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EMPLOYMENT DISCRIMINATION, WHISTLEBLOWING AND RELATED TRENDS: NEW THREATS FOR MULTINATIONAL EMPLOYERS

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Over the past few years, US companies have invested heavily in assuring compliance with the stringent demands of the 2002 Sarbanes-Oxley Act (SOX). As its scope extends far beyond United States boundaries, US executives must not only restructure corporate policies in parent companies, but also those of foreign subsidiaries.

Currently, there are approximately 375 US companies with subsidiaries in Denmark (excluding multinational corporations listed on the US stock exchange). Questions as to whether the SOX Code of Conduct is actually applicable in Denmark remain, as of today, unanswered.

One issue, the whistleblowing issue and the proportions it has taken in the SOX Code of Conduct (e.g. anonymous hotlines, etc.), has raised particular concern: although Danish legislation does not specifically deal with this problem, whistleblowing policies could, to a certain degree, be in direct conflict with local case law, legal customs, culture, etc.

As a result, US companies enforcing SOX whistleblowing policies in their Danish subsidiaries have absolutely no indication as to their actual legality in Denmark.

Cultural considerations

When implementing codes of conduct in foreign jurisdictions, companies should always consider factors such as cultural background and local environment.
In Denmark, the concept of whistleblowing is said to be "a very unfamiliar method of revealing fraud"[1]. This presumption reveals itself to be quite accurate given the degree of protection whistleblowers are granted (close to nothing). This is mainly due to two factors: first, the duty of loyalty; and second, the limited rights employees possess when dismissed without cause (small amount of damages, scarce chance of reinstatement).

The duty of loyalty

A major principle governing employment relationships in Denmark is the employee's duty of loyalty, under which an employee must not harm the employer's interests and by no means disclose confidential information.

Hence, if at any moment an employee becomes aware of a colleague's misconduct, or dishonesty, his duty would be to report to the employer. If he "blows the whistle" and addresses a critique directly to the press or any third party, such behaviour would constitute a breach of his obligations, and justify termination or even liability for damages[2]. Furthermore, loyalty may even, under certain circumstances, prevent an employee from addressing issues directly to upper management: he must first resolve them with his direct supervisor.

1 Public Concern at Work – Whistleblowing, fraud and the European Union, 1996

2 According to Section 10 (2) in the Danish Marketing Act, the employee may not disclose trade secrets or other similar confidential information to third parties. If the employee were to do so, he would be in breach of his duties to the employer, who would then be entitled to dismiss him, or even sue for damages.

Thus, on this first point, there would seem to be a conflict between loyalty and whistleblowing policies, especially when considering the use of anonymous whistleblowing "hotlines".

However, it is worth noting that only a few Danish cases have specifically dealt with the applicability of SOX codes of conduct, or employees reporting illegal activities.

There is one case[3] where the Danish Supreme Court considered an employee's right to inform third parties of company related information. The facts are as follows: an employee, during a private meeting with his bank, informed the clerk of financial difficulties the company he worked for was facing. Even though the information was requested by the bank, the Supreme Court found that it constituted a violation of the employee's duty of loyalty.

The case evidently does not offer much guidance as to the legitimacy of whistleblowing in Denmark, nor to the reporting of illegal activities. However, it does establish some form of precedent that stresses the importance of loyalty in employee/employer relationships.

Another case[4], although not particularly recent, demonstrates just how an employee may legitimately report illegal activities to third parties. Kaj Christiansen, an employee of a toy factory, became aware of certain tax violations committed by the company (tax evasion). The accountants having confirmed the frauds, he dealt with the problem internally by addressing the issue to the employer, who ultimately decided not react. The employee therefore proceeded to alert the authorities of these illegal activities, and he was, as a result, immediately fired. The Court declared in its decision that the dismissal was unjustified.

Accordingly, the protection of an employee's right to report illegal activities will truly rely on whether his intentions were to harm the company. Indeed, putting this into perspective with the last case, the employee was considered to have acted in good faith because he addressed the issue to his employer first, before going to the authorities. It is worth noting that he would not have been entitled to start a public debate, which could have drawn unwanted attention to the company, and demonstrated harmful intent.

The Swedish Labor Court

Sweden, which shares many legal traditions with Denmark, has several cases that dealt with public denunciation by employees. The decisions of Swedish Court give us an idea of how SOX whistleblowing policies will be implemented in Denmark.

In a case judged by the Swedish Labor Court[5], a Scandinavian Airlines (SAS) flight engineer publicly revealed, by means of a magazine article, confidential information regarding staff-related issues and criticised the allegedly insufficient attention given to flight safety. The article also contained information which, according to the collective agreement, was not to be disclosed to third-parties. For these reasons, the flight engineer was found to have breached his duty of confidentiality. The Labor Court affirmed that, since the article was capable of causing damage to SAS, the employee had seriously breached his duty of loyalty, and therefore, SAS had the right to dismiss him immediately. Finally, it emphasized the fact that the employer had the right to report the incident to the authorities.

