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Whistleblowing – Good Corporate Governance

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Aspects of "Whistleblowing"

- Protection
- Reporting
- Non-compliance with law, rules, standards etc.
History
What happened in the US

– Public Company Accounting Reform and Investor Protection Act of 2002 (Sarbanes-Oxley Act, "SOX"):
  • Section 406(a): Companies listed on US stock exchanges have to adopt code of ethics,
  • Section 301(4): implement a confidential and anonymous reporting procedure and
  • Section 806: must not discriminate against employees for making use of the reporting system

– Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010
  • Providing incentives for disclosing information

-> Companies set up ethics systems on a global basis
History
Reactions in Europe

- In **France**, CNIL decided in May 2005 that the hotlines set up by McDonalds and Exide Technologies violate French data protection law; CNIL published guidance later in 2005
- Also in 2005 in **Germany**, Wal-Mart was found to violate Section 87 of the German Works Council Constitution Act for failing to engage in a co-determination procedure before implementing a code of conduct
- The Article 29 Working Party released its "Opinion 1/2006 on the application of EU data protection rules to internal whistleblowing schemes in the fields of accounting, internal accounting controls, auditing matters, fight against bribery, banking and financial crime" (WP 117)
- Guidance by member state data protection authorities followed
What are the legal issues in the EU?

- Reporting System
- Data Protection Law
- Code of Conduct
- Employment Law
Employment Law Issues

− Employment Law is not harmonized in the EU and therefore varies from country to country to a considerable extent
− Generally, where a works council exists, it has either to be informed or consulted; in some countries and depending on the scope of the ethics code, the works council has to agree to the ethics code
Data Protection Issues (1)

- EU (and member state) data protection law applies to individuals who are identified or can be identified from particular data, "personal data" (Directive 95/46 Art. 2a)

- Unless the report is anonymous and no individual can be identified from the report, personal data is involved and the data protection regime applies

- Relevant data subjects
  - Reporting individual
  - Incriminated individual
Data Protection Issues (2)

- Relevant controllers / processors
  - Employer entity
  - Usually (US) holding entity
  - Possibly external processor

- Obligations of employer (= data controller)
  - Collect and process data lawfully
  - Transfer data only in accordance with the law
  - Provide for adequate data security
  - Provide information to data subjects (incriminated individual)
  - Provide access to personal data
Article 29 Working Party, WP117 (1)

- Application of data quality and proportionality principles
  - Limit the number of individuals entitled to report
  - Limit the number of individuals who might be incriminated
- Reporting on a named basis
  - No encouragement of anonymous reporting
  - Instead encourage to report on named but confidential basis
- Limitation of information provided through the whistleblowing scheme
  - Limit the type of information to accounting, auditing and related matters
- Limit data retention
  - Where investigation revealed no evidence of wrongdoing, the data should be destroyed within two months
Article 29 Working Party, WP117 (2)

– Provision of information about the whistleblowing scheme
  • Inform employees about existence, purpose and individuals' rights related to reporting mechanism

– Rights of incriminated persons
  • All individuals concerned should be informed
  • Exceptions where this would jeopardize the investigation

– Security of processing operations
  • Adequate technical and organizational measures must be in place
  • Third party providers act as data processors

– Management of whistleblowing schemes
  • Set up independent internal team to handle reports
Article 29 Working Party, WP117 (3)

- Transfers to third countries
  - Keep data in EU where possible
  - Comply with data transfer requirements (Safe Harbor, BCRs, model contracts)

- Compliance with notification requirements
  - Notify where applicable
  - Wait for approval where required
Legislation / Guidance in EU Member States

- Whistleblower protection is subject to some member state laws
- But no specific legislation covering data protection requirements of reporting mechanism
- Most member state data protection authorities have issued guidelines referring to WP 117
- Some countries have significantly stricter requirements
  - Scope
  - Anonymity
  - Regulatory approval
- Notification / authorization requirements vary from member state to member state
Data Protection
EU Member States: France, UK, Germany

