

## **GLOBAL TRENDS IN THE AREA OF MUTUAL ASSISTANCE IN BUSINESS REGULATION: A GUIDE TO THE PREPARATION OF NATIONAL LAWS TO FACILITATE THE PROVISION OF ASSISTANCE**

**A Paper by the Commonwealth Secretariat**

### **INTRODUCTION**

1. At their 1993 Meeting in Mauritius, Ministers issued a Statement of Principles on Mutual Assistance Between Business Regulatory Agencies and asked their Senior Officials to keep the Statement under review. Senior Officials considered the Statement at their 1995 meeting and have proposed amendments for consideration by Ministers at this Meeting.

2. To assist countries wishing to enact legislation which will enable them to give assistance to business regulatory agencies in other Commonwealth (and, indeed non-Commonwealth) countries, the Secretariat has prepared the following notes which are designed to give effect to the Statement in the form being recommended by Senior Officials for adoption by Ministers. These notes will, of course, need revision if Ministers amend the draft Statement.

3. These notes have been prepared on the assumption that laws which facilitate co-operation between business regulatory authorities will complement laws relating to the provision of mutual assistance in criminal matters and that the type of action contemplated by the regulator will determine which channel is chosen. The Secretariat is conscious that some countries do not draw a distinction and have chosen to permit, in business regulation laws, the provision of information for the purposes of criminal investigations and proceedings in the requesting country where such proceedings are, or may be, brought by a regulatory authority. The reason for this practice is clear - often a regulator requesting information from a foreign counterpart does not know, at the time the request is made, the final form of action which may be taken against the person or entity being investigated. If information sought under business regulation statutes may only be used for civil or administrative purposes a regulator may be forced to make an

identical request under mutual assistance in criminal matters laws if and when s/he decides to resort to criminal sanctions against a person. Other countries choose to separate the channels for equally good and proper reasons and in so doing may provide a mechanism for a regulatory authority to simply pass a request to the central authority for action under its criminal co-operation law.

4. Ministers first acknowledged that increased international activity in the securities, futures and investment markets had resulted in a corresponding need for a high level of international co-operation between business regulatory agencies if national agencies were to administer national regulatory laws effectively. They acknowledged that the administrative and civil sanctions which are a feature of most business regulation laws meant that the Scheme relating to Mutual Assistance in Criminal Matters did not adequately meet the needs of regulators and needed supplementation. They equally acknowledged that the development of a Commonwealth Scheme would, at this stage, be premature and accordingly they determined that the development of a Statement of Principles would be the appropriate way of proceeding pending further investigation of the question whether a scheme would be appropriate.

5. Since the enunciation of the Statement of Principles in Mauritius regulators have reiterated their growing interdependence when seeking to regulate national market places. Increasingly they acknowledge that the global nature of today's securities markets makes enforcement difficult as there are many evidentiary, jurisdictional and detection problems which are encountered.

6. Meeting in special session at the 1994 Oxford Conference on Mutual Legal Assistance, business regulators drew a clear distinction between their needs and those of authorities administering criminal laws. They pointed to the importance of the economic interests which were at stake in administering business regulatory laws and noted the different form in which the information they sought was required. For example, in seeking to take administrative action, they required information which justified, on reasonable grounds, the making of a decision. They did not, in many cases, require that the information was provided in a form which was usable in a court. A full report of the issues raised by business regulators at the Oxford

Conference is contained in the report of that Conference, additional copies of which will be available to delegations in Kuala Lumpur.

## LEGISLATION TO GIVE EFFECT TO THE STATEMENT OF PRINCIPLES

7. The first principle is that *systems devised to respond to requests for assistance by counterpart regulatory authorities for the purpose of the exercise of their regulatory functions should be simple, quick and flexible and be capable of use with the minimum of formality.*

8. Legislation to give effect to this principle could adopt a number of approaches. For example, each piece of legislation which established and created powers and functions for a regulator, could include provisions which permit the regulator to co-operate with counterparts in other countries. The powers given in aid of this function would include powers to communicate, or make arrangements for communicating, information obtained by the regulator in the performance of his or her functions and powers.

