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SARBANES-OXLEY ACT

UNICE COMMENTS

The approval of the Sarbanes-Oxley Act has come at a particular moment in the history of the US financial market with the declared aim of providing greater protection for investors (in fact the subtitle states that it is "*an act to protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws, and for other purposes*").

The underlying purpose of the Act is to restore the "confidence" of investors. In principle, Unice agrees with any measure that helps to increase confidence in markets, especially in the difficult economic conditions we face today. The stability and growth of financial markets depend, in fact, to a large extent on the confidence of investors.

The means chosen in the United States to restore investor confidence primarily concern the corporate governance of issuers, the reliability of the financial statements published in their annual and quarterly reports, and full disclosure of corporate activities.

The direct and indirect effects of the Sarbanes-Oxley Act on the corporate governance of issuers appear to be far-reaching. Among other things, the Act makes absolutely no distinction between US companies and foreign companies whose securities are registered or listed in the United States. This is a cause of strong concern for Unice and is addressed in these comments.

The corporate governance of companies is the product of a complex system having its roots in the country in which they are incorporated; a system that is the result of laws, regulations, self-regulation, accepted practices and, more generally, of the legal and economic culture prevailing in each country.

The risk inherent in the application of the Sarbanes-Oxley Act to non-US issuers, especially as regards corporate governance, is not so much that some of the Act's individual provisions will conflict with those in force in companies' country of incorporation, although this risk exists (see below), as of a conflict between systems.

In this respect it has to be stressed that the Sarbanes-Oxley Act marks a radical change in the attitude of the United States to the application of its corporate governance rules to foreign issuers, which in the past had been granted a sort of general exemption.

In fact the solution adopted in the past consisted in requiring non-US companies simply to disclose their corporate governance arrangements, without interfering with the internal organization of foreign issuers. The rationale underlying this approach was that the implicit recognition of the ability of other national legal systems to ensure the equivalent level of investor protection would encourage the listing of foreign companies on US markets, while avoiding the complications that their having to adapt to a system — in the sense described above — different from their own would have caused.

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This, it should be noted, is the approach currently adopted by the European Union. The philosophy of corporate governance rules in the EU is based on self-regulation, in recognition of the structural differences between the company laws of the various Member States.

UNICE's serious critical evaluation of the change in the approach of the United States, obtained by imposing predetermined corporate governance arrangements on foreign issuers and accentuating the responsibilities of issuers and their top managements, is reinforced by the fact that it is extremely difficult for companies which entered the American market voluntarily to exit that market, since registered issuers are not free to move out of reach of the securities laws (an issuer with at least three hundred shareholders in the United States remains subject to the rules issued by the SEC and cannot revoke its registration).

An additional concern is raised for the Bank sector, *inter alia*, about discriminatory treatments and extraterritorial effects. The lending prohibition provided by sec. 402 applies to all issuers, foreign and domestic, except to FDIC banks; foreign banks will then be subject to that restriction whether or not they are engaged in banking activities in the USA.

Separate consideration needs to be given, however, to the new rules on the certification of periodic reports (which, among other things, has important effects for foreign issuers in terms of proof and in general of enforceability, with consequences for the risk incurred by companies' top managements, especially in view of the well-known litigiousness of American investors).

In particular, the Sarbanes-Oxley Act assigns responsibility for issuers' periodic reports by requiring a Regulatory Certification (provided for in Section 302) and a Statutory Certification (provided for in Section 906). The SEC has already issued the implementing regulations for Regulatory Certification; no implementing provisions seem to be necessary, for Statutory Certification since Section 906 of the Act does not provide for any powers of implementation, derogation or interpretation to the SEC.

The declarations in question have to be made by the chief executive officer(s) and the chief financial officer(s) and attest the accuracy of the information contained in issuers' periodic reports. Both certifications focus on the fair representation in all material respects of the information contained in the reports they accompany. Regulatory Certification extends, moreover, to procedural aspects and involves a series of statements concerning internal controls and procedures serving to ensure the accuracy of the information reported.

The obligation to issue the latter certification, for which mandatory formulas are established, has a direct impact on important aspects of corporate governance (responsibility for internal controls, evaluation of the latter's effectiveness within strict time limits), which the SEC has aggravated by extending the request to implement disclosure controls and procedures to foreign issuers and making them subject to the same recommendations as domestic issuers (e.g. the creation of a disclosure committee).

An annex contains country notes for individual Member States indicating the provisions of the Act whose effect is to produce a conflict with EU Member States laws. Further national assessments should be allowed considering that the US new regulatory framework is to be completed. Some clarification as to the combined application of the SEC and NYSE rules would be useful.

This annex shows that each Member State has its own individual system of corporate governance that provides sufficient protection for investors and of which the general spirit is much the same as is envisaged by the US securities laws and Act.

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COMPARATIVE TABLES OF CONFLICTING PROVISIONS BETWEEN THE SARBANES OXLEY ACT AND EU NATIONAL LAWS

SARBANES-OXLEY ACT / ITALIAN LAW: CONFLICTING RULES AND INCONSISTENCIES

Sarbanes-Oxley Act	***Italian law***	***Comments***
Certifications (Regulatory and Statutory) Section 302 (1) the signing officer has reviewed the report; (4) the signing officers (A) are responsible for establishing and maintaining internal controls; (B) have designed such internal controls to ensure that material information relating to the issuer and its consolidated subsidiaries is made known to such officers by others within those entities, particularly during the period in which the periodic reports are being prepared; (C) have evaluated the effectiveness of the issuer's internal controls as of a date within 90 days prior to the report; and (D) have presented in the report their conclusions about the effectiveness of their internal controls based on their evaluation as of that date;	**Art. 2423 Civil Code** The directors shall prepare the annual accounts, comprising the balance sheet, the income statement and the notes to the accounts. (…) **Art. 2381 Civil Code** If permitted by the bylaws or the shareholders' meeting, the board of directors may delegate powers to an executive committee made up of some of its members or to one or more of its members, establishing the limits of such delegated powers. The powers specified in Articles 2423, 2443, 2446 and 2447 [of the Civil Code] may not be delegated. **Art. 2392 Civil Code** The directors shall perform the duties assigned to them by law and the bylaws with the diligence of an agent and shall be jointly and severally liable to the company for harm deriving from failure to perform such duties, except for powers assigned to the executive committee or to one or more directors. The directors shall be jointly and severally liable if they have failed to supervise the general conduct of the business or if, knowing	In addition to what was stated on a general basis in the text of the UNICE document with regard to the effects of the US certification requirements on companies' control systems, the following considerations apply. The Civil Code states that the annual accounts must be prepared by the entire board of directors on a collegial basis. Consequently, responsibility for the accuracy and truthfulness of the accounts is assigned collegially to the board of directors. By requiring the CEO to certify the accounts, US law diverges from this approach. Furthermore, by requiring the CFO to certify as well, it transforms what was a purely internal responsibility — i.e. towards the company — into a responsibility towards third parties, who can therefore bring legal actions. It is also likely that the principle of *ne bis in idem would be violated*, since the same offence by the management (the non-truthfulness or accuracy of the accounts with the consequent issue of false certifications) would be punishable under two different regimes (that of Italy and that of the United States).

(5) the signing officers have disclosed to the issuer's auditors and the audit committee of the board of directors (or persons fulfilling the equivalent function)- (A) all significant deficiencies in the design or operation of internal controls which could adversely affect the issuer's ability to record, process, summarize, and report financial data and have identified for the issuer's auditors any material weaknesses in internal controls; and (B) any fraud, whether or not material, that involves management or other employees who have a significant role in the issuer's internal controls; and (6) the signing officers have indicated in the report whether or not there were significant changes in internal controls or in other factors that could significantly affect internal controls subsequent to the date of their evaluation, including any corrective actions with regard to significant deficiencies and material weaknesses.	of prejudicial acts, they have not done everything in their power to prevent their perpetration or to eliminate or attenuate their harmful consequences. (….)	
Section 301 Public Company Audit Committees **(2)** **Responsibilities relating to registered Public Accounting Firms** The audit committee of each issuer, in its capacity as a committee of the board of directors, shall be directly responsible for the appointment , compensation and oversight of the work of any registered public accounting	**Art. 159 Legislative Decree 58/1998:** The annual shareholders' meeting shall confer the engagement to audit the company accounts and the consolidated accounts on an auditing firm (…), after consulting the board of auditors. The meeting shall determine the fee to which the auditing firm shall be entitled. (…)	Italian law does not provide directly for companies to have an Audit Committee, a body composed of independent directors, but assigns supervisory duties to an autonomous body elected by the shareholders' meeting, the board of auditors.