– UK
  • Public Interest Disclosure Act 1998 (PIDA), Bribery Act 2010
  • Notification

– France
  • CNIL Guidance, (updated) "Single Authorization" (Dispositifs d'alerte professionnelle - AU-004)
  • If not covered: normal authorization

– Germany
  • No notification requirement, no approval by DPA
  • Guidelines by "Düsseldorfer Kreis" from 2006
  • Employment law: Works council involvement required
Compliance Strategies

- Make a decision: Do you need to implement locally?
- Drafting the ethics code:
  - Limit the scope of the ethics code (topics, people)
  - Make reporting optional
  - Do not encourage anonymity
  - Have all relevant EU jurisdictions in mind when drafting the code and setting up system
- Involve local entities and relevant bodies (works council, data protection officer) early on to cover local employment law issues
- Bring time and patience
29 country survey

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Whistleblowing Hotlines—Good Corporate Governance

• Regulation and requirements in the USA
• Sarbanes Oxley – Legislation enacted July 2002 - Section 301:

“(4) COMPLAINTS.—Each audit committee shall establish procedures for—
“(A) the receipt, retention, and treatment of complaints received by the issuer regarding accounting, internal accounting controls, or auditing matters; and
“(B) the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters.
Under Section 301, the audit committee is required to:

• Establish procedures for the receipt, retention and treatment of complaints received by the issuer regarding accounting, internal accounting controls or auditing matters. The system must be capable of receipt of complaints both from company personnel and third parties such as competitors, vendors, and consumers.

• Maintain the anonymity of complaints made by company employees. Note that this confidentiality requirement does not extend to complaints made by non-employees.
Bruker Facts

- 6,200 employees
- 40 countries internationally on every continent
- 18 EU countries
- We also work with agents and distributors, and additional countries
- Policy defines hotline protocol to follow
- Internal matrix of assessment representatives
Considerations for Implementing a Whistleblower Hotline

- Tone at the Top
- Build Widespread Awareness and Support
  Campaigns and reminders
- Accessibility of the “program”
  Internal or External
  Sophistication and Technology
  Domestic or International
- Communications and access to employees and interested parties
Internal vs. external considerations
   International reach
   Internal band-with to react, response time

What protocol to follow for any allegation

Next step considerations and parties involved

What necessary information is considered/provided in an allegation
   Various types of potential topics which could be received
   What could be learned form such a mechanism

Who internally will be involved in assessing
   Legal, human resources, finance, etc.

How will the data be handled, by who, how and where
- International regulations concerning Data Privacy
- Legal protections of allegations and subsequent activities
- How and to whom does such information get reported
  Executive Management, Audit Committee, Etc.
- Whistleblower considerations
  Possibility of being identified, intimidation, discrimination
- Potential implications and regulations - external
Never sell short “other means” to receive an allegation letters, voice mail, etc. “under the door”

Always be flexible as to how to receive “but” treat all consistently

Consult with legal counsel

Assess allegation requirements specialists for forensics, surveillance, etc.
Other US Factors:
“Securities Whistleblower Incentives and Protection.” The Dodd-Frank Wall Street Reform and Consumer Protection Act, enacted on July 21, 2010 (“Dodd-Frank”), established a whistleblower program that requires the Commission to pay an award, under regulations prescribed by the Commission and subject to certain limitations, to eligible whistleblowers who voluntarily provide the Commission with original information about a violation of the federal securities laws that leads to the successful enforcement of a covered judicial or administrative action, or a related action. Dodd-Frank also prohibits retaliation by employers against individuals who provide the Commission with information about possible securities violations.

