INTERNATIONAL CORPORATE LAW AND FINANCIAL MARKET REGULATION

Perspectives in Company Law and Financial Regulation

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Pre-clearance in European accounting law – the right step?

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I. The 'open society' of accounting law actors

The responsibility for the accuracy and reliability of the annual and consolidated acounts of a company has for a long time rested with the members of the board of directors (in some countries also with the members of the supervisory board) and with the auditors who are educated and mandated to scrutinize the financial reports drawn up by the company itself and to testify as to its accordance with the relevant rules and principles under accounting law. This responsibility has been strengthened in recent European legislation. On the one hand, the establishment of an 'audit committee' being part of the company board is held to be necessary for 'public-interest entities' such as listed companies;[1] on the other hand, the standards of auditing for public accountants have been increased by a recently enacted directive, including new levels of public oversight devoted to their work.[2]

Nevertheless, there are additional actors present in the world of accounting. First of all, there are the standard setters as such. In the old days, these used to be national legislators or other national bodies; over time, starting with the directive on annual accounts in 1978, the European Institutions joined this group. Accounting rules were codified during the 1980s in most European countries. This 'legalization' of accounting practice led to an increased scrutiny by the courts. They are competent to decide finally on matters of interpretation of accounting law,[3] although in some Member States of the European

[1] Art. 41 of Directive 2006/43/EC of the European Parliament and of the Council of 17 May 2006 on statutory audits of annual accounts and consolidated accounts, amending Council Directives 78/660/EEC and repealing Council Directive 84/253/EEC [2006] 05. L 157/87.

[2] Art. 26 *et seq*. of Directive 2006/43/EC (note 1, above).

[3] Schön, 'Kompetenzen der Gerichte zur Auslegung von IAS/IFRS', *Betriebs-Berater,* 59 (2004), 763 *et seq*.

Union the interpretation of accounting standards is still regarded as a matter of fact rather than as a matter of law. The most prominent example for the examination of accounting issues by the courts is the judgment of the European Court of Justice in the *Tomberger* case[4] which was echoed widely throughout Europe.

For listed companies, accounting law is more and more shaped by the London-based International Accounting Standards Board (IASB), issuing International Financial Reporting Standards (IFRS),[5] and the European Commission, which endorses these standards, thus making them mandatory for listed companies in Europe under the IAS Regulation of 2002.[6] Moreover, the interpretation of these standards is the task of ancillary bodies like the International Financial Reporting Interpretation Committee (IFRIC) in London or domestic standard setters such as the Accounting Interpretations Committee (*Deutscher Standardisierungsrat*) in Berlin.

In recent years, another group of actors has appeared on the accounting scene: capital market authorities and their auxiliary troops such as the UK's Financial Reporting Review Panel or Germany's Federal Reporting Enforcement Panel (*Deutsche Prüfstelle für Rechnungslegung*). They have been entrusted with the task of *ex post* review of financial reports which were disclosed by listed companies. Their work is meant to fill the 'expectation gap' which became apparent in some corporate scandals at the beginning of the new millennium (Enron, Parmalat, WorldCom, FlowTex, etc.).

The introduction of this new enforcement procedure has – for capital market oriented companies – increased the danger of being exposed to a public discussion about the appropriateness of their financial reports. Whereas intra-corporation issues relating to accounting questions only seldom come before a court (e.g. in the context of a shareholder suit) and lawsuits against financial auditors were well nigh unknown till quite recently, the – more factual than legal – pressure effect of the control exerted by the public review panels and by capital market authorities has dramatically changed the scope for action for the accounting of listed companies. It seems understandable against this backdrop, that the big players of the economy voice the desire, that capital market

[4] Case 234/94, Tomberger [1996] ECR I-03133.

[5] For further information see www.iasc.org.

[6] Art.3 par.2 of Regulation (EC) No 1606/2002 of the European Parliament and of the Council of 19 July 2002 on the application of international accounting standards [2002] 05. L 243/1.

authorities and their appendices may be enabled – for the sake of preventing accounting law related disputes, i.e. in the run-up to the set-up and adoption of annual and group accounts or even in the run-up of realising the relevant facts – to make clarifying statements vis-à-vis those companies, which are obliged to disclose their accounts to the capital markets.[7] Capital market authorities may be asked for defined (future or already-realized) facts to make individual case-related statements or indicate via 'no action letters', that it would not attack certain accounting measures. By doing so, a provisional assessment of the respective case under the corresponding accounting law rules would take place, in the run-up to the audit certificate by the financial auditor and before the internal involvement of the supervisory board and shareholder bodies.