firm employed by that issuer (including resolution of disagreements between management and the auditor regarding financial reporting) for the purpose of preparing or issuing an audit report or related work, and each such registered public accounting firm shall report directly to the audit committee. **(3)** **Independence** (A) In general Each Member of the audit Committee of the issuer shall be a member of the board of directors of the issuer and, shall otherwise be independent. (B) Criteria In order to be considered to be independent for purposes of this paragraph, a member of an audit committee of an issuer may not, other than in his or her capacity as a member of the audit committee, the board of directors, or any other board committee: (i) accept any consulting, advisory, or other compensatory fee from the issuer; or (ii) be an affiliated person of the issuer or any subsidiary thereof **(4) Complaints** Each audit committee shall establish procedures for: - the receipt, retention and treatment of complaints received by the issuer regarding accounting, internal accounting controls or auditing matters; and	**Art. 2400 Civil Code:** The members of the board of auditors shall be appointed (...) by the shareholders' meeting (...) **Art. 2397 Civil Code:** The board of auditors shall be composed of three or five auditors (...). The members of the board of auditors must be chosen from among persons entered in the register of auditors kept by the Ministry of Justice. **Art. 2408 Civil Code:** Any shareholder may report facts deemed to be censurable to the board of auditors, which must take the complaint into consideration in its report to the shareholders' meeting	Moreover, Italian law does not require the board of auditors to supervise the firm appointed to audit the accounts but provides for cooperation between the two bodies in the performance of their respective tasks. It is true that the board of auditors is required to express a favourable opinion on the conferment and revocation of the engagement of the auditing firm and (on the basis of Consob Resolution 97001574 of 20 February 1997) on the employment of the auditing firms to perform tasks other than auditing the accounts. However, in now way does Italian law allow the board of auditors to be charged with the task of supervising audit activity. The conferment and revocation of the auditing firm's engagement is entrusted, moreover, to the shareholders' meeting and assigning these tasks to other bodies would constitute a deviation from Italian law. It should also be noted that a similar deviation would be produced by assigning the handling of complaints to bodies other than the board of auditors. In fact the body designated by Italian law to receive shareholders' complaints is the board of auditors.

matters; and - the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters. **(6) Funding** Each issuer shall provide for appropriate funding, as determined by the audit committee, in its capacity as a committee of the board of directors, for payment of compensation: (A) to the registered public accounting firm employed by the issuer for the purpose of rendering or issuing an audit report; and (…..). **Section 202 (1) (A)** All Auditing Services (which may entail providing comfort letters in connection with securities underwritings or statutory audits required for insurance companies for purposes of State law) and non-audit services, other then as provided in subparagraph B), provided to an issuer by the auditor of the issuer shall be preapproved by the audit committee of the issuer.	its report to the shareholders' meeting. **Art. 10 Code of Corporate Governance (so-called "Preda Code")** **Internal control committee** 10.1 The board of directors shall establish an internal control committee, charged with the task of giving advice and making proposals and made up of non-executive directors, of which the majority shall be independent. (…)	Lastly, there is the fact that the Italian Code of Corporate Governance (known as the Preda Code) provides for listed companies to set up an internal control committee, composed of non-executive directors, the majority of whom must be independent. This committee is charged with the task of supervising these companies' internal control systems. This body is not imposed by law, however, but adopted on a self-regulatory basis. Moreover, it only performs an investigative and advisory role in support of the board of directors and is not entrusted with the executive tasks that US law assigns to the Audit Committee. It would be useful to clarify the US notion of "independence" especially in the light of Sec. 303 A of the NYSE listing standards requirements and of Sec. 301 of the Sarbanes-Oxley provisions already mentioned in order to compare it with the Italian one, . This is strictly connected with the issue about the number of independent directors required.

Sec. 304 If an issuer is required to prepare an accounting restatement due to the material non-compliance of the issuer…with any financial reporting requirements under the securities laws, the chief executive officer and chief financial officer of the issuer shall reimburse the issuer for any bonus or other incentive-based or equity-based compensation received by that person (….).	There is no such provision in Italian company law.	The possibility of bringing actions to force directors to return part of their compensation exists only within limits and in the ways established in the following provisions of Italian law concerning the liability of directors. **Art. 2392 Civil Code** The directors shall perform the duties assigned to them by law and the bylaws with the diligence of an agent and shall be jointly and severally liable to the company for harm deriving from failure to perform such duties, except for powers assigned to the executive committee or to one or more directors. The directors shall be jointly and severally liable if they have failed to supervise the general conduct of the business or if, knowing of prejudicial acts, they have not done everything in their power to prevent their perpetration or to eliminate or attenuate their harmful consequences. (….) **Art. 2393 Civil Code** Company actions for liability of directors shall be brought pursuant to a resolution of the shareholders' meeting (…). **Art. 2394 Civil Code** The directors shall be liable to creditors of the

		company for failure to fulfil their obligations concerning the preservation of the company's assets. The action may be brought by creditors when the company's assets are insufficient to meet their claims. In the event of bankruptcy or compulsory administrative liquidation, the action shall be brought by the receiver or the liquidator. Failure Waiver of the action by the company shall not prevent its being brought by creditors of the company. **Art. 2395 Civil Code** The provisions of the preceding article shall not prejudice the right to compensation of individual shareholders or third parties who have been harmed directly by fraud or negligence on the part of directors.

Sec. 402 a)PROHIBITION ON PERSONAL LOANS TO EXECUTIVES Section 13 of the Securities Exchange Act of 1934 (15 U.S.C. 78m), as amended by this Act, is amended by adding at the end the following: "k) PROHIBITION ON PERSONAL LOANS TO EXECUTIVES 1) IN GENERAL – It shall be unlawful for any issuer (as defined in section 2 of the Sarbanes-Oxley Act of 2002), directly or indirectly, including through any subsidiary, to extend or maintain credit, to arrange for the extension of credit, or to renew an extension of credit, in the form of a personal loan to or for any director or executive officer (or equivalent thereof) of that issuer (……..)	Italian legislation applying to banks: Article 136 of the 1993 Banking Law provides for insider landing restrictions. It does not act as an outright prohibition of the affected loans and other transactions; it subjects them to certain restrictions in the form of pre-approval procedures. Based on Bank of Italy regulations, if the loan (or other transaction) is made on the basis of a general plan available to all employees of the bank or banking or financial subsidiary, and is made on the same terms as those available to all other employees, it is exempted from the insider lending restrictions of Article 136 of the 1993 Banking law.	Article 2624 — which prohibited directors, general managers and members of the board of auditors of a company from obtaining loans from the company or its subsidiaries — has recently been repealed. It therefore appears legitimate for a company to grant loans to directors, general managers and members of the board of auditors. No provision of Italian law has ever forbidden companies from granting loans to employees. In addition, Section 402 raises particular concerns within the banking community. Its lending prohibition applies to all issuers of securities under the Securities Exchange Act of 1934, foreign and domestic, except the FDIC insured banks (which are subject to more flexible rules, for officers and directors lending, under the Federal Reserve Regulation). Foreign banks – having issued securities - are subject to the prohibition of sect. 402 and such restrictions apply whether or not they are engaged in banking activities in US. An exemption from section 402 would be therefore necessary.

SARBANES-OXLEY ACT / SWEDISH LAW: CONFLICTING RULES AND INCONSISTENCIES

Sarbanes-Oxley Act	***Swedish law***	***Comments***
General		
Departure from generally accepted principles of mutual recognition	The law of incorporation, and with respect to foreign operations the relevant foreign jurisdiction, primarely apply. Secondary, listing agreements apply.	Following the principles of mutual recognition for foreign issuers with a secondary listing on a US stock exchange, Company law and Corporate Governance standards of their home-country should be deemed equivalent. Thus, the Sarbanes-Oxley Act should not be applicable to foreign private issuers, but the listing agreement with the US stock exchange only.
Due to extraterritorial applicability of Act, interference with company law concepts of home-country of foreign private issuer.	Company law concept in various respects not in concurrence with the one underlying the Sarbanes-Oxley Act, e.g. • In financial reporting matters the board of directors bears the ultimate responsibility and not certain specific executives. If misconduct occurs, liable are those persons in the board or management, who are in fact responsible. This is in contrast to the singling out of certain executives under the certification rules of the Sarbanes-Oxley Act. • Certain competences are by law allocated to certain bodies in the company and may not be taken over by another body such as the Audit Committee.	If the above-mentioned principle of mutual recognition was applied, undue interference in company law concepts that foreign issuers are subject to, could be avoided. Moreover, enforcement of several of the criminal and penalty provisions under the Sarbanes-Oxley Act outside the US are very questionable.

Substantial departure from self-regulation in the field of Corporate Governance	Corporate Governance is dealt with on the level of self-regulation	Advantages of self-regulation: • Efficiency • Fast adaptation of rules to new circumstances
Independance requirements		The vast majority of the directors of the boards of Swedish listed companies are independent. Note, however, that Swedish mandatory law allows the unions to appoint members of the board. These members are normally employees of the company.
Specific provisions		
Sec. 106 …foreign public accounting firm shall be deemed to have consented (A) to produce its workpapers for the Board or the Commission ..	Auditors are prohibited from disclosing information that they have obtained in exercising their mandate to individual shareholders or to third parties. It is prohibited under criminal law to disclose a manufacturing or business secret, that a person is bound to hold secret by a legal or contractual obligation ….is liable to imprisonment or a fine. It is prohibited under criminal law to disclose a manufacturing or business secret to a foreign authority or a foreign organisation or their agents … liable to imprisonment…	Producing the workpapers pursuant to Sec. 106 may lead to a violation of the business secrecy duty according to Swedish law.
Sec. 301 ….The audit committee of each issuer..shall be directly responsible for the appointment …of any registered public accounting firm employed by that issuer. ….The audit committee of each issuer..shall be directly responsible for the compensation	Under the Swedish Compaines Act the Shareholders' Meeting has the mandatory right and obligation to appoint an auditor. The auditor further has an obligation to adhere to instructions provided by the Shareholders' Meeting	The appointment of the auditors by the audit committee is contrary to mandatory Swiss law. The Audit Committee may not be provided the exclusive instruction rights. According to

