenced to 28 days in prison for non-payment of that fine.

Rice noodle cartel in China

The National Development and Reform Commission (NDRC) of China has prosecuted a group of rice noodle manufacturers in Guangxi province, involved in a joint action to increase prices in the region. The NDRC is the Chinese competition authority tasked with enforcing the AML in relation to price-related anti-competition activities. According to the NDRC report, the Rice Noodle Cartel involved 18 rice noodle producers from Nanning and 15 rice noodle producers from the neighbouring city of Liuzhou in the Guangxi Autonomous Region of China. The alleged collusion, according to the NDRC, also involved the China branch of the International Ramen Manufacturers Association (IRMA). The NDRC, acting in accordance with the powers awarded to it under the Chinese Price Law which prohibits price-collusion by business operators, ordered the instant noodle producers to immediately slash prices. On 1 November 2009, a senior executive in a rice noodle manufacturing company in Nanning organised a meeting with local competitors to discuss avenues of co-operation in the industry. In the following month, 18 rice noodle producers from Nanning met to discuss a joint increase in rice noodle prices. This joint increase, of RMB 0.20 per 500 grams of rice noodles, was implemented on 1 January 2010. On 21 January 2010, 15 rice noodle producers from neighbouring Liuzhou joined their counterparts in Nanning in the price increase, entering into profit-sharing agreements with the Nanning producers.

The public infringement decision was imposed almost a year and a half after the coming into force of the AML in August 2008. This enforcement action was taken under the authority of several laws which pre-date China's anti-monopoly legislation (AML). On 1 November 2009 and 16 December 2009, 18 rice noodle manufacturers, led by the owner of Nanning Xianyige Food Plant (the Organiser) held meetings seeking to reorganize the local rice noodle industry and increase rice noodle prices in the region. Article 225 of the Criminal Law, which broadly prohibits unlawful business activities that seriously disrupt the market order, was applied as the basis for the detention. Also, Article 52 of the AML states that where any conduct constitutes a criminal offence, the relevant individual or organisation shall be prosecuted for criminal liability in accordance with the law.

Power station bid-rigging in Germany

Alstom Power Systems GmbH (Alstom), a German subsidiary of the French company Alstom SA, and a manufacturer of boilers for brown coal power stations, together with two of its former managers, was fined approx. €91 million by the German Federal Cartel Office (BKartA) on Thursday, 12 August, for bid-rigging, which included the assignment of customers as well as fixing quotas and prices with its competitors when participating in large public tenders. During the period 1990 to 2003, Alstom (then called EVT Energie- und Verfahrenstechnik GmbH) together with its competitors, Babcock, Steinmüller and Lentjes, fixed the bids submitted by each of the companies in public tender processes to supply boilers for large brown coal power stations at various locations in Germany. The participants in the cartel together agreed the details of the bids before they were handed in, thereby ensuring that each of the four companies received at least one of the large projects at a price over and above what would ordinarily have been expected. The company that won the overpriced bid would form a consortium under its lead comprising of the other members of the cartel. The projects were shared by reference to each company's market share, to guarantee all four participants in the

cartel were involved to their best capacity throughout each of the projects. Given the boiler manufacturing business of each of Steinmüller and Lentjes merged with Babcock in the 1990's, and Babcock has since become insolvent, Alstom is the only party still active in the manufacture of boilers for coal power stations. Consequently, fines have only been imposed on Alstom.

.

The UK will have new one- stop agency to deal with economic crime

Sally Ramage

The government plans to create a one-stop agency which might better deal with the perceived shortcomings of the current multi-agency system for investigating and prosecuting fraud and related commercial crime. An Economic Crime Agency is proposed. Critics express their views that such an agency would require huge investment in people and resources at a time of severe financial cut-backs. Looking to the demise of the Asset Recovery Agency as an example of and with government announced plans to replace the Serious Organised Crimes Agency with a new National Crime Agency, and taking into account the new National Fraud Authority not yet of influence, the plan, critic say, is half-baked.
SOCA's2010 published details of ancillary orders imposed to 'aid the lifetime management of offenders' assumes that 'career criminals regard prison as an interruption', something that rarely marks the end of their involvement in serious crime. Therefore SOCA plans to publish details of all Orders made.