9. There may be circumstances where the request raises issues which suggest that it should be dealt with in the first instance by an authority having overall responsibility for the subject of business regulation - perhaps a government department. It would be open then for legislation to require a regulator who receives a request to consult with the relevant department (or Minister) before making a decision to grant assistance. Requests falling within this class could include those:

- (a) asking that the regulator in the requested country undertake an investigation on behalf of the requesting Authority; and
- (b) asking that the overseas regulatory Authority be permitted to undertake an investigation in the requested country.

The Secretariat is aware of one national law designed to permit regulators to render assistance to overseas counterparts which requires the regulator to make a preliminary assessment of the request and then, unless s/he decides to refuse the request, to refer it, together with recommendations, to the relevant Minister for final decision.

10. The extent to which national laws require a regulator to consult or otherwise seek permission to render assistance is a matter for national

consideration. Whatever the outcome of that consideration it would be desirable for the legislation (or instruments or guidelines made thereunder) to specify any channels through which requests should go before being granted. In the spirit of the principle, such channels should be kept to a minimum so as to permit the speedy responses sought by regulators who, for example, may need urgent information to take a decision on a takeover, on the question whether to delist a company, or whether to suspend trading in a particular share.

11. To minimise formality, legislation which generally required the approval of a person or authority other than the regulator, could draw a distinction between confidential and public information and not require the latter to be the subject of any special consideration.

12. The second principle *contemplates the provision of assistance subject to undertakings being given by the requesting Authority or country relating to the use, maintenance of confidentiality and return of any documents provided.*

13. Legislation to give effect to this principle would permit (or require) the person or Authority granting the assistance to seek undertakings and grant assistance once a satisfactory response is received from the requesting country.

14. If the legislation sets out the usual contents of a request, it could include in such a provision a requirement that, in relation to all or specified types of requests, the following will be included:

- (a) details of the use to which the requested information will be put;
- (b) an undertaking that, without the consent of the requested Authority or country, the information or documents provided in response will not be used for any purpose other than that specified in the request;
- (c) an undertaking that, if requested by the requested country, the information or documents will be returned upon conclusion of the case for which they are provided; and
- (d) details of any other person, authority, department (or otherwise) in the requesting country which may have legally enforceable access to information in the custody of a regulatory Authority. For example, if the laws of the requesting country provide that revenue

or law enforcement authorities have a right of access to Authority documents which right cannot be defeated by an undertaking as to use or confidentiality, a requested country may consider that such information should be included in any request.

15. The third principle *establishes the discretionary nature of the decision to grant assistance.*

16. Legislation to give effect to this principle could list the matters to which the person or Authority given power to grant assistance must, or may, take into account in reaching such a decision. The majority of countries would wish to ensure that the granting of assistance did not prejudice any essential public interest. Legislation could leave the determination of what is an essential public interest for consideration on a case by case basis or it could list some examples in an inclusive (rather than exclusive) definition of the term. One country has included in its law a reference to "blocking statutes" to ensure that the law facilitating business regulatory co-operation does not override specific legislation relating to the provision of evidence to overseas authorities. The maintenance of the laws of the requested country is clearly an essential public interest. (It is of interest that business regulators at the Oxford Conference cited "blocking statutes" as one of the major problems facing them.)

17. Issues listed in the Statement which could be listed as issues decision-makers must or may take into account in considering whether to grant a request are:

- (a) the seriousness of the alleged violation of the regulatory law, regulation or requirement;
- (b) whether the assistance sought should or could be sought under provisions relating to mutual assistance in criminal matters;
- (c) whether comity would require the granting of assistance;
- (d) whether the requested country or Authority can (and would) reciprocate; and
- (e) the cost to the requested country of providing the assistance.