… of any registered public accounting firm employed by that issuer…Each issuer shall provide for appropriate funding, as determined by the audit committee…for payment of compensation (A) to the registered public accounting firm … In order to be considered to be independent... a member of an audit committee of an issuer may not, other than in his or her capacity as a member of the audit committee, the board of directors, or any other board committee (i) accept any consulting, advisory, or other compensatory fee from the issuer; or (ii) be an affiliated person of the issuer or any subsidiary thereof.	Swedish mandatory law provides union appointed directors the right to participate in all board work, including Audit Committee work.	established Swedish corporate governance practice, auditors' fees are determined by the Shareholders' Meeting. Audit Committees are not mandatory nor common. Swedish law is in conflict with the Sarbanes-Oxley Act.
Sec. 304 If an issuer is required to prepare an accounting restatement due to the material non-compliance of the issuer…with any financial reporting requirements under the securities laws, the chief executive officer and chief financial officer shall reimburse the issuer for any bonus or other incentive-based or equity-based compensation received by that person….	There is no equivalent provision in Swedish law. General torts principles apply.	Unless liable under general torts principles, principal executive directors residing in Sweden cannot be forced to reimburse the issuer.
Sec. 305 & 1105 Authority of the Commission to prohibit persons from serving as officers or directors	According to the Swedish Company Act the Shareholders' Meeting may appoint any persons to its board of directors, with certain exceptions, one being individuals excluded by decision of the court.	Swedish law is in conflict with the Sarbanes-Oxley Act.
Sec. 402 Prohibition of personal loans to executives	Swedish law provides far reaching prohibitions against personal loans and similar arrangements to executives and other related persons.	At large the Swedish law is more far reaching than the Sarbanes-Oxley Act. The details in the Swedish law and the Sarbanes-Oxley Act are not consistent and thus are in conflict.

		Further, the Sarbanes-Oxley Act exemptions are difficult or impossible to apply in non-US jurisdictions.
Sec. 806 & 1107 Whistleblower protection	.	Swedish labour law requires cause for termination of employment. Reporting of a criminal act would not constitute cause. Further, Swedish labour law prohibits discrimination of employees for any reason. Moreover, in Sweden the labour unions are generally very strong and provide a far-reaching protection of their members as well as other employees.
Sec. 302 & 906 Corporate Responsibility for Financial Reports	According to the Swedish Company Act, the board of directors and the managing director are responsible for the financial statements as well as for internal control. Further, anyone making false or incomplete statements of relevance that may induce another person to a detrimental disposition of property is subject to criminal and civil liability.	Swedish law already contains provisions that prohibit company executives from making false or misleading statements in financial reports. If the same behavior is equally sanctioned under the Sarbanes-Oxley Act this leads to a violation of the principle “ne bis in idem”, i.e. that no one should be prosecuted twice with respect to the same offence. Furthermore, it is in conflict with general principles of Swedish law to single out and hold liable any individual for wrongdoings and omissions for which others in fact are responsible. Any such development is sharply critizied in Swedish legal doctrine.
Sec. 1103 Temporary freeze of payments to directors, employees etc.		The freeze order will under Swedish law be considered as an administrative law matter and will thus not be enforceable in Swieden.

SARBANES-OXLEY ACT / NETHERLANDS LAW: CONFLICTING RULES AND INCONSISTENCIES

Sarbanes-Oxley Act	***Netherlands law (NL)***	***Comments***
General		
44 NL companies are listed and/or traded in the US market. They have to comply with the disclosure and other substantive rules and regulations of the '34 Act. So far application of home country rules and practices were allowed in principle.	NL Company law and Corporate Governance standards so far have been recognized under the US 'home practice' rules.	Since the Act directly interferes with the internal affairs and organization of both US and foreign 'public' corporations (private issuers) not only home country practiced but even mandatory law is disregarded. Undue interference in NL mandatory law and practice should be avoided by subsequent rules and regulations of the SEC and NYSE, allowing foreign private issuers just to adhere to mandatory law of their home country. The general spirit in NL Company law and Corporate Governance standards is much the same as envisaged by US securities laws and the Act. NL Law and corporate practice should continue to be deemed appropriate under the Act and subsequent SEC-, NYSE-, and NASDAQ-rules and regulations.
The Act, its subsequent SEC-rules and regulations aim at restoring confidence in the capital market by radical changes in the total of cheks and balances for proper oversight on public corporations by intensified rules on disclosure, liability of directors and officers, intensified public and other oversight on auditors and their tasks.	NL law has its own system of cheks and balances on corporate governance of public corporations, partly by mandatory laws, partly by listing requirements and also by codes and case law.	Accumulation of contradictory and overlapping cheks and balances should be avoided.

Specific provisions		
Position of Board and its Commitees: general		
The Act and subsequent rules and regulations are evidently based on the US unitary Board system consisting of executive (officers) and non executive directors ('NED's). Often the CEO is at the same time Chairman. A clear distinction between management and oversight is not alien to US mandatory corporate law. Independent NED's have been strongly promoted but are not (yet) required.	NL law clearly distinguishes between management, to be pursued by the Board of Management ('BoM') and oversight by a separate corporate body, the Supervisory Board ('SB'). BoM-members may not at the same time be SB-members. The BoM is assigned with management and representation of the corporation. Its chairman takes a position comparable to the CEO in US companies. The SB advises the BoM, supervises its performance, fixes its compensation and usually has to agree on major BoM-proposals. The SB-chairman chairs the AGM; he can not be CEO at the same time. The SB is independent from the BoM. (Financial) reporting is enframed in rules on 'accounting' by the BoM and SB to the AGM. All BoM- and SB-members have to sign the Accounts an are *collectively* accountable and responsible to the AGM for its contents. Each of them can be held liable for damages caused by misstatements unless he/she can prove that the misstatement can not be attributed to due care was exercised to prevent the consequences thereof. The concept of (singling out) CEO and CFO from the BoM and SB is unfamilar to NL law. The power to appoint and fix the assignment of the public auditor is vested in the AGM by mandatory law.	

Audit Committees of US companies are committees of the *unitary* Board.	Audit, like other committees are in NL practice committees of the *Supervisory* Board and hence independent from the BoM. Under NL corporate governance recommandations SB's have indeed installed audit committees. These committees do advise the full SB on the tasks attributed to them. Full delegation of powers by the SB to such committees is not practice nor allowed under the NL law principle of collective accountability of all of its members.	
Sec. 301 ….The audit committee of each issuer..shall be directly responsible for the appointment …of any registered public accounting firm employed by that issuer.	Art. 2:393 Civil Code attributes this power exclusively to the AGM, with fall back rules in case the AGM does not exercise these powers.	The appointment of the auditors by the audit committee would conflict with mandatory NL law. In the NL system shareholders decide on the appointment of the auditor.
….The audit committee of each issuer..shall be directly responsible for the compensation … of any registered public accounting firm employed by that issuer…Each issuer shall provide for appropriate funding, as determined by the audit committee…for payment of compensation (A) to the registered public accounting firm …	The compensation of the public auditor usually is fixed by the BoM and SB.	Practice is clearly developping towards Audit Committees reviewing the auditor's compensation. Since Audit Committees are recruited from SB-members, only these are indepent from the BoM.
In order to be considered to be independent... a member of an audit committee of an issuer may not, other than in his or her capacity as a member of the audit committee, the board of directors, or any other board committee (i) accept any consulting, advisory, or other compensatory fee from the issuer; or (ii) be an affiliated person of the issuer or any subsidiary	Formal independency of an NL Audit Committee follows from the independency of the SB from which its members are recruited.	

thereof.		
Sec. 304 If an issuer is required to prepare an accounting restatement due to the material non-compliance of the issuer…with any financial reporting requirements under the securities laws, the CEO and CFO shall reimburse the issuer for any bonus or other incentive-based or equity-based compensation received by that person….	Neither does NL law single out the position of the CEO and CFO nor is there any specific provision for their liability for misstatements. This follows general rules of corporate and tort law.	If held liable BoM- and SB-members will pay (part of) damages. Reimbursement of compensation is not enforceable
Sec. 305 & 1105 Authority of the Commission to prohibit persons from serving as officers or directors	An equivalent provision is unknown in NL law, though persons may be prohibited to create a new company under the review procedure of the NL Ministry of Justice. Qualified officers in the bank, insurance and securites industry have to pass an integrity test and a conviction by the SEC most certainly would qualify under that test negatively.	Apart from the Ministry's discretion in case of acting as promotor upon creation of new companies or –as the case may be- acting as qualified officer or director in the banking, insurance and securities industry, persons that are convicted by the SEC can be elected by the AGM to serve on NL Boards. The act is technically not enforceable, but in practice disqualification will be effective.
Sec. 402 Prohibition of personal loans to executives	NL law does not prohibit such loans, but requires detailed disclosure (S. 2:383 Civil Code).	
Sec. 806 & 1107 Whistleblower protection		Should be limited to those cases in which US labour law is applicable.
Sec. 906 Corporate Responsibility for Financial Reports	Sections 2:139 and 151 hold every BoM-member and SB-member liable for damages caused to third parties that have relied on misleading statements in the company's financial reports.	
Sec. 203 Lead or "coordinating" partner must rotate after five years.	NIVRA-NovAA regulation: Lead or "coordinating" partner must rotate after seven years.	NIVRA-NovAA regulation according EU Recommendation on auditor independence.

