

CODES OF CONDUCT AND WHISTLEBLOWING CLAUSES

LABOUR LAW AND DATA PROTECTION CONCERNS

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WHISTLEBLOWING

- **Whistleblowing** is the term used to describe the situation when an employee, or a group of employees raises a concern about malpractice or wrongdoing within an organisation
- **Whistleblower:** the person raising the concern
- **Whistleblowing policy** (for example, part of a CoC / compliance system):
 - encouragement (or obligation) to speak out;
 - establishment of an accessible procedure (internally!!!!);
 - assurance for staff that they won't be subject to reprisals (protection)

CODES OF CONDUCT

- “a code of conduct is a name given to a **set of principles and rules** that govern the way social institutions should behave toward their stakeholders and the way stakeholders (especially employees) should conduct themselves toward the institution and each other.”
- “a written document by which a company pledges to follow a certain **policy or certain principles**” (Servais)

PROBLEM IN OUR CONTEXT

In corporate practice WB-policies are widespread with

-Purely unilateral adoption....*
- ...Mandatory reporting obligation...*
- ...Exclusive focus on internal WB....*
- ...Broad scope of reportable wrongdoings....*
- ...Offering the possibility of anonymous reporting...*
- ...Uniform MNE-policies worldwide....*

→ This reality can not be ignored, but should be viewed critically.

PROs & CONs OF MANDATORY INTERNAL WB IN CoCs

Positive aspects	Negative aspects
<ul style="list-style-type: none">•Sign of taking CoCs seriously...•Early warning system...•Part of CSR, image, positive publicity...•No damage of reputation..	<ul style="list-style-type: none">•A lack of trust in the internal system (+ more legitim external channels?, e.g.: Fair Trial Act in Hungary, Act CLXIII of 2009)•Unwillingness of employees to be "snitches"•Belief that management is not held to the same standard•Fear of retaliation•Fear of alienation from peers

OBLIGATION TO BLOW THE WHISTLE IN CoCs

- **Example:** „... *Group employees must report any breaches or potential breaches of theGroup Code of Ethics of which they become aware.*”
- **Labour law problem:**
 - Art. 15. § (1) of the New Labour Code: A unilateral legally binding declaration may only create rights and obligations in the cases determined in a *rule relating to employment*.
 - 13. §: For the purposes of the present Act, legal rules, collective agreements and works agreements qualify as rules relating to employment.
 - *Conclusion:* Employer rules (like CoCs) can not create such obligations in itself! (only CA or explicit - or implied (?) - contractual duty)

CONCERNS RAISED

- **Typically:** health and safety, financial mismanagement (see: SOX), corruption, environmental matters or criminal activities etc.
- **Where are the limits?** – unethical, immoral practices?
- **Dangers of extending, ‘generalizing’ the obligation in CoCs:**
 - *Legal risk:* WB can not be used for the direct monitoring and controlling of employees (652/K/2007-3.); ‘institutionalized snitching’ (295/K/2007-3)...
 - *Privacy risk:* ‘proportionality principle’ + what is immoral? how to judge?...
 - *HRM risk:* unhealthy corporate culture; mistrustful atmosphere...

INTERNAL VS. EXTERNAL WB

- **LIMITATIONS ON EMPLOYEES' FREEDOM OF EXPRESSION:** Employees' freedom of expression may not be exercised on a way to seriously violate or jeopardise the lawful economic and organizational interests of their employers (Art. 8. § (3) of the new L.C.)
- **PROBLEMS:**
 - freedom of opinion (as a most basic communication right) often clashes with loyalty towards the employer
 - „organizational interests”: extremely broad, undefined category...
 - ILO recommendation: deletion of this Provision of the new Code!!!!
([ILO: Memorandum of Technical Comments on the Draft Labour Code of Hungary](#), November 2011)
- **EFFECT IN TERMS OF WB:** discouragement of external WB!
 - BUT: in favour of internal WB only!
 - With less legitimacy...
 - „Privatization” of investigations...
 - Undermining the Fair Trials Act (Act No. CLXIII. of 2009)...

BYPASS: PROPOSAL OF THE NEW L.C.

INSTITUTIONALIZED LABOUR-RELATED INTERNAL WB?!

The original proposal of the L. C. contained the institution of the **„independent labour inspection”** (audit)

- **employee’s complaint** regarding the legality of employment
(‘quasi WB!’)

Potential: an additional tool to facilitate the compliance with labour laws.....but left out from the final Code!....

POSSIBILITY OF ANONYMOUS REPORTS

DANGERS:

- Harder to investigate...
- Harder to organize protection...
- Harder to control malicious reports and troublemakers...
- Risk of a culture of „snitching”...(deteriorated social climate)...
- In contradiction with the principle of fair, accurate collection of personal data...

→ **‘ULTIMA RATIO’....**

SELF-REGULATION VS. COLLECTIVE CONTROL

- **EXAMPLE:**

In Germany in a case involving Wal-Mart, the higher labour court in Düsseldorf upheld the Wuppertal labour court's earlier decision that a whistleblowing policy (which, in Germany, would be incorporated into a code of conduct) requires the approval of a works council.

- **(NEW) HUNGARIAN LABOUR CODE:**

254. § (1) The employer shall, at least fifteen days prior to its decision, consult the works council with respect to contemplated employer's measures and draft regulations concerning larger groups of employees. (e.g.: c) management and protection of personal data relating to employees)

- **ALL IN ALL:** The organization should consult on the WB-arrangements in advance with staff, managers and any recognized representation of employees.

MNEs – UNIFORM WB-POLICY WORLDWIDE?

POSSIBLE PROBLEMS:

- Special problem: the employer is based in a country where WB and / or CoCs are a legal requirement (e.g.: US: SOX)...
- In the EU, data protection rules tend to be more robust than in many other countries (e.g.: US)....
- US: whistleblowers are more protected (LL) ↔ EU: the accused are also protected (with regard to the processing of personal data)...
- It may be necessary to obtain prior authorisation from a national body (e.g.: DPA)....
- Data protection issues may arise concerning information being given anonymously or information being transferred to third party....
- The EU now seeks to simplify cross-border data protection compliance: companies will be able to negotiate pan-European agreements (BCRs) with a single authority, rather than country by country as now

CONCLUSIONS FOR HUNGARY IN THE LIGHT OF THE NEW L. C.

- Still very controversial legal background...
- Fair Trial Act (2009)...lack of institutionalization...
- New L. C.....still no explicit mention...
- **External WB:** almost impossible...
 - Limitations on freedom of expression - 8 § (3)
 - Confidential information, business secrets – 8. § (4)
 - Obligation of mutual cooperation – 6. § (3)
- **Internal WB:** possible, but only on a limited and ‘decent’ way
 - ‘Limited’: no obligation, no anonymity, restricted scope of reportable wrongdoings...(see above)
 - ‘Decent’: compliance with the WP 117 of the ARTICLE 29 Data Protection Working Party (2006)

Thank you for your attention!

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