18. In addition to the matters listed in the principles, countries may wish to consider whether other grounds should be added. Some countries may

wish to enshrine in law the rule that assistance will not be provided if action could be taken on the basis of race, religion, nationality or political opinions of the person in respect of whom the requesting Authority proposes to exercise its powers.

19. An important element of the third principle is that the fact that the circumstances giving rise to the request do not, or would not, constitute a violation of laws, regulations or requirements in the requested country should not, of itself, preclude the giving of assistance. Enshrining this principle in law would make it clear that a matching of regulatory laws was not a prerequisite for the granting of assistance.

20. The fourth principle *provides that the law of a requested country should permit (subject to appropriate civil liberties and other safeguards) a regulatory authority to use appropriate powers available to it in a domestic context.*

21. A provision giving effect to this principle could state simply that the power of a regulatory Authority may be exercised on behalf of a foreign regulatory Authority. A more limited provision would require that the requesting foreign regulatory Authority must be a counterpart of, or perform functions similar to the functions of the requested Authority. Countries which wished to list precisely the functions of a regulatory Authority which could be exercised on behalf of a foreign regulator could specifically list powers such as the power to:

- (a) gain access to information;
- (b) obtain information or documents from any person or entity subject to its jurisdiction (whether compulsorily or otherwise);
- (c) exercise powers of investigation; and
- (d) exercise powers of inspection.

22. The fifth principle states that *the law of the requested country should make it possible (in appropriate cases) to invoke sanctions or take other enforcement proceedings in cases in which a person or entity withholds information, documents or other assistance which the regulatory authority is entitled to obtain.*

23. Countries which give regulatory authorities powers to obtain information usually prescribe penalties for non-compliance with a lawful request for such information. Legislation to implement this

principle would provide that where information is sought on behalf of a foreign regulator, failure to provide such information (or failure to provide it honestly) will attract the same penalty as would apply if the failure occurred in a case within the jurisdiction of the requested regulator.

24. The sixth and final principle states that *countries should consider the removal of legal obstacles to the spontaneous provision (subject to appropriate safeguards) of information by a regulatory authority to a counterpart authority in another Commonwealth country where the information gives rise to a reasonable suspicion of a breach of a legal provision, regulation or requirement of that other country.*

25. Given the internationalisation of markets, it is highly likely that the investigation of an alleged breach of a law, regulation or requirement in one country will reveal evidence (or give rise to a suspicion) that breaches of the laws, regulations or requirements of other countries have occurred or may occur. In the collective interests of Commonwealth countries the sharing of such information may result in enabling early preventative (or damage limitation) action to be taken in another country.

26. Legislation to give effect to this principle could make a distinction between confidential and other information. A law could provide that information which is not confidential or sensitive could be passed freely. Confidential or sensitive information may need to be the subject of special provisions. It is self evident that information held by regulators can be commercially sensitive and ought to be the subject of laws which control its distribution. A significant majority of countries will already have laws which define for domestic purposes, classes of information which may be described as restricted information and establish the classes of persons to whom specific classes of restricted information can be passed. Such laws could, in order to facilitate spontaneous provision of information between regulators, include foreign regulators amongst the class of persons to whom restricted information can be passed. Generally known as "gateways", such provisions facilitate international co-operation.

27. An alternative approach would be to legislatively provide specifically a power to pass information, without request, to a foreign regulator. In such cases a law could specifically provide that information could only be provided without request

where the regulator had reason to suspect that a class of laws, regulations or requirements had been or was about to be breached in another country. If it was considered necessary to limit the countries to which information could be provided spontaneously, legislation could provide that such information could only be provided to countries with whom arrangements for co-operation had been made (for example, by way of a memorandum of understanding) or, alternatively to countries which could provide reciprocity. An alternative approach would be to authorise regulators to pass information to specified (or generically described) counterpart authorities.