SARBANES-OXLEY ACT / GREEK LAW: CONFLICTING RULES AND INCONSISTENCIES

The role of audit committees in the selection of external auditors	**Greek legislation**	**Comments**
Section 301 of the Sarbanes-Oxley Act (the "Act") provides that "the audit committee of each issuer…shall be directly responsible for the appointment" of the issuer's external auditors. The SEC is authorized to issue a ruling implementing Section 301.	Greek legislation (and the legislations of most EU Member States) provides that only the General Shareholders' Meeting can appoint the company's external auditors.[1]	It would be good if the SEC clarifies in its forthcoming ruling that (i) the General Shareholders' Meeting's right to appoint the external auditors does not contravene Section 301 of the Act, and (ii) that the requirement that the audit committee be "directly responsible" for the appointment of the external auditors is satisfied where the **audit committee proposes a short list** of external auditors to the General Shareholders' Meeting.
Loans to directors and executive officers granted by European Banks		
Section 402 of the Act makes unlawful all personal loans to the issuers' directors and executive officers. The same Section provides an exception from this general prohibition, which is limited to financial institutions operating in the United States (e.g., loans granted by FDIC "insured		It would be good if the SEC clarifies that **this exception also applies to loans granted in Europe by EU-based Banks** and financial institutions, despite the fact that such Banks are not FDIC-insured and the relevant loans are not included in the list of paragraph 2 of Section 402.

[1] The relevant provisions can be found in Greek Law 2190/1920, Article 34(1)(b).

depository institutions" [paragraph 3 of Section 402] and certain US-regulated loans [paragraph 2 of Section 402]).		
Audit committee financial expert		
Section 407 of the Act provides that each audit committee of an issuer should have at least one "financial expert" and it authorizes the SEC to define by ruling what is meant by the term "financial expert". The Act provides that, among other things, the "financial expert" should have "an understanding of generally accepted accounting principles and financial statements". This formulation seems to indicate that the audit committees of even European companies should have a member who has an understanding of the <u>United States GAAP</u>.		It would be good if the SEC clarifies in its forthcoming ruling that "understanding of GAAP" **does not necessarily mean "US GAAP"** and that individuals with an understanding of IAS, or the GAAP in accordance to which the company's accounts are prepared and presented in its home jurisdiction qualify as "financial experts" for purposes of the Act.
Compatibility of existing EU Internal Control Systems with the Act		
Section 404 of the Act authorizes the SEC to issue a ruling requiring issuers to include an "internal control report" in their annual reports. The purpose of this report is to	Greek legislation already imposes on companies listed in the Athens Stock Exchange (and especially on Banks and financial institutions) elaborate internal control obligations.[2]	• To avoid potential contradictions and duplications, the SEC ruling **should preferably <u>not</u> contain detailed guidelines on the characteristics of the internal control system that issuers must have**. The SEC ruling should simply impose on issuers the obligation to describe and evaluate the effectiveness of their **existing**

describe and evaluate the effectiveness of the issuer's internal control system		describe and evaluate the effectiveness of their **existing** internal control system in their annual reports. • In the unlikely event that the SEC would insist on providing detailed guidance on the characteristics of internal control systems, it would be good to have SEC clarify that the internal control systems existing in the EU Member States satisfy the SEC requirements.
Disclosure of transactions involving management and principal shareholders		
Section 403 of the Act provides that (i) every director or officer of an issuer and (ii) every shareholder holding more than 10% of any class of equity security of the issuer (the "10% shareholder"), is obliged to report to the SEC (and the NYSE) any purchase or sale of the issuer's equity within 2 days from the completion of such purchase or sale.	Greek legislation imposes similar disclosure obligations on directors, officers and 10% shareholders of companies listed in the Athens Stock Exchange. In some cases these persons are obliged to publicly announce similar transactions 24 hours prior to their completion.[3] In some other cases, directors and officers are obliged to report such transactions after their completion.[4]	To avoid subjecting the same persons to multiple disclosure obligations towards different regulatory authorities (i.e., SEC, NYSE, home-country securities regulatory authority, home-country stock exchange) and at different time periods (i.e., one day before the transaction, two days after the transaction, etc.), it may be advisable to put in place a system of "mutual recognition", whereby such disclosures should be made only in the EU country of incorporation, provided that the issuer (i) is also listed in a major stock exchange in that EU country, and (ii) is subject to broadly similar (and not necessarily identical) disclosure obligations in that EU country.

[2] The relevant provisions can be found in the Greek Capital Markets' Committee decision 5/204/2000, Article 12 and in the Governor of the Bank of Greece's decision 2438/1998, Sections I to VI.

[3] The relevant provisions can be found in the Greek Capital Markets' Committee's decision 5/204/2000, Article 8 (for directors and officers) and Article 10 (for 10% shareholders), as well as in Greek Law 3016/2002, Article 6(2)(e).

[4] The relevant provisions can be found in Greek Law 3016/2002, Article 6(2)(d).

SARBANES-OXLEY ACT / FINNISH LAW: CONFLICTING RULES AND INCONSISTENCIES

Sarbanes-Oxley Act	***Finnish law***	***Comments***
General		
Withdrawal from the mutual recognition of legislation	The law of incorporation, and with respect to foreign operations the relevant foreign jurisdiction, primarely apply. Secondary, listing agreements apply.	According to previous practice with non-US companies, it should be adequate that such companies would inform the primary legislation that they are subordinate to and primary differences regarding the legislative requirements compared to the US companies. Particularly financial statements and closing of the accounts of the non-US companies should be allowed on the basis of the mutual recognition.
Extraterritorial applicability of Act causes interference with company law concepts of home-country of foreign private issuer.	Company law concept in various respects is not in concurrence with the one underlying the Sarbanes-Oxley Act. E.g. According to Finnish legislation the financial reports shall be drawn by the board of directors as a whole. Individual board members or other officers of the company are not individually responsible to do so. Also Finnish Companies Act does not know organs or officers that have been given tasks in the Sarbanes-Oxley Act. I.e. CFO and audit committee are not organs that companies shall have nor they cannot be given tasks that belong to other organs such as board of directors.	It is impossible for Finnish companies to fulfil all the requirements set in the Sarbanes-Oxley Act (later SOX). Even some additional organs would be established, they could not be given the tasks which they are required to administer according to the SOX.
Specific provisions		
Sec. 106 Foreign public accounting firms	According to Finnish Auditing Act auditors are prohibited from disclosing information that	Producing the workpapers pursuant to Sec. 106 may lead to a violation of the Finnish law.

	they have obtained while exercising their assignment. Finnish Penal Code includes sanctions (imprisonment or fine) for a person who violates against obligation to maintain secrecy according Finnish law.	
Sec. 206 Audit Partner Rotation	There are no time based restrictions for persons who can work as an auditor of a company. Shareholders' meeting has absolute power to elect auditor or associate of auditors for the company	Finnish legislation provides companies with more flexible ways to elect auditors. Shareholders' meeting has the final decision regarding the election.
Sec. 301 Public Company Audit Committees	Finnish Companies Act provides the Shareholders' Meeting the sole and exclusive power to appoint an auditor. The auditor has an obligation to carry out audit tasks according to the Finnish Auditing Act and additional instructions given by the Shareholders' Meeting	The appointment of the auditors by the audit committee and the powers given to the audit committee are in conflict with the Finnish Companies Act.
Sec. 302 Corporate Responsibility For Financial Reports	According to the Finnish Accounting Act and the Finnish Companies Act the board as a collegial body has joint responsibility to draw up the financial statements.	In Finland there are no personal obligations for individual officers of the company or for members of the board.
Sec. 304 Forfeiture Of Certain Bonuses And Profits	There is no equivalent provision in Finnish law.	Individual officers of the company are not liable to reimburse the issuer unless found liable on the basis of the civil action
Sec. 305 & 1105 Officer And Director Bars And Penalties	According to the Finnish Companies Act the Shareholders' Meeting may appoint any person to its board of directors. The exceptions to personal qualifications are mentioned in the act.	The SOX is in conflict with the Finnish Companies Act.
Sec. 402 Prohibition on Personal Loans to Executives	There are specific regulation in the Finnish Companies Act regarding personal loans to officers of the company. Such a loan can be	The Finnish legislation already provides shareholders with adequate protection. Nevertheless, provisions of the SOX are

	given only within the limits of distributable funds and against safeguarding collateral.	difficult or impossible to apply in non-US jurisdiction.
Sec. 806 & 1107 Whistleblower protection		Finnish labour law requires grounds for termination of employment and it prohibits discrimination of employees for any reason.
Sec. 1103 Temporary Freeze Authority	No such provisions.	The freeze order will not be enforceable in Finland.

SARBANES-OXLEY ACT / ENGLISH LAW : CONFLICTING RULES AND INCONSISTENCIES

Sarbanes-Oxley Act	***English law and corporate governance***	Comments
Sections 302 & 906. Certification requirements and penalties for failure to certify		
Form of certificate under sections 302 prescribed by SEC rules and cannot be altered. Guidance awaited on relationship between sections 302 & 906. For foreign companies certification by CEO and CFO applies only to annual reports filed with Form 20F. Does not apply to interim reports or other filings on Form 6K.	No concept of certification in UK. But under section 233 Companies Act 1985, all directors responsible for the statutory accounts.	This is the major difference in the regimes of the US and UK (and other countries).
General observations on other provisions affecting foreign companies set out below	English law is primarily found in the Companies Acts 1985 and 1989 and the Remuneration Report Regulations 2002. Corporate Governance is governed by the Combined Code published in 1998, enforced by the FSA Listing Rules requiring a statement on the extent of compliance, and identifying any areas of non compliance and reasons therefor.	Whilst certification of annual accounts filed on Form 20F is now mandatory, there might be exemptions or relaxations from compliance for foreign companies, provided that they meet certain criteria such as: - explaining why they are unable to comply with the respective aspects of the law and - setting out equivalent alternatives. However US companies and US politicians may object if foreign companies are given too many relaxations.