3 Ufr.1987.495H

4 SHT 1955/62 (see also SHT 1942/81: conflicting case, but due to historical factors).

5 AD 1961 no 27

In another case before the Swedish Labor Court[6], a night clerk and receptionist, working at a hotel, contacted the licence department of the Swedish Agency of Entailed Estates (Lensstyrelsen) to report serious violations allegedly committed by the hotel management (e.g. selling of spirits after hours, tax fraud, etc.). Even though the judges recognized that an employee should report misconduct to the authorities, it made it equally clear that such whistleblowing could also constitute a breach of the employee's duty of loyalty. According to the Court, special weight should be given to the question of whether or not the employee approached the management first. In this case, the night clerk and receptionist had not. As a result, the judges decided that the report caused damage and inconvenience to the employer, and justified the dismissal.

What is interesting in these two cases is that the Labor Court did not necessarily condemn the employee for appealing to a third party, but rather because he did it in such manner that explicitly demonstrated disruptive intentions. In other words, if it is proven that an employee reveals confidential information to a third party for the purpose of bringing positive change to the company, judges would be far more inclined to accept whistleblowing. That's precisely why Swedish judges suggest that employees raise criticism to the company's management first, before presenting it to the relevant third party: for probatory reasons. In such situations, it is easier to presume that the wage-earner's intent was *bona fide*.

The public sector

The duty of loyalty often conflicts with freedom of speech. This becomes most evident in the public sector, where section 77 of the Danish Constitution prohibits the state from exercising censorship, including on its own employees. On the other hand, section 152 (2) of the Danish Criminal Code penalises public employees who breach their duty of confidentiality. This conflict has given rise to a few cases with strong media coverage.

In the "Tamil" case, the Special Court of Indictment found that the former Minister of Justice gave illegal instructions to his staff regarding the denial of Tamil family reunion. Several of the officers were dismissed after the trial. The judges suggested that the staff should have addressed the issue following a specific pattern: first, the problem must be dealt with internally, by reporting to a superior; second, if such measures fail, action may be taken externally by contacting the authorities, union, or shop steward. Resorting to the media must only be used as an ultimate measure.

In the latest case, the so-called "Grevil" case[7], a former army intelligence officer, Frank Grevil, passed on some classified information concerning the threat reports from Iraq. The purpose of the exposure was to prove that the Danish Government had actually lied about the reasons for going into war. Frank Grevil was found guilty under the Danish Criminal Code and sentenced to four months imprisonment.

Following the "Grevil" case, Danish Parliament demanded new legislation protecting whistleblowers. The government has thus, as of 2004, commissioned a report on possible legislation for public sector employees.

Even though the public sector evidently raises different concerns than the private sector, the balance between loyalty and freedom of speech can be dealt with quite similarly. Therefore, if the Parliament enacts laws on whistleblowing in the public sector, it may guide us on how the courts will deal with SOX code of conducts in the private sector.

6 AD 1986 no 95

7 The Eastern Appeal Court decision of 23 September 2005 (Ufr.2005.65)

Data Protection

The European Council Data Protection Directive (95/46/EC) could equally be a source of conflict. This text, implemented by the Danish Parliament in May 2000, reflects general rules of lawfulness and fairness in the processing of data. Specifically, it sets forth strict conditions for the collection, use, and disclosure of personal information. Thus, there are many potential conflicts between EU data protection laws and SOX.

For instance, the directive requires that the processing of data must not adversely affect the personal freedom of individuals, and as a result, imposes consent and disclosure requirements. How could such provisions possibly be respected if companies set up anonymous whistleblowing "hotlines"? Indeed, when an employee calls a hotline to report a colleague's fraudulent activities, he will necessarily have to reveal personal information without consent (who would give approval to such denunciations?). This would constitute a serious breach of data protection regulation (in particular article 6 relevant to fair processing).

To further complicate matters, the directive also greatly restricts the transfer of personal information to certain countries, namely the United States.

It is not surprising that on May 26, 2005, the French data protection authority (the "CNIL") refused to allow two companies (McDonald's France and Compagnie européenne d'accumulateurs or CEAC, an affiliate of Exide Technologies) to operate anonymous reporting systems such as those required by SOX. In its decisions, the CNIL considered, *inter alia*, that the collection of data by way of these proposed hotlines was unfair, as the concerned employee was only to be informed several days later. Moreover, the CNIL found that setting up such hotlines could strengthen the risk of defamatory accusations and stigmatize employees concerned by anonymous denunciations.

Such a decision may very well have repercussions in Denmark, as it has implemented the same EU Directive as France.

Conclusion

Given all these potential conflicts, US companies might have to face liability on both sides of the Atlantic: in Denmark if they enforce Sarbanes-Oxley's whistleblowing provisions; or in the US, if they comply with Danish law. It is thus essential to ensure that such hotlines are drafted carefully and administered in accordance with the principles of loyalty developed by the Danish courts and that procedures are implemented to ensure that the hotlines apply minimum standards of data protection, fairness and due process.