#### **OTHER PROVISIONS WHICH COULD BE INCLUDED IN NATIONAL LAWS**

28. Countries which have more than one business regulatory authority may decide to enact a specific law to deal with the subject of international co-operation rather than make provision in the enabling law of each authority. The choice is one for each jurisdiction. A general law, if enacted, could be made applicable by regulation, to specific regulatory authorities thereby facilitating its extension as and when appropriate circumstances, such as the creation of a new authority, arise.

29. It may be desirable to define the term "regulatory authority" and in this context countries may wish to include those which exercise functions in the spheres of banking supervision, the marketing and supply of financial services, insider trading and market manipulation, insurance and company affairs.

30. Countries which choose to legislatively prescribe the contents of requests for assistance may wish to follow the precedent in the model law designed to give effect to the Harare Scheme and provide that a request which does not comply exactly with the statutory requirements will not, for that reason alone, be refused. A list of contents of a request could include any or all of the following - some of which have been discussed in more detail above:

- (a) details of the authority making the request, including a description of the authority's regulatory functions and the statutory basis for them;
- (b) details of the purpose of the request and a summary of the information which gives rise to it;

- (c) personal details of the persons named in the request (full names, places and dates of birth, known addresses, nationality, etc);
- (d) a description of the conduct constituting the alleged or suspected breach of the regulatory law, regulation or rule;
- (e) extracts of the relevant laws covering the provision, regulation or rule alleged to have been or suspected of being breached;
- (f) information on any relevant dates or cause for special urgency;
- (g) if interviews are proposed to gather evidence, details of any privileges which a witness or suspect may be entitled to claim, if such interviews are to be admissible in the requesting state;
- (h) where evidence is requested to be taken from a witness or suspect, details of whether the evidence is to be taken on oath or affirmation;
- (i) a description of the evidence sought, if appropriate, and a list of any specific questions to be asked;
- (j) information on whether it is desired that any persons from the requesting country or authority should be present during the taking of evidence, and if so, whether the request is for such persons to be permitted to participate in the questioning (if appropriate);
- (k) an undertaking to keep confidential, to the extent permitted by law, the information arising from the request, unless this requirement is waived by mutual agreement;
- (l) particulars of other parties, where this is apparent, who may obtain the information for a purpose other than securing compliance with the relevant law; and
- (m) an undertaking to return any documentation provided.

31. It may be desirable for any law designed to facilitate co-operation between business regulatory authorities to specifically preserve existing channels through which assistance can be provided. It would be undesirable if anything in such a law operated to lessen co-operation which already exists between

countries which are members of IOSCO or between stock exchanges. A saving clause such as is included in the Harare Scheme and laws implementing it may commend itself to some governments.

32. Although not included in the Statement, regulators at the Oxford Conference identified a need to obtain information about bank accounts and sought the creation of facilities which would permit the urgent freezing of foreign accounts on their behalf. Where such information and facilities are needed in support of possible criminal proceedings it would seem inappropriate that business regulatory channels be used but it is possible that such information may be needed for the purpose of civil proceedings or to prevent loss, or further loss, to shareholders. Mareva injunctions could, perhaps, be used to secure the freezing of bank accounts but the question of giving access to information concerning such accounts could be provided for in legislation covering this subject. Countries may consider that there would be merit in specifically listing information concerning bank accounts in provisions designed to give effect to the fourth principle.

33. Countries may consider it desirable to provide a right of legal representation to persons required to give evidence in response to a foreign request for assistance. Legal issues such as the existence or otherwise of a privilege against self-incrimination may need to be addressed in national laws. If the privilege against self-incrimination is abrogated by the law, countries may need to consider whether statutes should provide for use or use-derivative indemnities. The question of how to deal with a witness who claims legal professional privilege may also need to be dealt with in the context of powers to compulsorily acquire information on behalf of a foreign regulator.

March 1996