Sarbanes-Oxley Act	English law and corporate governance	Comments
Audit Committee Composition (Section 301) - Wholly independent membership is required - One member with financial expertise in field - Broad mandate of duties	The Combined Code recommends having an audit committee, the majority of whose members are independent	Additional requirements for UK issuers
Internal Controls (section 302) - Requires the CEO & CFO to certify as to having established and maintained internal controls, evaluated their effectiveness, disclosed deficiencies and fraud to the auditors and audit committee, and disclosed any significant changes affecting controls	The Combined Code and the Turnbull Report provide guidance regarding the maintenance of internal controls, their review by the board and audit committee, and the board's disclosure requirements	Imposes additional obligations on CEO / CFO
Forfeiture of Bonuses and Profits (Section 304) - If an issuer is required to prepare an accounting restatement due to material non-compliance of the issuer, as a result of misconduct, with any financial reporting requirements, the CEO & CFO must disgorge - Any bonus or other equity or incentive-based compensation received during the 12 month period following the first publication of the document containing such accounts and	No UK equivalent.	There is a question regarding enforcement.

- Any profits realised from the sale of such securities during that period SEC can exempt individuals		
Sarbanes-Oxley Act	**English law and corporate governance**	**Comments**
Insider Trades During Pension Fund Blackouts (Section 306) - Effective 26 January 2003, *directors and executive officers* may not acquire or dispose of issuer equity securities acquired in connection with their services during any "blackout" period - Blackout period is defined as a period of more than three consecutive business days during which a majority of participants or beneficiaries of individual account plans maintained by the issuer are temporarily suspended from the acquiring or disposing of the securities held in the plan - Violators must disgorge profits realised; enforcement question	Listing Rules/Model Code/Criminal Justice Act/ FSMA - Through a variety of regulations, prohibitions exist on trading by directors, certain employees and other individuals during close periods, when in possession of material non-public information, etc.;	An area that may already be adequately addressed by English law and corporate governance standards. SEC could clarify the rules as they apply to foreign companies, or recognise home state requirements which are equivalent.
Loans to Directors and Officers (Section 402) - Prohibits issuers from extending or maintaining credit, or arranging or renewing an extension of credit in the form of a *personal loan* to or for any director *or executive officer* - Provides for certain exemptions for loans made in the ordinary course by certain financial institutions, but non-US based institutions may not qualify	Section 330 of the Companies Act - Prohibits the making of loans, quasi-loans and entering into credit transactions with directors and connected persons - Provides for certain exemptions including loans made in the ordinary course and on ordinary commercial terms	An area that may already be adequately addressed by English law and corporate governance standards which SEC might recognise

Sarbanes-Oxley Act	English law and corporate governance	Comments
Real Time Issuer Disclosure (Section 409) - Requires the public disclosure "on a rapid and current basis" of material information - Subject to SEC rulemaking	Chapter 9 of the Listing Rules - Disclose major developments that may lead to substantial movement in price of listed securities or affect ability to meet debt commitments (9.1) - Disclose changes in financial condition, performance and expectations likely to result in a substantial movement in price (9.2)	An area that may already be adequately addressed by English law and corporate governance standards, which SEC might recognise. An exemption granted to US banks for ordinary banking business should be extended to foreign banks.
Disqualification of Directors and Officers (Section 1105) - The SEC may prohibit any person who has violated Section 10(b) or related rules and regulations of the Exchange Act from acting as an *officer* or *director* if the conduct demonstrates unfitness to serve	UK Company Directors Disqualification Act - Court can disqualify directors (not others) in a number of enumerated circumstances	US and UK provisions are mutually exclusive - Enforcement/recognition - Practical effect in the US

SARBANES-OXLEY ACT / FRENCH LAW : CONFLICTING RULES AND INCONSISTENCIES

Certification des comptes et de la qualité du contrôle interne	Droit américain SOA	Droit français : code de commerce, réglementation COB, Rapports VIENOT et BOUTON
Nature obligation	Certification des comptes : - obligation de revoir les comptes, déclaration qu'à leur connaissance, les comptes ne contiennent aucune information inexacte ou n'omettent aucune information de nature à fausser les déclarations - responsabilité de l'établissement et du suivi du contrôle interne, attesté par l'auditeur (v. infra)	**Obligation pour le président ou le directeur général,** en cas de dissociation des fonctions**, d'une société cotée de signer le prospectus**. Mais cette certification n'inclut pas le contrôle interne. Par ailleurs, à la différence de ce qui se passe aux Etats-Unis, **l'assemblée générale des actionnaires délibère et statue sur les comptes sociaux et consolidés**, qui sont arrêtés par le conseil d'administration et le directoire. Ces derniers doivent être réguliers, sincères et donner une image fidèle du patrimoine, de la situation financière ainsi que du résultat des sociétés concernées.
Sociétés visées	Sociétés cotées au NYSE et au NASDAQ et, de façon plus générale, toutes les sociétés dont les titres sont échangés sur des marchés relevant de la SEC, américaines ou étrangères, quel que soit le type de titre coté. **Quid** si contradiction avec droit étranger ?	Les sociétés anonymes et les sociétés en commandite par actions
Personnes responsables	CEO et CFO (directeur général et directeur financier)	Président ou directeur général pour le prospectus Conseil d'administration et directoire : responsabilité collective pour les comptes

Périodicité des comptes	- annuels et trimestriels pour les sociétés américaines - annuels pour les sociétés françaises	Annuels Actualisation des comptes annuels dans le prospectus en cas d'opération
Périmètre d'examen du contrôle interne	- sociétés du groupe telles que définies par la loi	- sociétés du groupe
Certification des comptes et de la qualité du contrôle interne (*suite*)	**Droit américain SOA**	**Droit français : code de commerce, réglementation COB, Rapports VIENOT et BOUTON**
Sanctions	- **Celles applicables à la fraude financière** + Infraction spécifique : 1 million $ et/ou 10 ans de prison maximum ou 5 millions $ et 20 ans de prison maximum, si infraction intentionnelle	▪ **Sanctions pénales :** - Délit de « faux bilan » : peine de prison de 5 ans maximum et amende de 375.000 euros maximum, le fait pour le président, les administrateurs ou les directeurs généraux d'une société anonyme de publier ou présenter aux actionnaires, même en l'absence de toute distribution de dividendes, des comptes annuels ne donnant pas, pour chaque exercice, une image fidèle du résultat des opérations de l'exercice, de la situation financière et du patrimoine, à l'expiration de cette période, en vue de dissimuler la véritable situation de la société. - Délit de diffusion d'informations inexactes : peine de prison de 2 ans maximum et amende de 1.500.000 euros maximum dont le montant pourra être porté jusqu'au décuple du profit éventuellement réalisé et sans que l'amende puisse être inférieure à ce même profit. ▪ **Sanctions administratives prononcées par la COB :**

		- Pour information inexacte, imprécise ou trompeuse, sanction pécuniaire de 1.500.000 euros maximum, proportionnée à la gravité des faits, pouvant être prononcée tant à l'encontre des personnes physiques que des personnes morales et des commissaires aux comptes de la société cotée et lorsque des profits ont été réalisés, une sanction pécuniaire qui peut aller jusqu'au décuple de leur montant→cumulable avec les sanctions pénales. **Risque pour dirigeants sociétés françaises cotées aux U.S. d'être condamnés aux Etats-Unis et en France**
Obligation pour dirigeants de déclarer achats et ventes titres sociétés		
Nature	Pas nouvelle : déjà prévue par le SEC Act Jusqu'à présent, la SEC en exemptait les sociétés étrangères et devrait maintenir cette exemption	Recommandation de la COB du 15 mars 2002
Personnes visées	- Sociétés cotées au NYSE ou au NASDAQ - Administrateurs, dirigeants et actionnaires détenant plus de 10% d'une classe d'actions de la société cotée	- Sociétés françaises ou étrangères dont les titres sont négociés sur un marché réglementé français. - **Mandataires sociaux** : gérants, président (du conseil d'administration ou président directeur général), directeurs généraux, directeurs généraux délégués, membres du directoire, personnes physiques ou morales exerçant les fonctions d'administrateur ou de membre du conseil de surveillance ainsi que les représentants permanents des personnes

		morales exerçant ces fonctions, et toute personne exerçant des fonctions équivalentes dans des sociétés étrangères.
Contenu obligation : Délais	Déclaration des opérations sur titres **Accélération de la déclaration** : - fin du 2e jour ouvrable qui suit la transaction - publicité sur le site Internet de la société 24 heures plus tard et simultanément sur le site de la SEC	- **mise au nominatif des actions** des sociétés françaises détenues par leurs mandataires sociaux, - déclaration par les mandataires sociaux à la société des opérations qu'ils effectuent sur les titres de cette société, - déclarations par les mandataires sociaux de toutes les opérations sur les titres de leur société qu'ils réalisent directement ou par personne interposée, pour leur compte propre ou pour un tiers, en vertu d'un mandat, à moins que ce mandat ne s'exerce dans le cadre de gestion pour compte de tiers. Sont également concernées les opérations effectuées sur les comptes des mandataires pour leur conjoint non séparé ou toute personne disposant d'un mandat.
Obligation pour dirigeants de déclarer achats et ventes titres sociétés (*suite*)		
		▪ **<u>Opérations concernées</u> :** ➢Opération de souscription, d'achat ou de vente : - de titres de capital de la société, à l'exception de la souscription ou de l'achat par l'exercice de stock options,