➢ Reward program
Randstad Group
Misconduct Reporting Procedure – Good Corporate Governance

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Randstad - who we are

• 1960: incorporated in the Netherlands
• 1990: listed on the Amsterdam Stock Exchange
• 2008: merger with Select Vedior
• 2012: Randstad is second largest staffing company worldwide

• Some key figures (2011)
  • revenue € 16.2 billion
  • approx. 4,700 branches & inhouse locations
  • 28,700 corporate employees on average
  • 576,000 staffing employees on average
  • present in 40 countries
Regulatory requirements in the Netherlands

• Dutch Corporate Governance Code requires listed companies to establish a procedure that provides the possibility
  • to employees
  • to report
  • without fear for retaliation
  • on alleged or actual misconduct
  • with respect to general, operational and financial issues
  • to the chairman of the executive board or designated officer

• Procedure to be posted on the company’s website
Whistle blowing – Randstad Group
Misconduct Reporting Procedure

• Seventies: company core values developed and still applicable now and serve as the basis for our code of conduct
  • to know, to serve, to trust, simultaneous promotion of all interests, striving for perfection

• 2005 - Randstad’s Business Conduct Code and Integrity Code
  • resulting from the new obligations under the Dutch Corporate Governance Code (Code Tabaksblat)

• 2008 - merger with Select Vedior, Randstad second largest staffing company worldwide

• 2009 - code of conduct and whistle blowing procedure revised: Randstad Business Principles and Misconduct Reporting Procedure

• Randstad works with the SpeakUp system of People Intouch as the external tool since 2005
Setting up a whistleblower procedure

Making choices:

- Why
- For what purposes
- Who can use it
- Who is responsible for running the program, dealing with complaints
- Anonymous complaints allowed
- Rights of the complainant
- Rights of the accused
- Reporting structure
- All internal or use external service provider
Randstad misconduct reporting procedure

- Dutch corporate governance code, Randstad core values
- Serious misconduct, not restricted - but MRP is to be used as last resort. Examples:
  - Illegal activities and criminal offences
  - Breaches of Randstad’s Business Principles, policies or procedures
  - Personal misconduct or disrespectful behavior
  - Health and safety failures
- All stakeholders can use the MRP
  - corporate staff
  - staffing employees
  - other third parties
Randstad misconduct reporting procedure (continued)

- Executive board is ultimate responsible, but locally it will be the CEO

- Anonymous complaints allowed, but not preferred manner

- No retaliation against good faith complainants

- The accused will be notified and has the right of reply

- Local Integrity Officer receives and handles complaints, cc. to the Central Integrity Officer at Randstad Holding

- External service provider: SpeakUp® by People Intouch
External service provider
Speak Up® by People Intouch

- Independent 3rd party
- Compliant with EU data protection regulations
- Located in EU (the Netherlands)
  - No sensitive data leaves the EU
  - No infrastructure in the US
- Processor agreement providing for compliance with DP laws and technical and organizational security measures
- Allows for communication between the complainant - who can remain anonymous - and the local integrity officer
- Reporting in native language (with translation into English)
- 24/7/365 reporting through freephone number or online webservice and free form reporting
- Access to online cases overview and reporting possibilities included in system
- When case is closed personal data will be deleted
Implementation

• Tone at the top and buy-in from local management

• One procedure, but will have to allow for local deviations resulting from local laws, e.g.:
  • Data protection laws vary
  • Anonymous reporting not allowed
  • Restricted scope of issues that can be reported on

• Set up local reporting structure – who will be the local integrity officer, or deviating structure based on local laws

• Training of and providing guidelines to relevant local staff

• Communication; it can only be effective if employees are aware of its existence and know how to use it
  • Letter to all employees by CEO, internet, intranet, internal news letters, included in personnel handbook, induction training and/or e-learning tools, posters, wallet cards etc.
YES, it does work!

- Valuable tool to receive complaints and a must have, but it is *not* meant to replace the normal reporting lines

- Significant reportings still come through other means as well – email or letter to the CEO, other executive board members or senior management

- Not all reportings are legitimate or the MRP is not the right channel to file the complaint

- The role of Local Integrity Officer is always something additional, but requires commitment when a complaint is made – investigate, involve, inform, respond