II. The state of 'pre-clearance' in the US and in Europe

The method of pre-clearance is not unknown in the US-American and European context. The organization of the SEC includes the office of the Chief Accountant, which supports listed companies with clarifying statements[8] encountering ambiguous issues in accounting law when preparing the filing. By doing so the competent statutory auditor and if need be the FASB as standard setter, the Public Company Accounting Oversight Board or other auditing companies are called in by the SEC. The 'no action letter' is typical for the SEC's method, i.e. a personal statement by an SEC employee, which is not legally binding, neither for its commissioners nor for the company in question, but highlights the prospective course of action by the SEC and therefore has great factual importance.[9]

[7] See the discussion report on the *Schmalenbach*-Conference 2006 in Hillmer, 'Enforcement in Rechnungslegung und Prüfung', *Zeitschrift für Corporate Governance*, 1 (2006), 39 ff.; that such a competence does not exist under German law is generally recognised, see Gelhausen and Hönsch, 'Das neue Enforcement-Verfahren für Jahres- und Konzernabschlüsse', *Die Aktiengesellschaft*, 50 (2005), 511, at 514.

[8] US Securities and Exchange Commission, *Guidance for Consulting with the Office of the Chief Accountant*, status quo 17 July 2006, www.sec.gov/info/accountants/ocasubguidance.htm; see also US Securities and Exchange Commission, Release N°s 33–8040; 34–45149; FR-60, 12 December 2001, www.sec.gov/rules/other/33–8040.htm.

[9] T.L.Hazen, *Treatise on the Law of Securities Regulation* § *1.4*[*4*] *43 (4th edn.2002)* offers a formulation example from the point of view of the competent official in charge: 'This is my view based on the facts as you describe them. You may not rely on it as if it were a Commission decision. If you don't like it, you are at liberty to disregard it and follow your own construction, subject to the risk that I may recommend appropriate action to

Equally in the context of European capital market supervision, openness for the introduction of pre-clarifying methods fundamentally exists. Taking this course of direction, the Standard No.1 on Financial Information by the Committee of European Securities Regulators (CESR) recorded that:

> Some enforcers offer issuers the possibility to obtain pre-clearance, whose aim is only to allow knowledge of the competent enforcer's view on a certain specific accounting or disclosure treatment. In particular, by means of pre-clearances the enforcers that are willing to provide for this possibility will express their view on the fact that a particular accounting treatment may be considered (or not) an infringement to the reporting framework which may lead to enforcer's actions. These pre-clearances should also clearly identify all the circumstances surrounding the specific case submitted by the issuer. [10]

In the meantime the CESR already integrated a few decisions by national enforcement agencies in pre-clearance procedures in its database and published them in due course.[11]

The reaction of the Member States and their domestic authorities is mixed. France[12] is one of the Member States, where the supervisory bodies use the pre-clearance method, whereas the Financial Reporting Review Panel (FRRP) in the UK is not readily available to make such provisional statements and has confirmed this line early in 2008 in its revised operating procedures.[13] In Belgium, there is no general pre-clearance system for accounting rules, but the financial supervisor (CBFA) has a limited power to give 'rulings' regarding certain matters of financial law.[14] In Germany, currently no pre-clearance mechanism

the Commission and the Commission may institute proceedings or take other steps if the Commission agrees with my view.'

[10] CESR, Standard N° 1 on Financial Information: *Enforcement of Standards on Financial Information in Europe*, 12 March 2003, § E, www.cesr.eu.

[11] Most recently CESR, Press Release 17 December 2007, 2nd Extract from EEECS's database of enforcement decisions.

[12] *Mémento Pratique Francis Lefèbre*, *Compatble* para 249, (2208); Brown and Tarca, 'A Commentary on Issues Relating to the Enforcement of International Financial Reporting Standards in the EU', *European Accounting Review*, 14 (2005), 181.

[13] FRRP, Operating Procedures, Para.40 (www.frc.gov.uk).