		- de titres donnant accès à son capital, - ou d'instruments financiers à terme sur ses titres, ainsi que les opérations à terme sur ces titres (ne sont pas prises en compte les opérations réalisées par les personnes morales au sein du groupe). ➢Information par le mandataire social des opérations qu'il a effectuées, selon une procédure organisée par la société. ➢Déclaration sous forme d'un tableau par les sociétés à la COB des transactions sur leurs titres déclarés par les mandataires sociaux , à la fin de chaque semestre dans un délai maximum de deux mois, sous forme globalisée ou anonyme. ➢Déclaration portée à la connaissance du public par un communiqué de l'émetteur diffusé sur la banque des communiqués via le site internet de la COB.
Comité d'audit ou des comptes		
Obligation ou recommandation	Théoriquement, pas d'obligation d'avoir un comité d'audit, le *board* pouvant exercer cette fonction. Pratiquement : obligation, car presque impossible pour un *board* de satisfaire aux exigences d'indépendance	Recommandation des codes précités pour des sociétés cotées d'avoir un comité d'audit
Sociétés visées	Sociétés américaines et étrangères cotées.	Sociétés françaises cotées.

Composition :	**Exclusivement composé d'administrateurs indépendants**, un administrateur indépendant étant défini comme suit : aucun membre du comité ne devra recevoir aucun autre revenu de la société ou de ses filiales que celui lié à l'exercice de ses fonctions, ou être lié à l'émetteur ou à une autre société du groupe (participations …). Possibilité exceptions SEC Obligation d'avoir un expert financier, ou de justifier son absence // NYSE : totalité d'administrateurs indépendants	**<u>Recommandations rapport BOUTON</u> :** • aucun mandataire social, • **2/3 d'indépendants** (contre 1/3 pour le rapport VIENOT), • appréciation de l'indépendance par le conseil d'administration , • critères devant être examinés par le comité et le conseil afin de qualifier un administrateur d'indépendant et de prévenir le risque de conflits d'intérêts entre l'administrateur et la direction, la société ou son groupe : - ne pas être salarié ou mandataire social de la société, salarié ou administrateur de sa société – mère ou d'une société qu'elle consolide et ne pas l'avoir été au cours des cinq années précédentes, - ne pas être mandataire social d'une société dans laquelle la société détient directement ou indirectement un mandat d'administrateur ou dans laquelle un salarié désigné en tant que tel ou un mandataire social de la société (actuel ou l'ayant été depuis moins de cinq ans) détient un mandat d'administrateur,
Comité d'audit ou des comptes		
		<u>Recommandations rapport BOUTON</u> (suite) : - ne pas être (*ou être lié directement ou indirectement*) client, fournisseur, banquier d'affaire, banquier de financement

		* significatif de la société ou de son groupe, * ou pour lequel la société ou son groupe représente une part significative de l'activité, - ne pas avoir de lien familial proche avec un mandataire social, - ne pas avoir été auditeur de l'entreprise au cours des cinq années précédentes (art. L. 225-225 du Code de commerce), - ne pas être administrateur de l'entreprise depuis plus de douze ans (*à titre de règle pratique, la perte de la qualité d'administrateur indépendant au titre de ce critère ne devrait intervenir qu'à l'expiration du mandat au cours duquel il aurait dépassé la durée de 12 ans).* S'agissant des administrateurs représentant des actionnaires importants de la société ou de la société – mère, le groupe de travail propose de les considérer comme indépendants dès lors qu'ils ne participent pas au contrôle de la société. Au delà d'un seuil de 10% en capital ou en droits de vote, il convient que le conseil, sur rapport du comité des nominations, s'interroge systématiquement sur la qualification d'indépendant en tenant compte de la composition du capital de la société et de l'existence d'un conflit d'intérêts potentiel. <u>Président</u> : sa reconduction doit faire l'objet d'un examen particulier de la part du Conseil.

Comité d'audit ou des comptes (*suite*)	**Droit américain SOA**	**Droit français : code de commerce, réglementation COB, Rapports VIENOT et BOUTON**
Rôle et pouvoirs	- recrutement, fixation, rémunération et surveillance des auditeurs externes (**problème d'incompatibilité en France avec le statut du commissariat aux comptes),** - traitement des plaintes relatives aux comptes et des dénonciations par les salariés d'infractions sur les comptes - possibilité de recruter un expert indépendant aux frais de la société	**<u>Rapports VIENOT et BOUTON</u>** : - pilotage de la procédure de sélection des commissaires aux comptes (leur nomination relevant de la compétence de l'assemblée générale), - avis sur le montant des honoraires sollicités, - veiller au respect des règles relatives à l'indépendance des commissaires aux comptes, - obligation de les entendre, ainsi que les directeurs financiers, comptables et de la trésorerie, éventuellement hors la présence de la direction générale de la société, - examen du périmètre de consolidation, - examen des risques et des engagements hors bilan significatifs, - obligation d'entendre le responsable de l'audit interne, de donner un avis sur l'organisation de son service et d'être informé sur son programme de travail ; d'être destinataire, à ce titre, des rapports d'audit interne ou d'une synthèse périodique de ces rapports.

Sanction en cas de non respect	Non admission ou radiation de la cote	Pas de sanction
Rapport :	Rapport dans le rapport annuel	**<u>Rapport BOUTON</u>** : - compte rendu d'activité au conseil, - exposé dans le rapport annuel sur l'activité du Comité.
Remboursement des sommes indûment perçues par dirigeants		
	SEC peut ordonner le remboursement par les CEO et CFO des sommes indûment perçues : bonus, profits liés à l'exercice de stock-options, sur la base de comptes faux ou inexacts. →Possibilité d'exemption. **→Applicable aux dirigeants de sociétés étrangères : problème d'extraterritorialité.**	Pas d'équivalent en droit français, mais possibilité pour les juridictions pénales et pour la COB de prononcer des amendes équivalant au maximum à 10 fois le montant du profit réalisé grâce à l'infraction commise, notamment sur la base d'une information inexacte, trompeuse.
Interdiction des prêts aux dirigeants		
	<u>Nouveau aux Etats-Unis</u> : Applicable aux administrateurs et dirigeants de sociétés étrangères	**<u>Existe depuis toujours en droit français</u>**

Contenu interdiction	Interdiction à toute société cotée, y compris au travers de filiales d'accorder des prêts personnels aux administrateurs et aux dirigeants, y compris les membres du comité de direction. **Exceptions :** - validité des prêts en cours jusqu'à leur échéance, sans modification, - prêts accordés dans les mêmes conditions que ceux accordés aux clients.	Interdiction à un administrateur, directeur général, directeur général délégué, aux conjoints, ascendants et descendants de contracter des emprunts, de se faire consentir des découverts en compte courant ou autrement, de faire cautionner ou avaliser par la société ses engagements envers des tiers. - Nullité →restitution - Si abus de biens sociaux : sanction pénale
Interdiction de gérer		
	Pouvoir de la SEC d'interdire de manière conditionnelle ou inconditionnelle, provisoire ou définitive, aux personnes soupçonnées de fraude d'exercer des fonctions d'administrateur ou de dirigeant d'une société cotée **<u>Applicable aux dirigeants de sociétés étrangères</u>** : problème d'application extraterritoriale	Pas de pouvoir équivalent de la COB. L'interdiction de gérer n'est pas prévue en droit français à titre de sanction principale mais elle l'est en cas de comportement fautif dans le cadre d'une procédure collective. Elle est prononcée par le tribunal de commerce et peut être prononcée comme peine complémentaire pour certaines infractions.
Information financière		
	- Obligation de diffuser de manière rapide (dans les deux jours) et régulière les informations de nature à modifier la situation financière ou les conditions d'activité de la société. - SEC doit préciser obligation. - Applicable aux sociétés étrangères ?	**<u>COB</u>** Obligation de diffuser dans les plus brefs délais tout fait important susceptible, s'il était connu, d'avoir une incidence significative sur le cours du ou des titres concernés

Contrôle informations	Accélération de la fréquence du contrôle par la SEC des informations qui lui sont communiquées : → Obligation pour la SEC de vérifier systématiquement les déclarations faites par les sociétés auprès d'elle avec une périodicité qui varie selon la société, mais qui ne peut être inférieure à une fois tous les trois ans.	Visa de la COB sur les opérations, reposant sur un contrôle des prospectus. Système de contrôle qualité des travaux des CAC : COB/ CNCC,
Code de déontologie		
	Obligation de la SEC de développer des règles pour les sociétés cotées, leur demandant de déclarer les règles de déontologie établies à destination de leurs dirigeants ou de justifier leur absence.	Pas d'obligation légale. Codes de déontologie établis sur une base volontaire.
Protection des salariés qui dénoncent des fraudes financières		
	- Les employés injustement sanctionnés (licenciés) pourront demander leur réintégration et/ ou des dommages et intérêts (v. supra le rôle du comité d'audit en ce domaine). - S'applique aux salariés de sociétés étrangères : théorique → problème d'application extraterritoriale de la loi.	- Pas de texte légal ou réglementaire. - La jurisprudence fait application du principe de liberté d'expression des salariés, sauf abus (article 41 de la loi du 29 juillet 1881 et article 6 de la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales). - Deux décisions récentes de la Chambre sociale de la Cour de cassation méritent de retenir l'attention.