SCPOs
The highest profile Order is the Serious Crime Prevention Order, (SCPO), which was introduced by the Serious Crime Act 2007. An Order can be made on application by the Director of Public Prosecutions, the Director of Revenue and Customs Prosecutions Office and the Director of the Serious Fraud Office. The court must be satisfied of two things. Firstly, that a person has been convicted of a serious offence. Secondly, that there are reasonable grounds to believe that the Order would protect the public by preventing, restricting or disrupting involvement in serious crime by the person in England and Wales. An Order may contain such prohibitions, restrictions or requirements; and such other terms; as a court considers appropriate for the purpose of protecting the public by preventing, restricting or disrupting involvement by the persons concerned in serious crime in England and Wales. The Serious Crime Act 2007makes clear that Orders will be provided for the purpose of protecting the public by preventing, restricting or disrupting involvement in serious crime in England and Wales. The details of Orders made to date in cases prosecuted by SOCA include restriction and notification of ownership, possession or control of vehicles; notification of premises, owned, occupied, rented, leased or has right of access to; restriction to one mobile phone handset and one SIM card; non-association with co-defendant; notification of changes to name and identity; restriction on bank accounts; restrictions on loans in excess of £3000; restriction on applying for mortgages; restriction on third party financial accounts; restriction and notification of travel out of the UK; restriction on computer software that can reproduce an image of any official document and restricted access to the internet via one device; notification and access to premises owned, rented, leased or otherwise; notification of prison visitors; restrictions on using the prison telephone system; and notification of travel outside the UK. A Serious Crimes Prevention Order (SCPO) lasts for a maximum of 5 years. A breach of an Order is punishable by a penalty of up to 5 years imprisonment and/or a fine. Other Orders at the disposal of SOCA, and indeed other prosecuting authorities, include Travel Restriction Orders (TROs) and Financial Reporting Orders (FROs).

Police in France and Roma DNA

Sally Ramage

In many countries minority ethnic groups suffer harassment and assault. The Roma are persecuted in this way throughout Europe, and in some countries there seems to be a situation close to ethnic cleansing in which all those not perceived as being nationals are intimidated into leaving. In this era of global capitalisation, it is no surprise that people follow the free movement of capital in search of work. Inequalities between rich and poor, both between and within countries, continue to widen.

In July 2010 French President Nicolas Sarkozy ordered measures against illegal Roma communities in France and announced legislation would make deportation/repatriation easier. The League of Human Rights (LDH) on Thursday 7 October 2010, accused French authorities of improperly collecting DNA samples from Roma migrants before deporting up to 1,000 Roma migrants from France. The LDH cited EU Directive 38/2004 for the proposition that EU citizens are free to move within EU territory, raising concerns about allegations of the country fingerprinting deportees violated according to the EU Charter of Fundamental Rights and Freedoms. Group leader Martin Schulz said:

> *'As a founding principle, the EU bans discrimination based on ethnic origin or nationality. This ban is part of the EU's DNA and its identity as a community of values, as defined by the Charter of Fundamental Rights. Now, with the Lisbon Treaty in force, it has the status of binding primary law. The recent treatment of Roma people in France was appalling and cannot go unchallenged. Their rights have been abused for populist, electoral reasons by a government that is fast losing support. Scenes like those we have recently witnessed in France must never be repeated.'*

There are some 300 illegal camps in France and over 700 illegal Roma there. The French government plan to dismantle these camps and deport all illegal immigrants. Criminal law in France allows the police to collect samples of genetic material from indicted individuals only, yet the hundreds of Roma, deported to Romania and Bulgaria, were not charged but their DNA samples were nevertheless taken from them. France does have a department named 'Fight against Itinerant Delinquency (OCLD)' and it is alleged, a database of illegal documents pertaining to Roma families, and their ethnic origins, although the French Ministry of Justice denied knowledge that such a database exists. France does have a database of convicted sexual offenders, set up since 1998; the genetic information of this database has officially been deleted since 2007.

Switzerland has 170,000 Roma

France is not alone in its treatment of the Roma people as Switzerland and Kosovo have signed a readmission agreement, enabling Switzerland to return Kosovars who are in the country illegally to their homeland. Swiss Justice Minister Eveline Widmer-Schlumpf said the accord provided the legal framework for an already existing practice. Widmer-Schlumpf signed the deal with the Kosovo interior minister. She said cooperation with Kosovo had been important since it is a transit country for organised crime. The Kosovan government representative said that the government would increase efforts to fight drugs and human trafficking. Switzerland has the largest expatriate community of Kosovars after Germany, with 170,000 living in the alpine nation. The readmission agreement would not affect all Roma people, although the UK's Amnesty International had warned the Swiss government against using the accord to send back members of ethnic minorities because, they claim, Roma people among other minorities face discrimination in Kosovo.

United Kingdom's deportation criteria

Foreigners convicted of murder, sex offences, fraud and people trafficking could be automatically recommended for deportation under new guideline. Police, magistrates, judges and prison officers were asked to comment on which offences were serious enough to warrant a recommendation for deportation. One proposal laid out in the report was that judges should recommend for removal all foreigners who received a custodial sentence of 12 months or more. At the same time, Magistrates Courts were allowed to give one year sentences rather than a maximum six- month sentence, thus qualifying many convicted of minor offences to be deported. (See Crime and Security Act 2010). In the UK, the deportation guidelines were aged and the practice of courts varied across the country. Judges and magistrates can only recommend that a convicted criminal should be removed - it is up to the Home Secretary to make the order for deportation. The use of intelligence material as evidence is frequently admitted in proceedings before the Special Immigration Appeals Commission (SIAC), the court established in 1997 to hear appeals against deportation on national security grounds. SIAC's jurisdiction was extended by the Anti-Terrorism, Crime and Security Act 2001 to cover appeals by individuals who are detained under that Act pending deportation as suspected international terrorists. The SIAC procedure is designed to enable the court to take account of sensitive evidence, including sensitive intelligence material. Where evidence is not sensitive, SIAC sits in open sessions in which the appellant and his/her lawyers participate in the normal way.

