

Whistleblowing Procedures: French Highlights

February 11, 2010

The article below reviews the decision of the French Supreme Court (*Cour de Cassation*) Rules for the Whistleblowing Procedures in France (Decision No 2524 of the Social Law Chamber (*Chambre sociale*) dated December 8th, 2009). The decision addresses for the first time the validity of the internal code of business conduct implemented by Dassault Systèmes.

In order to meet the requirements of the American Sarbanes-Oxley Act setting the rules of transparency, reporting and whistleblowing for US publicly traded companies, the company Dassault Systèmes, listed on the New York stock exchange, implemented, in 2004 and 2007, a “code of business conduct” intended to promote the fundamental principles of the company under the latter’s corporate social responsibility, to lay down different rules in terms of conflicts of interest and insider trading, to set forth the rules applicable to disclosure of corporate information and to set up a professional whistleblowing procedure.

This code provides for a whistleblowing procedure in case of violation of the principles it lays down in the fields of accounting, finance or bribery prevention, as well as any other principle if such violation affects the vital interests of the group or its employees’ physical or mental integrity (including cases of violation of intellectual property rights, disclosure of strictly confidential information, conflict of interests, insider trading, discrimination, moral or sexual harassment). The federation of metallurgical employees and workers referred the matter to the French Supreme Court (*Cour de Cassation*), which ruled on the validity of this code in a decision rendered on December 8th, 2009.

Employee's Right of Freedom of Speech

In said decision, it is first of all noted that the employees have a right to freedom of speech within and outside the company that can only be limited by restrictions justified by the nature of the task to be performed and in proportion to the objective sought. However their right to freedom of collective expression as to the content, conditions of performance and organization of their work can't be made conditional upon any prior authorization whatsoever.

It is then noted that the information for internal use referred to in the code is not strictly defined, so that it is impossible to verify whether this

restriction on freedom of expression is justified by the nature of the task to be performed and in proportion to the objective sought.

Finally, it is pointed out that the exercise of this right to direct and collective expression by the employees may involve the use of part of this information.

The Validation Process of Whistleblowing Procedures by the French Data Protection Authority

The decision comes to the conclusion that the restrictions applied to disclosure of information for internal use are illegal and it quashes the decision of the Court of Appeal of Versailles which ruled to the contrary.

According to the French Data Protection Act¹, any processing of personal data must be subject to a notification to the *Commission Nationale de l'Informatique et des Libertés* (CNIL) (French Data Protection Authority) or to an authorization delivered by said authority. In this sense, the French Data Protection Act allows the CNIL to authorize, through a single decision, any and all data processing which have the same purpose, relate to similar categories of data and are intended for the same recipients or same category of recipients. Any data processing devices which do not satisfy these conditions must be subject to an individual authorization granted by the CNIL on a case-by-case basis.

It is in such circumstances that, after finding in a decision dated November 10th, 2005 that professional whistleblowing systems were subject to the authorization regime when they are likely to deprive persons of their entitlement to a right, a benefit or a contract on the basis of no legislative or regulatory provision, the CNIL authorized said systems through a single decision on December 8th, 2005, provided that they comply with certain rules concerning the collection of information, the peoples' right to be informed of the existence of the data processing, their right to oppose thereto for legitimate reasons, or to correct or to delete the inaccurate or incomplete information.

The Supreme Court first notes that, in accordance with article 1 of the decision of December 8th, 2005, this simplified procedure ("*autorisation unique*") satisfies a legislative or regulatory requirement concerning the implementation of internal audit procedures in the fields of accounting, finance, banking or bribery prevention. It further states that even though, under article 3 of the same decision, facts that do not relate to these areas can nevertheless be disclosed to the relevant persons within the entity if the vital interests of the group or its employees' physical or mental integrity are at stake, the latter text did not result in modifying or extending the

¹ French Act No 78-17 of January 6th, 1978 on Data Processing, Files and Individual Liberties.

This memorandum is intended only as a general discussion of these issues. It is not considered to be legal advice. We would be pleased to provide additional details or advice about specific situations. For additional information on this important topic, please feel free to call upon your Dewey & LeBoeuf relationship partner.

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purpose of an automated processing of personal data implemented in accordance with the simplified procedure.

The Supreme Court concludes therefrom that a professional whistleblowing system can have no other purpose than that defined under article 1.

Yet, in this particular case, the system implemented by Dassault Systèmes had a broader scope since it provided for a possible professional whistleblowing in case of violation of the rules of business conduct, outside the scope of the purpose provided for in said text. Therefore, Dassault Systèmes could not be entitled to resort to the simplified procedure.

The Judicial Court's Freedom to Appraise the Legality of a Professional Whistleblowing System

In so doing, the Supreme Court acknowledges the judicial court's freedom to appraise the legality of a professional whistleblowing system even if it falls within the scope of the decision implementing the "*autorisation unique*" delivered by the French Data Protection Authority.

Finally, the Supreme Court ruled that insofar as Dassault Systèmes' professional whistleblowing system did not provide for any measure aiming at ensuring information of the persons concerned and at reminding them of their right of access and/or rectification, it was thus not compliant with the requirements of the French Data Protection Act.

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