		▪ La première (2000) précise que le fait pour un salarié de porter à la connaissance de l'Inspecteur du travail des faits concernant l'entreprise et lui paraissant anormaux, qu'ils soient ou non susceptibles de qualification pénale, ne constitue pas en soi une faute. ▪ En vertu de la seconde (2001), un salarié condamné pénalement pour avoir intentionnellement commis, fût-ce sur ordre de son commettant, une infraction ayant porté préjudice à un tiers, engage sa responsabilité civile à l'égard de celui-ci. Cette jurisprudence est de nature à inciter les salariés à la dénonciation de faits délictueux.
Corps de contrôle des auditeurs		
	Création d'une autorité de contrôle des auditeurs : *Public Company Accounting Oversight Board* → Compétent cabinets étrangers assurant le contrôle légal de sociétés cotées aux Etats-Unis : problème d'extraterritorialité → Financé par sociétés cotées : droit d'enregistrement	- Compagnie Nationale des commissaires aux comptes (CNCC), - COB : autorité administrative - Comité de déontologie et de l'indépendance (CDI)
Composition	Cinq membres dont deux au maximum sont ou ont été des experts comptables/ auditeurs, nommés par la SEC après consultation du président de la Réserve Fédérale et due Secrétaire du Trésor. Le Président devra ne pas avoir exercé des fonctions d'auditeur depuis au moins cinq ans.	
Rôle	- surveillance des auditeurs des sociétés cotées, contrôle annuel des cabinets	- pouvoir d'enquête de la COB, - contrôle qualité (CENA) sur la base d'un accord

	- élaboration de règles de conduite professionnelles - pouvoir d'enquête et pouvoir disciplinaire	entre la CNCC et la COB, - pouvoir de la COB de s'opposer à la nomination d'un commissaire aux comptes dans une société cotée, - procédure disciplinaire de la CNCC, - application de la déontologie.
Corps de contrôle des auditeurs (*suite*)		
Obligations pour auditeurs	- obligation pour les auditeurs de s'enregistrer auprès de cette autorité, - attestation du rapport sur le contrôle interne établi par les dirigeants, - obligation de communiquer tous documents de travail ou tout autre document de travail ou informations nécessaires à l'enquête , sur demande de l'autorité (→ problème extraterritorialité), - obligation de conserver documents utiles pendant sept ans.	Inscription à la CNCC (conditions de compétence, de moralité et d'absence d'exercice d'une activité commerciale).
Corps de contrôle des auditeurs (*suite*)		
Sanction	- Amende pouvant aller jusqu'à 750.000 $ et 15 millions de $ pour les sociétés. - Suspension enregistrement ce qui signifie impossibilité d'assurer l'audit de sociétés cotées.	- suspension ou interdiction temporaire, - radiation.

Indépendance auditeurs	Droit américain SOA	Droit français : code de commerce, réglementation COB, Rapports VIENOT et BOUTON
Prestation d'autres services que l'audit	Interdiction pour auditeurs d'offrir les services suivants aux sociétés cotées dont ils assurent l'audit : - tenue des comptes, - conception et mise en place de système d'information financière, - évaluation des actifs, - services d'actionnariat, - audits interne et assistance à l'externalisation financière, - management et gestion des ressources humaines, - service de broker-dealer, de conseil en investissements, - service de banque d'investissement, - conseil juridique et expertise non liée à l'audit, - tout autre service qui pourrait ultérieurement être interdit par la future autorité de contrôle. **Exception** : autorisation spécifique et préalable par le comité d'audit pour certains autres services (exemple : conseil fiscal).	- Incompatibilité légale générale des fonctions de commissaire aux comptes avec toute activité ou tout acte de nature à porter atteinte à son indépendance, avec tout emploi salarié et toute activité commerciale et incompatibilités spéciales dont l'une précise que ne peuvent être commissaires aux comptes, les personnes qui directement ou indirectement ou par personne interposée, reçoivent de la société un salaire ou une rémunération quelconque à raison d'une autre activité que celle du commissaire aux comptes. - Recommandation CE prévoyant un système de sauvegarde par l'auditeur permettant d'assurer que son cabinet ou la société membre de son réseau ne se trouve pas dans une situation à risque : établissement des comptes et états financiers, la conception et mise en œuvre des systèmes technologiques d'information financière, les services d'évaluation, la participation à l'audit interne du client, les actions pour le compte du client dans le cadre de la résolution des litiges, le recrutement de dirigeants. - **Recommandation du comité BOUTON** : pour les sociétés cotées, la mission de contrôle légal devrait être exclusive de toute autre. **Le cabinet sélectionné devrait renoncer pour lui-même et le réseau auquel il appartient à toute activité**

		de conseil (juridique, fiscal, informatique …) réalisé directement ou indirectement au profit de la société qui l'a choisi ou de son groupe. **Exception** : après approbation préalable du comité des comptes, des travaux accessoires ou directement complémentaires au contrôle des comptes pourraient être réalisés, tels que des audits d'acquisition, mais à l'exclusion des travaux d'évaluation.
Indépendance auditeurs (*suite*)		
Impossibilité de prendre des fonctions dans la société contrôlée avant un certain délai	Les auditeurs ayant quitté le cabinet exerçant le contrôle légal ne pourront exercer des responsabilités de direction au sein des sociétés anciennement contrôlées pendant un an.	**Recommandation CE** : délai de deux ans (associés d'audit principal).
Délais de rotation	Obligation au sein du cabinet exerçant le contrôle légal de faire tourner les associés tous les cinq ans.	- **Recommandation CE** : rotation des signataires au bout de sept ans, - **Recommandation COB juillet 2002** : mise en place d'une procédure de contrôle de rotation des associés signataires de mandats de commissaires aux comptes de sociétés faisant appel public à l'épargne →à l'issue d'une période de sept ans, conformément au code de déontologie de la profession et aux dispositions de la recommandation européenne. **Rapport BOUTON** : la rotation des signataires des comptes au nom des cabinets dans les grands réseaux est souhaitable, de même que le décalage dans le temps de l'échéance des mandats des deux

		commissaires.
Autres mesures de nature à assurer l'indépendance		**<u>Loi</u> :** - nomination par l'assemblée générale, - double commissariat aux comptes, - durée du mandat fixée par la loi à 6 ans et possibilité de renouvellement, garantie d'indépendance. **<u>Rapport BOUTON</u>** : mise en place d'un appel d'offres pour la sélection ou le renouvellement du mandat des commissaires aux comptes, supervisé par le comité des comptes qui veille à la sélection du mieux disant et non du moins disant.
Opérations hors bilan : Déclaration et enquête **Réconciliation des informations pro forma**		
	Selon des règles que la SEC doit préciser : • Inclusion, dans les rapports financiers enregistrés à la SEC, des ajustements significatifs aux états financiers identifiés par les auditeurs suivant les US GAAP et les réglementations de la SEC • Obligation d'opérer une réconciliation avec les US GAAP de l'information pro forma donnée dans les rapports annuels *et toute autre publication*	Pas de prescription similaire Doctrine de la COB relative à l'information pro forma : - Principe : n'utiliser que des notions comptables normalisées ; à défaut, préciser les définitions ; - Couverture par la certification ou, à défaut, vérification de sincérité à opérer par les CAC

	• Mention dans les rapports annuels des émetteurs étrangers des engagements hors bilan significatifs et des relations avec des entités non consolidées ayant ou pouvant avoir un impact significatif actuel ou futur sur la situation financière Pour les transactions hors bilan, au plus tard dans l'année suivant la publication de règles détaillées, étude par la SEC des informations données par les émetteurs pour évaluer l'importance de ces transactions et la pertinence des règles comptables (notamment en matière de consolidation). Conclusions et recommandations seront présentées aux institutions américaines dans les 6 mois suivants.	Obligations comptables générales relatives à la présentation des engagements hors bilan dans les comptes annuels et consolidés. Pour ces derniers, entrée en vigueur prochaine des IAS/IFRS, qui prévoient des règles plus strictes de consolidation. Recommandation de la COB sur les risques de marché. **Rapport BOUTON** Le rapport BOUTON préconise que les informations soient clairement définies et présentées de manière synthétique, notamment pour ce qui concerne les éléments hors bilan, les risques et les résultats (résultat opérationnel par exemple).

Opérations hors bilan : Déclaration et enquête Réconciliation des informations pro forma	Droit américain SOA	Droit français : code de commerce, réglementation COB, Rapports VIENOT et BOUTON
		<u>Rapport BOUTON</u> (suite) : Il est en outre recommandé : - de développer et clarifier l'information des actionnaires et investisseurs sur les éléments hors bilan et les risques significatifs, - de donner dans le rapport annuel une information spécifique sur ces sujets, en les présentant de façon claire et aisément accessible (notamment par un regroupement des informations dans des rubriques spécifiques des notes annexes). Selon le rapport BOUTON, il appartient, le cas échéant, aux normalisateurs comptables d'élaborer des textes permettant une présentation appropriée dans les états financiers.