[14] The relevant provision is Art.3 of the Royal Decree of 23 August 2004 (*Moniteur Belge*, 11 Octobre 2004) which refers to Art.12 of the Royal Decree of 31 March 2003 (*Moniteur Belge*, 3 Decembre 2003) which covers the financial reporting obligations of listed companies. This legal basis has recently been replaced by Art.12 of the Royal Decree of 14 November 2007 (*Moniteur Belge*, 3 Decembre 2007). My gratitude for this information goes to Michel Tison, University of Ghent.

exists. Yet some accounting academics have pleaded for the introduction of such a remedy.[15] The Federal Reporting Enforcement Panel would be responsible in a first step; in a conflictual situation the Federal Financial Supervisory Authority (*Bundesanstalt für Finanzdienstleistungsaufsicht*) would have to step in, who has the final say in the hitherto practiced reactive procedures in accounting disputes. One must interpret the most recent press communication by the Federal Reporting Enforcement Panel in this direction, who 'sees itself confirmed to further build the preventive function of the FREP with additional measures'.[16]

III. Allocation of competence in the area of accounting

A. Pre-clearance as an intermediary between rule-setting and application of norms

Even though CESR has indicated in its previous practice a fundamental openness for a pre-clearance mechanism, the same body however formulated in its first standard already significant concerns about the differentiation of the function of such a procedure within the framework of the general competence on interpreting and applying accounting law rules. The doubts hereby focus especially on the delineation between applying and setting norms:

> CESR recognizes that it is important that pre-clearance should not result in enforcers becoming standard setters. [17]

This diplomatically embellished reserve is formulated even more distinctly in the UK. The Institute of Chartered Accountants made clear already in the year 2000, that a pre-clearance procedure encroaches upon both the role of standard-setter and the role of the individual appliers and auditor:

> We recognize that there might be occasions, particularly in the case of new listings, when guidance would be helpful on the compatibility of a proposed accounting treatment with the requirements of the law and relevant accounting standards. However, we believe that it would be undesirable

[15] Böcking, *Zur Notwendigkeit eines Pre-Clearance im Rahmen des Enforcement*, Lecture, Cologne, 27 April 2006, www.wiwi.uni-frankfurt.de/professoren/boecking/downpub/1770.pdf; Böcking and Wiederhold, 'Mehr Sicherheit für Rechnungsleger', *Frankfurter Allgemeine Zeitung*, 31 July 2006, 16.

[16] Deutsche Prüfstelle für Rechnungslegung, Press Communication: Annual Activity Report 2007, 14 February 2008 (2007).

[17] Note 10, above.

> for the enforcement agency to provide any form of pre-clearance. This would dilute and even undermine the perceived responsibilities of directors and auditors, as well as encroaching on the standard setter's role by effectively allowing the enforcement agency to issue interpretations of accounting standards. [18]

The basic policy question is thereby already outlined: how should one visualize the role of pre-clearance in the overall system of commercial law and capital market law as a basis for accounting rules and principles? How does the adoption of statements by a capital market authority or a review panel interact with the statements by company bodies, auditors or courts, which are mainly responsible for examining the legality of annual and group accounts?

Already the first decision published by CESR crystallized the problem:[19] as for the fiscal year 2005, a company already requested in 2004 how one ought to deal with intangibles in the conversion from national accounting principles to IAS/IFRS, when these intangibles are completely absorbed by goodwill, for lack of individual tangibility. The accounting issue was particularly focused on the question whether the amortizations on this asset would be carried out in accordance with its effective 'useful life' or whether they could be merely considered in the general impairment test for the goodwill. The domestic review panel endorsed, within the context of a pre-clearance, already in September 2004 the last-mentioned alternative – thus even before the beginning of the authoritative accounting period.

By doing so, the review panel made a statement, which could be just as well formulated within the context of the interpretation of a standard by the IFRIC or by a domestic standard setter such as (in Germany) the Accounting Interpretations Committee. Moreover, this question should be independently assessed by the auditor in the context of the audit certificate or be conclusively judged by a court *ex post*. Evidently, the review panel has made here a general statement on the interpretation of an accounting standard, which can in many cases claim to be applied – and for only this reason has been published by the CESR.

On the other hand, the review panel did not only publish an opinion concerning a question of law. Moreover, at the request of the management

[18] Institute of Chartered Accountants in England and Wales (ICAEW), Policy Statement (Tech 23/00) on the Endorsement and Enforcement of International Accounting Standards within the EU, www.icaew.co.uk.