No information compiled about religion and ethnicity

In September 2010, the European Commission warned that France would face disciplinary proceedings and potential legal action if it did not follow EU regulations in its relations with Roma migrants. The UN Committee on the Elimination of Racial Discrimination (CERD) expressed concern about France's recent expulsion policy for Roma migrants. The Italian government is following developments and has expressed the wish to deport

many Roma from Italy but Italy plans to seek approval from the European Commission first, before expelling Roma who live on Italian state benefits. Four different NGOs have lodged complaints against France's actions against the Roma, because police in Europe cannot lawfully compile information based on religion or ethnicity.

Biometric database formation is legal in EU
It is perfectly in order for French immigration authorities to compose a biometric database record of the Roma that they are deporting. The creation of biometric records is intended to prevent fraud i.e. the claiming of the 300 Euros per deported person resettlement upon a second deportation. The authorities believe that those persons repatriated use the money to exercise their free movement rights as EU citizens and promptly return to France.

Fraud prevention
The creation of biometric records is, according to the French immigration ministry, intended to prevent fraud i.e. the claiming of resettlement money upon a second or multiple deportation(s). Although the exact use that will be made of these records remains unclear at this stage i.e. whether they will be used to prevent, where possible, entry to France or solely be used upon deportation to ensure that multiple amounts are not paid. The European Commission has been reported to have begun infringement proceedings against France for a breach of EU rules and the burden of proof has now shifted to France to show that it is not targeting a particular ethnic group.

***S and Marper v United Kingdom* [2008]: collecting biometric data breaches privacy right**
The applicants, S and Michael Marper, both British nationals, were born in 1989 and 1963 respectively. They lived in Sheffield. The case concerned the retention by the authorities of their fingerprints, cellular samples and DNA profiles after criminal proceedings against them were terminated. At the end of 2008, the Grand Chamber of the European Court of Human Rights gave judgment in the case of *S and Marper v United Kingdom*.[2]
The case concerned the violation of the right to privacy, protected by Article 8 of the Convention, caused by the taking and retention of biometric details for the UK criminal database from two individuals, neither of whom had been convicted of any offence and one of whom was a minor. This case has been incorrectly cited as precedent for the Roma deportation because the Roman who were deported had been proved to have committed illegal immigration offences whereas the in the Cases of S and of Marper, they had never been charged and were completely innocent. Article 8(2) (given the benefits in preventing and prosecuting crime). Article 8 (2) allows states to interfere with privacy if a measure is in accordance with law, meets a legitimate aim and is necessary in a democratic society: Sex offenders DNA are retained and other private details maintained in sex offenders' registers. If in fact, the authorities have just taken the Roma's fingerprints, the French authorities would be in order. The European Court in *S & Marper v UK*, with respect to fingerprints, reviewed earlier case law of the Commission of Human Rights which found no interference with regard to fingerprints. [3] In respect of Article 8 (2) the court, in finding that the retention of DNA and fingerprints was not justifiable under article 8(2) assumes a state a certain amount of discretion, especially where the state is best placed to decide how to meet the aims sought, as in criminal matters when, for example if cases of sexual offences, the court gives the state a wide area of discretion. The Court in *S and Marper v UK*, in considering whether retention was necessary in a democratic Society, gives the state scope for proportionality. Has an appropriate balance been struck between protection of individual rights and community interests, taking into account the limited amount of discretion to be given to the state? It gave several reasons for this finding, and especially because the UK had an indefinite retention policy. France does not.

Further reading
France Roma deportations violate EU law
http://www.socialistsanddemocrats.eu/gpes/index.jsp
News Wires, 'Priests slam Sarkozy for deporting Roma', 23 August 2010.
http://www.france24.com/en/20100822-priests-criticise-sarkozy-roma-deportation-france-heart-attack
Times, 'Storing innocents' samples is disproportionate', 8 December 2008.
http://business.timesonline.co.uk/tol/business/law/reports/article5303455.ece

[2] (Application Nos 30562/04 and 30566/04).
[3] *Kinnunen v Finland* [1996] Application no. 24950/94.

Printed and published by Sally Ramage ®, Copehale, Coppenhall, Stafford, ST18 9BW, UK. Registered as a Newspaper at the Post Office. ISSN 1758-8421.

ISSN 1758-8421
9 771758 842105 25>