Déontologie analystes financiers	Droit américain SOA	Droit français : code de commerce, réglementation COB, Rapports VIENOT et BOUTON
	La loi valide les propositions faites par le NYSE et le NASDAQ visant à réduire les cas de conflits d'intérêts pour les analystes (v. rôle SEC).	**Décision du CMF** (mars 2002) relative aux prescriptions applicables aux prestataires de services d'investissement produisant ou diffusant des analyses financières : - création d'une carte professionnelle d'analyste, - interdiction d'intervention pour compte propre sur les valeurs du secteur suivi, - interdiction pour l'analyste de percevoir une rémunération spécifique pour une opération de marché à laquelle il a participé, - interdiction de diffuser l'analyse en priorité à l'interne et mise en place de procédures de diffusion, - mise en place de procédures de détection de conflits d'intérêts, - publication dans l'analyse d'une valeur des participations du prestataire, des opérations sur le marché primaire, de la transmission de l'étude à l'émetteur et des contrats d'animation. **Code de déontologie professionnelle** de la société française des analystes financiers : mars 2002 **Réglementation CE** en projet, en application de la directive abus de marché (CCESR).

Déontologie des agences de notation financière	Droit américain SOA	Droit français : code de commerce, réglementation COB, Rapports VIENOT et BOUTON
	La SEC est chargée de réaliser une étude sur le rôle des agences de notation dans le fonctionnement des marchés financiers et les risques ou problèmes que ce métier peut engendrer.	**Comité BOUTON :** Le Comité considère que l'exigence de transparence devrait s'appliquer à ces sociétés elles-mêmes comme aux autres sociétés et qu'en conséquence, elles devraient périodiquement exposer au marché leur doctrine, l'évolution de celle-ci ainsi que le processus de décision applicable.

SARBANES-OXLEY ACT / GERMAN LAW: CONFLICTING RULES AND INCONSISTENCIES

Sarbanes Oxley Act		**Conflicts and possible solutions**
Sec. 101 Sec. 102	Obligation for foreign auditors to cooperate with PCAOB	No violation of confidentiality; no access of PCAOB to working papers.
Sec. 301	Audit Committee: Appointment and compensation of the auditor. Audit Committee: Independence of the members.	Recognition of the ultimate responsibility of the general assembly. Exemption with regards to workers' representatives; no extension to former board members.
Sec. 302	New form requirements to certify financial statements.	Recognition of the responsibility of the whole "Vorstand" and not certain executives.
Sec. 306	Insider Trading	Conflict with national insider law for persons being resident outside the USA; restriction to US-cases.
Sec. 401	All disclosures under reconciliation with GAAP.	Restriction to disclosure requirements in the US.
Sec. 402	Loans to directors and executive officers.	Unclear definition, clarification of the persons concerned.

SARBANES-OXLEY ACT / SWISS LAW: CONFLICTING RULES AND INCONSISTENCIES

Sarbanes-Oxley Act	***Swiss law***	***Comments***
General		
Departure from generally accepted principles of mutual recognition	Company law and Corporate Governance standards of the home-country of foreign issuers, with a secondary listing on the SWX Swiss Exchange are considered equivalent (Art. 6 of the Listing Rules, Art. 3 of the Directive on Information Relating to Corporate Governance)	Following the principles of mutual recognition for foreign issuers with a secondary listing on a US stock exchange, Company law and Corporate Governance standards of their home-country should be deemed equivalent. Thus, the Sarbanes-Oxley Act should not be applicable to foreign private issuers.
Due to extraterritorial applicability of Act, interference with company law concepts of home-country of foreign private issuer.	Company law concept in various respects not in concurrence with the one underlying the Sarbanes-Oxley Act, e.g. • In financial reporting matters the board of directors bears the ultimate responsibility and not certain specific executives. If misconduct occurs, liable are those persons in the board or management, who are factually responsible. This is in contrast to the singling out of certain executives under the certification rules of the Sarbanes-Oxley Act. • Certain competences are by law allocated to certain bodies in the company and may not be taken over by another body such as the Audit Committee.	If the above-mentioned principle of mutual recognition was applied, undue interference in company law concepts that foreign issuers are subject to, could be avoided.
Substantial departure from self-regulation in the field of Corporate Governance	Corporate Governance is dealt with on the level of self-regulation	Advantages of self-regulation: • Efficiency • Fast adaptation of rules to new circumstances

Specific provisions		
Sec. 106 …foreign public accounting firm shall be deemed to have consented (A) to produce its workpapers for the Board or the Commission ..	Art. 730 Code of Obligations … Auditors are prohibited from disclosing information that they have obtained in exercising their mandate to individual shareholders or to third parties….. Art. 162 Penal Code Every one who discloses a manufacturing or business secret, that he is bound to hold by a legal or contractual obligation ….is liable to imprisonment or a fine. Art. 273 Penal Code …every one who discloses a manufacturing or business secret to a foreign authority or a foreign organisation or their agents is liable to imprisonment…	Producing the workpapers pursuant to Sec. 106 will lead to a violation of the business secrecy duty according to Swiss law.
Sec. 301 ….The audit committee of each issuer..shall be directly responsible for the appointment …of any registered public accounting firm employed by that issuer. ….The audit committee of each issuer..shall be directly responsible for the compensation … of any registered public accounting firm employed by that issuer…Each issuer shall provide for appropriate funding, as determined by the audit committee…for payment of compensation (A) to the registered public accounting firm … In order to be considered to be independent... a member of an audit committee of an issuer	Art. 698 Code of Obligations … (The General Assembly) has the following non-transferable rights:….the election of the auditors… Art. 24 Swiss Code of Best Practice for Corporate Governance The Audit Committee should assess ….the fees charged by the external auditors… Art. 22 Swiss Code of Best Practice for Corporate Governance	The appointment of the auditors by the audit committee is contrary to mandatory Swiss law. The management has the responsibility for the compensation of the auditors in Switzerland. The Audit Committee's role is not to determine the compensation but to review the compensation. The Swiss Code of Best Practice at the same time goes further than the Sarbanes-Oxley

may not, other than in his or her capacity as a member of the audit committee, the board of directors, or any other board committee (i) accept any consulting, advisory, or other compensatory fee from the issuer; or (ii) be an affiliated person of the issuer or any subsidiary thereof.	As regards committee members, particular rules on independence should be applied. - …Independent members shall mean non-executive members of the Board of Directors who never were or were more than three years ago a member of the executive manangement and who have no or comparatively minor business relations with the company. - Where there is a cross membership in Boards of Directors, the independence of the respective member should be carefully examined case by case.	Act in excluding recent executives of the company from being members of the Audit Committee, while being a little less stringent on the present business relation to the company ("comparatively minor business relations" are permissible)
Sec. 304 If an issuer is required to prepare an accounting restatement due to the material non-compliance of the issuer…with any financial reporting requirements under the securities laws, the chief executive officer and chief financial officer shall reimburse the issuer for any bonus or other incentive-based or equity-based compensation received by that person….	There is no equivalent provision in Swiss law. General torts principles apply.	Unless liable under general torts principles, principal executive directors residing in Switzerland cannot be forced to reimburse the issuer.
Sec. 305 & 1105 Authority of the Commission to prohibit persons from serving as officers or directors	There is no equivalent provision in Swiss law. The Swiss Constitution (Art. 27), moreover, guarantees the freedom to choose and exercise a profession.	A prohibition to serve as officer or director issued by the Commission may have its impact on appointments in Switzerland and can thus conflict with constitutional rights of the affected persons.
Sec. 402 Prohibition of personal loans to executives	Art. 5.7 of the Directive on Information Relating to Corporate Governance (The following information must be disclosed in the annual report)…the total amount and conditions of the guarantees and outstanding	Arm's length loans to executives seem to be unobjectionable. Swiss law, therefore, provides for transparency but does not prohibit loans to executives. The prohibition pursuant to Sec. 402 will, thus, not be

	loans, advances or credits granted to members of the board of directors or the management board or parties closely linked to such persons….	enforceable in Switzerland.
Sec. 806 & 1107 Whistleblower protection	Art. 321a Code of Obligations The employee may not exploit or disclose to others secret information, as namely manufacturing and business secrets… Art. 162 Penal Code Every one who discloses a manufacturing or business secret, that he is bound to hold by a legal or contractual obligation ….is liable to imprisonment or a fine. Art. 273 Penal Code …every one who discloses a manufacturing or business secret to a foreign authority or a foreign organisation or their agents is liable to imprisonment.	Art. 162 and 273 of the Swiss Penal Code are prosecuted ex officio. The fear is, that such a prosecution and the necessary involvement of the company in the respective proceedings could be seen as an unlawful retaliation pursuant to Sec. 1107 of the Sarbanes-Oxley Act.
Sec. 906 Corporate Responsibility for Financial Reports	Art. 152 Penal Code Every one who, being a promoter, proprietor, unlimited partner, an agent or member of the board of directors, executive board, auditor or liquidator of a company, cooperative association or any other body corporate that runs a commercial business, in public announcements, reports or presentations to the shareholders or persons holding an interest in a cooperative association or other body corporate makes or concurs in making false or incomplete statements of relevance that may induce an other person to a detrimental disposition of	Art. 152 Penal Code shows, that Swiss law already contains provisions that prohibit company executives from making false or misleading statements in financial reports. If the same behavior is equally sanctioned under the Sarbanes-Oxley Act this leads to a violation of the principle “ne bis in idem”, i.e. that no one should be prosecuted twice with respect to the same offence.

	property, is liable to imprisonment or a fine.	
Sec. 1103 Temporary freeze of payments to directors, employees etc.		The freeze order will under Swiss law be considered as an administrative law matter and will thus not be enforceable in Switzerland.