[19] Note 11, above, 3.

of the applicant company, it subsumed the individual case by doing so and told the representatives of this company that it would not interfere if they would proceed according to this standpoint. By doing this, the review panel also reduced the leeway of the company bodies and other involved actors virtually to zero: which board of management will dare take steps against a negative preliminary decision by the review panel, and which supervisory board, audit committee or final auditor will take it upon itself, to raise concerns about a positive decision by the review panel? The pre-clearance by the review panel will – and this is foreseeable – generally represent the final clarification of an accounting problem and thereby preclude both the interpretation competence of the standard setters and the courts and withdraw from the hands of the company bodies and the statutory auditor the concrete application.

B. The institutional framework in the US and in Europe

1. The extensive authority of the SEC in accountancy law

One first important aspect in order to clarify the functional role of a pre-clearance concerns the localization of enforcement in accounting law and capital markets law. Whilst accounting law is in general harmonized in Europe for companies limited by shares (and is equally applied to the domain of some partnerships controlled by corporations), accounting law in the US is plainly focussed on capital markets. By doing so, the SEC's role is from the beginning designed to be considerably stronger than that of a European supervisory body.[20] This is furthermore reflected in the fact that the Securities Exchange Act 1934 allocates the role of standard setting in first instance to the SEC. Although the SEC delegated the development of individual rules to the Federal Accounting Standards Board (FASB) long ago, this did not modify the fundamental reign of the SEC over standard setting. The SEC is furthermore equally the central addressee of all accounts drawn up according to US-GAAP. The enforcement of the SEC inclusive of a pre-clearance therefore corresponds with its extensive authority on standard setting, on interpretation and application in individual cases and implementation. The SEC 'may make laws, may act as a public prosecutor in enforcing these

[20] In detail Kiefer, *Kritische Analyse der Kapitalmarktregulierung der US Securities and Exchange Commission*, (Deutscher Universitäts-Verlag, 2003), 50 *et seq.* and 121 *et seq.*, Herwitz and Barrett, *Accounting for Lawyers,* 4th edition (Foundation Press, 2006), 154 *et seq.*

laws, and may then determine the guilt or innocence of the person it has accused'.[21]

The SEC's pre-clearance procedure does not face, against this backdrop, the problem of a separation of powers with another standard setter. The US auditors will equally not be able to moan if the SEC provides 'authentic' interpretations, as a high-ranking source of material accounting rules. And finally, dealings of the courts with the interpretation and application of US-GAAP are virtually unknown in the US; in any case they do not focus on material issues pertaining to correct accounting, but at the most on the applicability of US-GAAP on its merits.[22]

The extension of the SEC's activity in the pre-clearance of accounting law related problems is thus a natural consequence of its extensive decision making and responsibility in the domain of capital markets-oriented accounting.

2. Division of power in European accounting law

The overall situation is however considerably more complicated in Europe. This begins with the allocation of standard setting. The main basics of accounting law are to be found either in the European Parliament's and Council's directives (Annual Accounts Directive, Group Accounts Directive) or in the IAS/IFRS, enacted by the IASB and approved by the European Commission in line with Art.3 of the IAS Regulation. Furthermore, they are fundamentally not founded on capital markets alone, but can also apply to all companies limited by shares (including some applications to partnerships). According to Art.5 IAS Regulation this can also be true for individual and group accounts of non-listed companies which apply International Financial Reporting Standards. The capital market supervisory bodies (or subordinated agencies like review panels) are not integrated in this process of standard setting. At the most, national standard setters – such as the German Accounting Standards Committee (on the basis of § 342 para. 1

[21] Lang and Lipton, 'Litigating Administrative Proceedings – the SEC's Increasingly Important Enforcement Alternative', in*: Phillips* (ed.), *The Securities Enforcement Manual – Tactics and Strategies* (American Bar Association), 239, 242 (quoted in: Kiefer, *Kritische Analyse der Kapitalmarktregulierung der US Securities and Exchange Commission*, (note 20, above), 121).

[22] See for example the decision by the US Supreme Court in: *Thor Power Tool Co. v. Commissioner* 439 U.S. (522) on the significance of US-GAAP for the fiscal income determination or the verdict by the US Supreme Court in: *Shalala v. Guernsey Memorial Hospital* 514 U.S. 87 on the relevance of US-GAAP for refunds in the health sector.

Nr.3 German Commercial Code) – are somehow included in the work of international standardization bodies.

Against this backdrop a Member State enforcement unit will not be able to invoke a natural authority for 'authentic' interpretation like the SEC when applying accounting standards. Neither the company bodies nor the statutory auditor will be relieved from making independent and autonomous assessments and the later invoked courts cannot be tied to the statements by the review panel. This is clearly accepted for Belgium and has to be seen in the same way in other countries of the European Union. This problem will not go away if the company bodies or the auditors are given the opportunity to be heard by the review panel in the pre-clearance procedure.

However the factual normativity which would be attributed to the objective content of a pre-clearance statement seems problematic. This is due to the fact that such decisions – as easily apparent in the above-mentioned example from CESR's publication practice – will be attributed, beyond the judged individual case, the effect of a precedent.

As far as the competence of the courts is damaged by such a pre-clearance procedure, it should not go unnoticed that in some European states – such as in the United Kingdom – the introduction, interpretation and application of accounting standards is not considered a task of the courts.[23] Courts must in the tradition of these legal systems treat questions pertaining to correct accounting not as an application of law, but as a factual matter, which in turn refers to the evidence given by experts. Also in Germany, the assessment of 'accounting principles' has for decades followed the prevalent usage of business people in Germany.[24] This line of thinking has not only become obsolete through the juridification of accounting law as a result of the accounting directives of the European Community, but equally through the transfer of the IAS/IFRS to the main body of EC law in the context of the endorsement procedure. Accounting rules – according to general accounting law and capital market oriented IAS/IFRS – are nowadays objective legal rules, whose interpretation is carried out by national courts and the ECJ.[25]

[23] See for example Freedman, 'Aligning Taxable Profits and Accounting Profits: Accounting Standards, legislators and judges', *Journal of Tax Research*, (2004) 71, 84 *et seq*.

[24] On the development see Moxter, *Grundsätze ordnungsgemäßer Rechnungslegung* (Düsseldorf: IDW-Verlag, 2003), 10 *et seq*.

[25] Schön, 'Kompetenzen der Gerichte zur Auslegung von IAS/IFRS', (note 3, above), 764.

Neither the capital market authority or the review panel have a decisive function with regard to ensuing lawsuits about the correctness of a balance sheet. Their own later intervention in the enforcement procedure can be resolved by such a pre-clearance, but not other contentions within the company bodies, vis-à-vis auditors or with regard to shareholders. If one follows the US practice, not even the panel itself would be bound by a 'no action letter' issued by one of the employees. However, a company's board of directors will in case of a preparation of balance sheets rely on the panel's statement as a tool to deny any fault of its own in order to fend off ensuing litigations and to neutralize the vulnerability of accounting.[26] The problem of the reliability and tenability of such pre-clearance statements would be thereby again carried over into the ensuing contentions.

Even though the interest of companies in a prompt pre-clearance of individual issues in accounting law cannot be denied, one has to therefore be sceptical about a further extension of pre-clearance mechanisms in European capital market law. Said proposal does not fit into the institutional framework, in which neither the standard setting in accounting nor the legal responsibility for the individual application are to be found with the review panel (or the supervisory body). Factual efficiency and legal competence would not correlate. Therewith, the individual attribution of responsibility to the review panel and the company bodies would be dissolved, which is of paramount importance in the context of efficient corporate governance.

IV. Practical issues of pre-clearance en route towards a new expectation gap

The establishment of review panels in recent years has been legitimized with the necessity of confronting glaring violations of recognized accounting rules with greater fierceness. The new enforcement units should work as an 'accountancy police', which control 'randomly and when suspecting manipulation of accounts'[27] the books of listed companies. The context were 'company scandals at domestic level and abroad', which had shattered 'the trust of investors in the correctness

[26] On the characteristic of the 'subjective correctness' of a balance sheet see Schön in: Canaris et al. (ed.), *50 Jahre Bundesgerichtshof – Festgabe aus der Wissenschaft* (München: Beck, 2000), 153 *et seq.*, 155 *et seq.*

[27] Draft of a law on the control of companies' accounts (Bilanzkontrollgesetz), 24 June 2004 (BT-Drs.15/3421, preliminary 1).

of important capital market information'[28]. The review panels have honoured this task with growing success. In a considerable number of addressed cases the panels could correct mistakes; there is in addition a considerable preventive effect, if somewhat difficult to put a number on it.

In contrast, the internal structure as well as the extent of the activity of these review panels would substantially change, if they would receive, alongside the reactive control of individual accounts of selected companies the task of pre-clearance in individual questions pertaining to accounting law. In order to develop the analogy with the police force: it is not easy to transform a criminal investigation unit, operating for special purposes, into a citizen's advice bureau for lawful conduct in road traffic. This begins with the circumstance that the review panels – like also other enforcement units – are designed for their main task of sanctioning evident violations of central accounting rules. The 'scandalous cases', which constitute the actual historical legitimization of the review panels, do not distinguish themselves by difficult issues on the interpretation of accounting standards, but by the glaring non-observance of basic requirements of correct accounting at the level of appreciating facts. The most significant cases in Germany and abroad such as Enron, WorldCom, Balsam, Comroad or Flowtex may be described as mere cases of accounting fraud, whose clarification does not require an innovative development of accounting rules, but necessitates in the first instance a clear improvement in the ascertainment of facts. The 'expectation gap' of the general public related in the run-up to the new legislation not to a further detailing of legal delimitation questions by way of a new interpreting institution, but related to a factual and effective ascertainment and prosecution of deceiving accounting failures. The Supreme Regional Court (*Oberlandesgericht*) Frankfurt defined most recently, in this vein, the target of accounting control: 'to preventively thwart irregularities when drawing up a listed company's financial statements and compiling the report, and to expose irregularities, insofar they still occur and to inform the capital market thereof. Reaching this goal requires a prompt, effective and accelerated review procedure.'[29]

Against this background it was not doubted that the interpretation of accounting rules in the Member States of the European Union would be carried out by companies and their auditors correctly to the largest

[28] Statement of reasons, (above, note 27), 18.

[29] OLG Frankfurt, 29 November 2007, Der Betrieb (2008), 629 *et seq.*, 631.

extent possible. In other words, a gap in enforcement is something different than a gap in standard setting and one would misallocate the professional know-how concentrated in the review panels (and their supervisory capital market authorities) if one deployed in future the manpower more to formulate accounting standards and their interpretation and less to prosecute evident accounting violations.

The review panels would also not be able to remedy this, by concentrating on selected cases as already during their control activity. As the responsible body under capital market law, they would be obliged to provide information vis-à-vis all requesting companies in a way which suffers no discriminatory fashion. The same would apply to the liberty of giving information or 'no action letters' as one pleases and without justification.

Against this backdrop it would be difficult for the review panel to shun a factually justified information request, with the allusion to lacking personal capacities. If one considers furthermore that companies subject to disclosure requirements have strict statutory periods for submitting their annual financial reports, a great number of requests can accumulate in the review panels in short periods of time. Boards of management of stock corporations will include in their duties of care a request for information to the review panel to address in time in ambivalent accounting issues. These requests can either only be worked off through a massive increase in personnel (and costs), or a quantitatively high share of 'customers' are not served. A new expectation gap would be foreseeable. Also one cannot simply say, according to which criteria a discretion-conform differentiation between processed and non-processed requests ought to be carried out: within the context of the actual control mission of the review panel, the cases with the highest financially quantitative relevance ought to have priority (in the case of accounting failures, the most extensive damages threaten to arise for investors), whereas the development of accounting rules would suggest a treatment of the legally most significant questions. Finally, the review panel would not have an easy task within the context of its central activity – the reactive control – to take on accounting issues, whose assessment it refused for capacity reasons in the pre-clearance proceedings. The actual 'customers' of the 'accounting police' however, that is those companies who contribute with evident false statements to the deception of financial markets, disappeared at the pace of this development progressively from the focus of the inspection unit, and would probably also not deign to come to a preliminary examination of their fraudulent actions.

In any case, any pre-clearance procedures should be restricted to the correct representation of given facts, from an accounting point of view. Any preliminary information on future facts, which could apply as a basis of business and accounting decisions of the respective company, would go far beyond the target of an adequate hedging of issuers from retroactive accounting claims.

V. Conclusion

The 'open society of accounting law actors' is on the verge of bursting at the seams. The extensive introduction of pre-clearance by capital market authorities and their ancillary bodies – the review panels – would influence the institutional structure within the companies subject to disclosure requirements, their rapport with the statutory auditors and the courts' control function in a sustainable and disadvantageous way. At the same time the accounting 'police' would master less and less its genuine task of effectively persecuting clear violations of rules in the financial statements of listed companies. The SEC's practice can be no example in this case – this body is regarded to be 'omni-competent' both for standard setting and application of standards in US accountancy law and can therefore act as an authentic interpreter of US-GAAP. From the point of view of the European legal system the lasting refusal of the British FRRP to damage the personal responsibility of issuers, their agencies and their statutory auditors by way of an advance clearance seems exemplary.